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Annotated Forms of Federal Procedure

Compiled, Arranged and Annotated

By

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Third Edition, Revised and Enlarged

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THREE VOLUMES
VOLUME I

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PREFACE

Since the second edition of this work there have been many changes in the *Federal Statutory Law* relating both to the Substantive Law and to the Law of Procedure; the Substantive Law calls for pleadings on new subjects, and the Law of Procedure calls for new pleadings on subjects which are old. Enough time has passed since these important changes were made for the accumulation of a body of precedents, and the practice has in most respects become stabilized.

The changes referred to include the Federal Safety Appliance Act, the Employer's Liability Law, the Hours of Service Act, the Chinese Exclusion Act, the Deportation Act, the Copyright Act, the Trade-mark Act, the Clayton Act, the Federal Trade Commission Act, extensive changes in the Interstate Commerce Act, the LaFollette Act (Seamen's Act), and criminal acts such as the Harrison Anti-Narcotic Act, the Mann White Slave Act, National Prohibition Act, and others, all of which are accounted for in the forms.

Other changes referred to are embodied in the Judicial Code, the New Federal Equity Rules with their far-reaching influence, the Penal Code, the procedure in certain kinds of injunction proceedings, the abolishing of the Circuit Court and the creation of the Court of Customs Appeals, the enlarging of the jurisdiction of the Federal Supreme Court and others of importance, all of which were not in effect when the former editions were published.

Forms of Appellate Procedure, including jurisdictional questions, certiorari to remove a case from the Circuit Court of Appeals to the Supreme Court, etc., have been made with exacting care.

Copious new forms are included also, dealing with the parties in case of diversity of citizenship and forms for alleging the "Federal Question" and the "Jurisdictional Amount," and many

new forms have been introduced among the older matter where a greater variety was possible. Almost all of the forms are taken from adjudicated cases.

The annotations which follow the forms will be of great help to the busy lawyer by giving him the essentials of the decisions and indicating where he can find the law fully discussed.

Hearty acknowledgment is made of valuable and cordial assistance rendered by the clerks of all the Circuit Courts of Appeals, and by the Clerk of the United States Supreme Court, and the Judge and the Clerk of the United States District Court in the Eastern Division of the Southern District of Ohio.

GEORGE W. RIGHTMIRE.

March, 1920.

TABLE OF CONTENTS

JURISDICTION ALLEGATIONS OF CITIZENSHIP

| Form No. | Page |
|---|------|
| 1. Caption | 1 |
| 2. A Citizen against a Citizen..... | 3 |
| 3. Co-plaintiffs against Co-defendants..... | 5 |
| 4. A Citizen against a Firm..... | 6 |
| 5. A Firm against a Citizen..... | 8 |
| 6. A Firm against a Firm..... | 8 |
| 7. A Corporation against a Corporation..... | 9 |
| 8. A Citizen against a Corporation..... | 11 |
| 9. A Citizen against a Corporation of Two or more States..... | 11 |
| 10. A Corporation against a Citizen..... | 13 |
| 11. A Firm against a Corporation..... | 13 |
| 12. A Corporation against a Firm..... | 13 |
| 13. An Infant Suing by His Guardian..... | 14 |
| 14. An Infant Suing by His Next Friend..... | 15 |
| 15. An Insane Person Suing by His Guardian or Curator..... | 16 |
| 16. By an Administrator..... | 16 |
| 17. By a Foreign Administrator..... | 17 |
| 18. By an Administrator de Bonis Non..... | 19 |
| 19. Against an Administrator..... | 20 |
| 20. By an Executor..... | 20 |
| 21. Against an Executor..... | 21 |
| 22. By a Trustee..... | 21 |
| 23. By a Corporation as Trustee under a Mortgage, Deed of Trust, etc. | 23 |
| 24. By a Trustee in Bankruptcy..... | 24 |
| 25. A Trustee under a Will against an Executor and Others..... | 25 |
| 26. By a Few Suing for Themselves and Others Similarly Situated.. | 26 |
| 27. By a Representative for a Joint Stock Company..... | 28 |
| 28. Against a Few as Representatives of a Community or Society.. | 29 |
| 29. Against a Few as Representatives of a Labor Union..... | 32 |
| 30. By a National Bank..... | 33 |
| 31. Against a National Bank..... | 34 |
| 32. By an Assignee of a Chose in Action..... | 35 |
| 33. By an Alien..... | 37 |
| 34. Against an Alien..... | 40 |

| Form No. | Page |
|---|-------------|
| 35. By an Alien Corporation..... | 40 |
| 36. Against an Alien Corporation..... | 41 |
| 37. Citizen against an Alien and a Citizen..... | 42 |
| 38. State against a State..... | 42 |
| 39. United States against a Corporation..... | 43 |
| 40. United States against a State..... | 44 |
| 41. Commencement where Corporation Sues a County..... | 44 |
| 41a. Allegations of Federal Question..... | 45 |
| 41b. Allegations of Amount Involved..... | 51 |

SUITS AT LAW—DECLARATIONS AND PETITIONS

| | |
|---|-----|
| 42. Declaration against Railway Company for Damages for Personal Injuries from Collision of Trains..... | 57 |
| 43. Petition against R. R. Co. for Personal Injuries to an Employee..... | 57 |
| 44. Petition for Damages for Personal Injury..... | 60 |
| 45. Verification by Corporation Officer..... | 64 |
| 46. Verification of Complaint by Testamentary Guardian..... | 64 |
| 47. Declaration in Tort for Carrier's Negligence in Massachusetts..... | 65 |
| 48. Declaration by a Minor by His Next Friend for Damages for Personal Injury | 69 |
| 49. Petition by an Administrator for Damages for Death at a R. R. Crossing..... | 71 |
| 50. Petition against Receivers for Damages for Ejectment from Railway Train | 74 |
| 51. Petition to Recover on Township Bonds..... | 75 |
| 52. Petition by County Treasurer for Back Taxes..... | 78 |
| 53. Declaration on Policy of Accident Insurance..... | 79 |
| 54. Declaration to Recover on Policy of Fire Insurance..... | 80 |
| 55. Complaint on Insurance Policy..... | 81 |
| 56. Petition on a Credit Indemnity Bond..... | 84 |
| 57. Petition to Recover for Libel..... | 89 |
| 58. Declaration in Action for Damages for Defamation by Calling a White Man a Negro..... | 92 |
| 59. Declaration in Replevin for Lumber Cut on Lands Claimed by Both Parties | 93 |
| 60. Declaration in Ejectment..... | 101 |
| 61. Declaration in Trespass and Ejectment..... | 102 |
| 62. Petition by United States for Timber Trespass..... | 103 |
| 63. Petition by the United States against Railway for Failing to Unload Stock En Route..... | 104 |
| 64. Petition of Receiver against Stockholder..... | 107 |
| 65. Declaration against Assignee of Shares for Assessment Thereon..... | 113 |
| 66. Action in Trespass by Minor by Next Friend and by Next Friend in His Own Right—Plaintiff's Statement..... | 121 |
| 67. Petition to Recover on Reparation Order of the Interstate Commerce Commission and Praecipe..... | 124 |

TABLE OF CONTENTS.

vii

| Form No. | Page |
|---|------|
| 68. Complaint against Carriers on Award of Reparation by Interstate Commerce Commission..... | 123 |
| 69. Declaration in Assumpsit for Goods Sold and Delivered..... | 135 |
| 70. Suit against Company on Fidelity Bond..... | 136 |
| 71. Complaint for Personal Injury against Partnership and Corporation | 137 |
| 72. Complaint for Breach of Contract of Sale.. | 139 |
| 73. Declaration against Carrier for Violation of Safety Appliance Act | 142 |
| 73a. Another Petition for Violation of Federal Safety Appliance Act | 144 |
| 73b. Answer in Suit for Violation of Federal Safety Appliance Act.. | 147 |
| 74. Complaint against Railroad for Fire Along Right of Way..... | 148 |
| 75. Complaint against the Collector of Internal Revenue for Illegal Exaction of Excise Taxes..... | 149 |
| 76. Allegation of Guardianship Ad Litem..... | 152 |
| 77. Complaint for Refusal to Honor Check against an Open Account.. | 152 |
| 78. Declaration by State on Indemnifying Bond Given in Suit to Enjoin | 153 |
| 79. Writ and Declaration—Violation of Federal Employer's Liability Act | 157 |
| 80. Complaint where Attorneys Sue for Fees..... | 160 |
| 81. Information against a Carrier for Violation of Hours of Service Act | 162 |
| 82. Complaint in Suit for Violation of Hours of Service Act of the United States. | 168 |
| 83. Answer in Suit for Violation of Federal Hours of Service Act.. | 169 |
| 84. Action on Judgment against Assignee of Debtor's Assets..... | 170 |
| 85. Complaint by Husband and Wife for Recovery of Money for Wife's Separate Estate..... | 174 |
| 85a. Declaration for Infringement of a Patent..... | 177 |
| 85b. Declaration for Infringement of a Copyright or Trade-mark... | 177 |

PLEADINGS BY THE DEFENDANT AND REPLY BY THE PLAINTIFF

| | |
|--|-----|
| 86. Demurrer to Declaration for Want of Jurisdiction..... | 177 |
| 87. Plea to the Jurisdiction..... | 177 |
| 88. General Demurrer | 180 |
| 89. Demurrer to Declaration for Damages for Personal Injury... | 180 |
| 90. Demurrer Based on Case Being One under Maritime Law..... | 182 |
| 91. Demurrer to Complaint—General and Special..... | 183 |
| 92. Demurrer to Pleas..... | 184 |
| 93. Demurrer to Answer..... | 184 |
| 94. General Demurrer to an Amended Answer..... | 185 |
| 95. Plea Not Guilty in Trespass by Cutting Timber..... | 185 |
| 96. Plea Not Guilty in Ejectment..... | 185 |

| Form No. | Page |
|--|------|
| 97. Plea, General Issue and Contributory Negligence..... | 186 |
| 98. Answer in Action for Tort, Alleging Negligence of Plaintiff.... | 186 |
| 99. Plea, Raising General Issue..... | 186 |
| 100. Defendant's Plea and Brief Statement in Action for Assessment on Shares | 187 |
| 101. Plea of Defendant in Action for Violation of Federal Employer's Liability Act | 189 |
| 102. Plea of General Issue to Additional Courts..... | 190 |
| 103. Allegation of Negligence and Assumed Risk..... | 190 |
| 104. Defense of Another Action Pending..... | 191 |
| 105. Defense to Counterclaim of Another Action Pending..... | 191 |
| 106. Counterclaim in Suit for Breach of Contract of Sale..... | 191 |
| 107. Defense of Breach of Contract..... | 194 |
| 108. Defense of Tender..... | 195 |
| 109. Defense of Res Adjudicata..... | 196 |
| 110. Pleading Equitable Defense in Action at Law..... | 198 |
| 111. Plea of General Issue with Notice of Set-off..... | 201 |
| 112. Pleas to a Declaration by an Engineer for Damages for Per- sonal Injury | 202 |
| 113. Plea of Statute of Limitations..... | 204 |
| 114. Pleas to a Declaration on Policy for Accident Insurance..... | 204 |
| 115. Plea that Suit Has Abated by Death of only Beneficiary..... | 205 |
| 116. Answer to Suit on Fidelity Bond..... | 206 |
| 117. Disclaimer in Action in Ejectment..... | 211 |
| 118. Answer of Railway to a Petition for Damages for Personal Injury | 211 |
| 119. Answer of Receivers to a Petition for Damages for Ejectment from Railway Train..... | 212 |
| 120. Answer of Railroad Company to Petition for Damages for Per- sonal Injury—General Denial with Defense of Contribu- tory Negligence | 213 |
| 121. Answer of Railway Company to Petition for Damages for Per- sonal Injury | 214 |
| 122. Answer of a Transportation Company to Suit for Taxes..... | 216 |
| 123. Answer of an Incorporated Village to a Petition to Recover on Bonds and Coupons..... | 221 |
| 124. Reply to Answer..... | 223 |
| 125. Similiter and Replications to Pleas..... | 223 |
| 126. Joinder and Replication..... | 224 |
| 127. Replication to Pleas in Suit on Policy of Insurance..... | 225 |
| 128. Reply to Answer in Suit on Municipal Bonds..... | 226 |
| 129. Reply by Plaintiff Denying Contributory Negligence..... | 228 |
| 130. Replication and Demurrer to Defendant's Pleas..... | 229 |
| 131. Rejoinder to Replication..... | 230 |

TABLE OF CONTENTS.

ix

PROCESS, MOTIONS, JUDGMENT, BILLS OF EXCEPTIONS, ETC.

| Form No. | Page |
|--|------|
| 131a. Praecipe for Summons..... | 230 |
| 132. Summons at Law..... | 231 |
| 133. Teste for Writs Issuing from a District Court..... | 231 |
| 134. Summons in Action in Assumpsit..... | 232 |
| 135. Writ in Action of Tort in Massachusetts and Return..... | 232 |
| 136. Alias Summons and Return..... | 234 |
| 137. Teste for Writs Issuing from the Supreme Court or a Circuit Court of Appeals..... | 235 |
| 138. Return of Writ by Marshal..... | 235 |
| 139. Cost Bond | 236 |
| 140. Notice to Surety..... | 236 |
| 141. Affidavit by Poor Person to Dispense with Surety for Costs.. | 237 |
| 142. Certificate of Counsel to Poverty Affidavit..... | 239 |
| 143. Order to Sue in Forma Pauperis..... | 240 |
| 144. Motion for Service by Publication..... | 240 |
| 145. Affidavit for Service by Publication of Non-Resident Defend- ants | 242 |
| 146. Order for Service by Publication..... | 242 |
| 147. Notice for Publication..... | 243 |
| 147a. Proof of Publication..... | 243 |
| 148. Order for Service on Non-Resident Defendants..... | 244 |
| 149. Certified Copy of Order for Service on Non-Resident Defendant, and the Return of Officer Serving Same..... | 244 |
| 150. Appearance | 246 |
| 151. Appearance for Special Pleading..... | 246 |
| 152. Appearance by Defendant in Person... .. | 246 |
| 153. Order Substituting Attorneys..... | 246 |
| 154. Order of Substitution of Attorney, and Consent Thereto..... | 247 |
| 155. Motion by Receivers to Quash Service of Summons..... | 248 |
| 156. Notice to Plead..... | 248 |
| 157. Notice to Declare..... | 249 |
| 158. Notice of Motion for Leave to Amend..... | 249 |
| 159. Demand of Oyer..... | 250 |
| 160. Notice to Reply | 251 |
| 161. Notice of Trial..... | 251 |
| 162. Subpoena of Witness to Testify Before a Commissioner..... | 252 |
| 163. Habeas Corpus Ad Testificandum..... | 252 |
| 164. Order Overruling Motions to Make Complaint More Specific and to Strike Portions Thereof, etc..... | 252 |
| 165. Motion of Defendant to Make Complaint More Specific..... | 253 |
| 166. Motion of Defendant to Strike Portions of Complaint..... | 253 |
| 167. Motion for Leave to Amend Complaint After Verdict..... | 254 |
| 168. Motion to Make Petition Definite and Certain..... | 255 |
| 169. Order Granting Motion to Make Petition More Definite and Certain | 255 |

| Form No. | Page |
|--|------|
| 170. Order Allowing Amendment to Count in Declaration..... | 255 |
| 171. Order Granting Leave to Plead..... | 256 |
| 172. Affidavit to Withdraw a Plea in Bar..... | 256 |
| 173. Motion to Strike Out Pleas..... | 257 |
| 174. Order Allowing Amendment to Plea..... | 257 |
| 175. Order Allowing Amendment (Plea of Statute of Limitations), and Striking Same from Files..... | 257 |
| 176. Writ of Venire for Jury..... | 258 |
| 177. Order Impaneling Jury and Trial Begun..... | 258 |
| 178. Order Discharging Jury Until Future Day..... | 259 |
| 179. Order for Trial by Eleven Jurors..... | 259 |
| 180. Stipulation Waving Jury..... | 260 |
| 181. Oath of Jury on Voir Dire..... | 260 |
| 182. Oath of Witness | 261 |
| 183. Affirmation of Witness..... | 261 |
| 184. Motion to Dissolve Attachment and Vacate Bond..... | 261 |
| 185. Motion to Transfer Suit from One Division to Another Divi- sion of the Same District..... | 262 |
| 186. Order Transferring Suit to Another Division in the Same District | 263 |
| 187. Order Transferring Cause to Another Place in Same District.. | 264 |
| 188. Motion to Transfer to Equity Docket..... | 264 |
| 189. Petition of Defendant for Transfer of Case to Equity Docket.. | 266 |
| 190. Notice to Plaintiff of Motions to Transfer Case to Equity Side and Strike Portions of Reply, etc..... | 266 |
| 191. Order Denying Motion of Defendant to Strike Portions of Reply to Answer, and Petition of Defendant to Transfer the Case to the Equity Docket..... | 267 |
| 191a. Petition for Assignment of a District Judge..... | 268 |
| 191b. Certificate of Good Faith..... | 269 |
| 192. Disqualification of Judge..... | 270 |
| 192a. Order of Disqualification of District Judge..... | 271 |
| 193. Designation of Judge by President..... | 271 |
| 193a. Order Designating Judge for Special Service..... | 272 |
| 194. Designation of Judge by Circuit Judge..... | 272 |
| 195. Verdict Directed by the Court..... | 273 |
| 196. Verdict for the Plaintiff..... | 273 |
| 197. Joint and Several Judgment, Order..... | 273 |
| 198. Order of Supreme Court in Suit, between States, on an Indebtedness | 274 |
| 199. Verdict for the Plaintiff against Two or More Defendants Jointly | 275 |
| 200. Verdict for the Defendant..... | 275 |
| 201. Order Overruling Demurrer to Petition and Permitting Amend- ment | 276 |
| 202. Order Sustaining Demurrer to Declaration and Allowing Amendment | 276 |

TABLE OF CONTENTS.

xi

| Form No. | Page |
|--|------|
| 203. Leave to Amend Answer in Open Court..... | 277 |
| 204. Order Overruling Demurrer..... | 277 |
| 205. Order Overruling Demurrer for Failure to Prosecute..... | 278 |
| 206. Election of Defendants to Stand on Answer after Demurrer Thereeto Allowed | 278 |
| 207. Order Sustaining Demurrer to Plead..... | 278 |
| 208. Judgment where no Jury..... | 279 |
| 209. Judgment where Jury Waived..... | 279 |
| 210. Judgment on Stipulation of Facts and Waiver of Jury..... | 280 |
| 211. Judgment where Jury Waived and Court Makes Findings and States Conclusions of Law..... | 281 |
| 212. Judgment--Non-Suit as to Certain Parties Defendant..... | 282 |
| 213. Entry--Impaneling of Jury and Beginning of Trial..... | 283 |
| 214. Motion to Dismiss Complaint in Open Court upon Completion of Prima Facie Case..... | 284 |
| 215. Motion by Defendant to Dismiss and to Direct Verdict, upon Completion of Plaintiff's Prima Facie Case..... | 285 |
| 216. Motion by Defendant to Dismiss and Direct Verdict at Con- clusion of All Testimony..... | 286 |
| 217. Motion to Exclude All Evidence and to Instruct Jury to Find for Defendant | 286 |
| 218. Judgment for Plaintiff..... | 287 |
| 219. Judgment for Defendant..... | 287 |
| 220. Order Sustaining Demurrer and Judgment for Defendant..... | 288 |
| 221. Motion for Judgment on the Pleadings..... | 288 |
| 222. Judgment in Condemnation Proceeding..... | 289 |
| 223. Judgment where Undertaking to Dissolve Attachment..... | 291 |
| 223a. Motion in Open Court to Determine Equitable Defense in Law Action by Court as Chancellor in Equity.. .. | 292 |
| 223b. Defendant's Reservation of Rights Respecting Certain Re- quested Instructions to Jury, where Equitable Defense. | 292 |
| 223c. Objection in Open Court to Taking Testimony on Entire Case, where Equitable Defense, until Later Disposed of..... | 293 |
| 224. Advisory Verdict on Equitable Defense in Action at Law, and Adoption Thereof, and Judgment Thereon..... | 293 |
| 225. Petition and Motion that the Court, Sitting as a Court of Chancery, Make Findings and Enter Decree, Notwith- standing Advisory Verdict of the Jury..... | 295 |
| 226. Judgment for Plaintiff upon Sustaining Demurrer to Answer.. | 298 |
| 227. Remittitur | 298 |
| 228. Plaintiff, a Minor, by His Testamentary Guardian, Consents to Reduction of Assessed Damages..... | 299 |
| 229. Order Denying Motion for a New Trial where Verdict Reduced. | 299 |
| 230. Alternative Order Reducing Verdict..... | 300 |
| 231. Judgment on Reduced Verdict..... | 301 |
| 232. Judgment on Reduced Verdict..... | 302 |
| 233. Judgment for Plaintiff upon Remitting Part of Verdict..... | 303 |

| Form No. | Page |
|---|------|
| 234. Judgment for Plaintiff, Overruling Motion for New Trial and Settling Bill of Exceptions..... | 304 |
| 235. Verdict and Judgment in Ejectment..... | 305 |
| 236. Motion for a New Trial..... | 305 |
| 237. Motion for a New Trial by Defendant..... | 306 |
| 238. Motion for New Trial where Court Instructed Jury to Find for Defendant | 307 |
| 239. Order Setting Aside Order Sustaining Motion for New Trial... | 307 |
| 240. Order Sustaining Motion for New Trial and Ordering a New Trial | 308 |
| 241. Order Overruling Motion for New Trial and Judgment for Defendant upon the Verdict..... | 308 |
| 242. Motion for New Trial..... | 309 |
| 243. Motion for a New Trial, and Order Overruling, and Judgment.. | 309 |
| 244. Order Overruling Motion for New Trial and Judgment..... | 311 |
| 245. Order Overruling Motion for New Trial, Motion in Arrest, and Judgment | 311 |
| 246. Entry on Motion for New Trial..... | 312 |
| 247. Petition for Extension of Time Within which to Make Motion for New Trial..... | 313 |
| 248. Entry of Trial in Progress; Verdict for Defendant by Direction of Court | 314 |
| 249. Affidavit in Support of Motion to Set Aside a Verdict Reached by Improper Method..... | 315 |
| 250. Extract from Charge on Weighing of Testimony..... | 316 |
| 251. Writ of Replevin..... | 317 |
| 252. Return of Marshal on above Writ of Replevin..... | 318 |
| 253. Replevin Bond | 318 |
| 254. Oath of Appraisers of Goods Taken on Writ of Replevin..... | 319 |
| 255. Report of Appraisers..... | 320 |
| 256. Fieri Facias | 320 |
| 257. Vendi Exponas | 321 |
| 258. Rule to Show Cause..... | 322 |
| 259. Undertaking in Attachment..... | 322 |
| 260. Writ of Attachment..... | 323 |
| 261. Writ of Attachment for Contempt..... | 324 |
| 262. Scire Facias to Revive a Judgment..... | 324 |
| 263. Notice of Taxation of Costs..... | 326 |
| 264. Cost Bill | 327 |
| 265. Stipulation Extending Time to Settle Bill of Exceptions..... | 328 |
| 266. Order Enlarging Time for Filing Bill of Exceptions..... | 328 |
| 267. Order Permitting Defendants to File Bill of Exceptions after Time Allowed | 329 |
| 268. Order Permitting Bill of Exceptions to be Prepared, Agreed to and Settled, after Term..... | 329 |
| 269. Bill of Exceptions—Introduction..... | 330 |
| 270. Bill of Exceptions..... | 332 |

TABLE OF CONTENTS.

xiii

| Form No. | Page |
|--|------|
| 271. Bill of Exceptions (Another Form)..... | 334 |
| 272. Certificate of Reporter to Testimony..... | 335 |
| 273. Certificate of Judge to Bill of Exceptions..... | 336 |
| 274. Certificate of Judge to Bill of Exceptions..... | 337 |

MANDAMUS

| | |
|---|-----|
| 275. Petition for Writ of Mandamus to Compel a Municipality to Levy Tax to Pay a Judgment..... | 338 |
| 276. Notice of Application for Writ of Mandamus..... | 343 |
| 277. Petition for Writ of Mandamus Directed to a Judge of an Inferior Court to Compel Him to Allow an Appeal..... | 344 |
| 278. Order Granting Alternative Writ of Mandamus..... | 346 |
| 279. Alternative Writ of Mandamus to Compel Levy of Tax to Pay Judgment | 346 |
| 280. Answer of a United States Judge to an Alternative Writ of Mandamus to Allow an Appeal from an Order Refusing to Confirm a Composition in Bankruptcy..... | 349 |
| 281. Order Sustaining Demurrer to Defense to Alternative Writ of Mandamus | 351 |
| 282. Order Granting Alternative Writ of Mandamus Directed to a District Judge, and Stay of Execution..... | 351 |
| 283. Order for Alternative Writ of Mandamus to be Directed to a Judge | 353 |
| 284. Motion for Peremptory Writ of Mandamus..... | 354 |
| 285. Peremptory Writ of Mandamus Directed to Judge of District Court | 355 |
| 286. Order Making Alternative Writ of Mandamus Peremptory... | 358 |
| 287. Order that Marshal Protect Tax Collector in the Discharge of His Duty | 359 |
| 288. Petition for Writ of Mandamus to Require United States Auditor to Pay a Judge's Salary..... | 361 |
| 289. Peremptory Writ of Mandamus to United States Auditor..... | 366 |
| 290. Marshal's Return of Writ of Mandamus..... | 368 |

CONDEMNATION PROCEEDINGS

| | |
|--|-----|
| 291. Petition to Condemn Land for a Government Lighthouse..... | 369 |
| 292. Petition to Condemn Land by United States for a Public Building | 372 |
| 293. Petition to Condemn Land under a State Statute of Eminent Domain | 376 |
| 293a. Petition for Condemnation of Easement over Railroad Property where Already Occupied under a Contract About to Expire | 382 |
| 294. Answer and Claim for Damages in Condemnation Proceedings.. | 388 |
| 295. Another Form of Answer and Claim | 390 |

| Form No. | Page |
|--|------|
| 296. Another Form of Answer and Claim..... | 393 |
| 297. Answer to Petition to Condemn under a State Statute..... | 397 |
| 298. Reply to Answer in Condemnation Proceedings..... | 403 |
| 299. Judgment of Condemnation and Order Appointing Commissioners to Assess Damages..... | 404 |
| 300. Report of Commissioners of Damages..... | 406 |
| 301. Judgment for Condemnation and for Damages (Jury Waived)..... | 408 |
| 302. Order Directing that a Jury be Empaneled to Assess Compensation for Property to be Condemned..... | 411 |
| 303. Order Empaneling Jury to Assess Damages in Condemnation Proceedings | 412 |
| 304. Writ to Conduct Jury to View Premises in Condemnation Proceedings | 413 |
| 305. United States Marshal's Return to said Writ..... | 413 |
| 306. Judgment of no Damages in Condemnation Proceedings..... | 414 |
| 307. Verdict for Damages in Condemnation Proceedings..... | 415 |

DEPORTATION OF CHINESE

| | |
|--|-----|
| 308. Complaint for Deportation of a Chinese Person..... | 418 |
| 309. United States Commissioner's Affidavit, Complaint or Information for Warrant..... | 420 |
| 310. Order Designating United States Commissioner to Try Chinese Person | 421 |
| 311. Warrant of Arrest and Marshal's Return..... | 421 |
| 312. United States Commissioner's Warrant to Apprehend..... | 422 |
| 313. United States Commissioner's Subpoena..... | 423 |
| 314. United States Commissioner's Temporary Recognizance for Appearance before Commissioner..... | 425 |
| 315. Findings, Judgment and Order of Deportation..... | 426 |
| 316. Entry of Deportation..... | 428 |
| 317. Order by Judge on Appeal..... | 429 |
| 318. Petition for Appeal from Commissioner..... | 430 |
| 319. Assignment of Errors on Appeal to District Judge..... | 431 |
| 320. Assignment of Errors on Appeal to District Court..... | 432 |
| 321. Citation on Appeal from Commissioner..... | 438 |
| 322. United States Commissioner's Transcript of Proceedings in Criminal Case | 439 |
| 322a. Endorsement and Certificate..... | 441 |
| 323. Certificate to Record by United States Commissioner..... | 442 |
| 324. Order Affirming United States Commissioner..... | 442 |
| 325. Decree Affirming or Reversing Order of Deportation..... | 443 |
| 326. Order to Remand a Chinese Person on Petition for Writ of Habeas Corpus | 444 |
| 327. Writ of Deportation of Chinese..... | 446 |
| 328. Warrant for Arrest of Alien under Immigration Act of 1907.. | 447 |
| 329. Order of Deportation of Alien..... | 448 |

TABLE OF CONTENTS.

xv

| Form No. | Page |
|---|------|
| 330. Application for Writ of Habeas Corpus..... | 449 |
| 331. Order Allowing Writ of Habeas Corpus..... | 449 |
| 331a. Demurrer to Petition for Writ of Habeas Corpus..... | 450 |
| 331b. Order Overruling Demurrer and Ordering Writ to Issue..... | 450 |
| 331c. Stipulation that Immigration Record and Exhibits be Filed and Considered Part of the Petition for Writ of Habeas Corpus | 451 |
| 332. Writ of Habeas Corpus..... | 451 |
| 333. Return to Writ of Habeas Corpus..... | 452 |
| 334. Hearing on Writ of Habeas Corpus, Recognizance Fixed on Order | 454 |
| 335. Recognizance | 454 |
| 336. Leave given to File Reply—Order..... | 455 |
| 337. Reply to Writ of Habeas Corpus..... | 455 |
| 338. Hearing on Application..... | 459 |
| 339. Decree Dismissing Application and Remanding Alien..... | 459 |
| 340. Order of Discharge..... | 460 |

DEPOSITION IN SUITS AT LAW AND IN EQUITY

| | |
|---|-----|
| 341. Notice of Deposition De Bene Esse..... | 461 |
| 342. Subpoena of Witness De Bene Esse..... | 463 |
| 343. Caption for Depositions De Bene Esse..... | 463 |
| 344. Certificate at Close of Depositions De Bene Esse..... | 464 |
| 345. Letters Rogatory | 465 |
| 346. Letters Rogatory | 466 |
| 347. Order for Dedimus Potestatem..... | 467 |
| 348. Dedimus Potestatem | 469 |
| 349. Commissioner's Return | 470 |
| 350. Order to Show Cause Why the Time for Taking Testimony Should not be Extended..... | 471 |
| 351. Order Extending the Time for Taking Testimony..... | 471 |
| 352. Notice of Motion for Appointment of Special Examiner..... | 472 |
| 353. Order Appointing Special Examiner..... | 472 |
| 354. Consent Order to Appoint Examiner to Take Deposition..... | 473 |
| 355. Order Appointing Special Examiner under Equity Rule 47..... | 473 |
| 356. Subpoena for Witness..... | 474 |
| 357. Subpoena Duces Tecum..... | 474 |
| 358. Writ of Attachment against Witness for Disobeying Subpoena. | 475 |
| 359. Notice to Take Depositions under 47th Rule in Equity..... | 475 |
| 360. Affidavit of Service of Notice..... | 476 |
| 361. Commencement for Depositions under 47th Equity Rule..... | 476 |
| 362. Certificate at Close of Depositions under 47th Equity Rule.. | 477 |
| 363. Transmission of Depositions..... | 478 |
| 364. Motion for Leave to Withdraw Depositions..... | 479 |
| 365. Order to Withdraw Depositions..... | 479 |
| 366. Stipulation as to Taking Proofs..... | 479 |
| 367. Motion to Strike Out Parts of a Deposition..... | 480 |
| 368. Motion to Suppress Deposition..... | 480 |

SUITS IN EQUITY FORMAL PARTS OF A BILL

| Form No. | Page |
|--|------|
| 369. Averring Citizenship where Numerous and Diverse Parties.... | 482 |
| 370. Allegations of Citizenship of State Public Service Commission. | 483 |
| 371. Allegation of Citizenship and Amount Involved in Suit to Enjoin Municipality from Collecting Taxes..... | 484 |
| 372. Allegation of State Suing as <i>Parens Patriae</i> | 485 |
| 373. Averments of Citizens, Complainants, Citizens and Aliens.... | 485 |
| 374. Averments of Citizenship of Defendants, Trustees in Bankruptcy, Foreign Corporations and Alien..... | 486 |
| 375. Allegations of Capacity to Sue for Indian Tribes..... | 487 |
| 376. Allegation Showing Why Named Persons are not Made Parties. | 480 |
| 377. Prayer for the Production of Deeds, Papers, etc..... | 400 |
| 378. Prayer for an Accounting of Money Had and Received..... | 400 |
| 379. Prayer for an Accounting Between Partners..... | 401 |
| 380. Prayer for Winding up a Partnership..... | 401 |
| 381. Prayer for an Account, and Distribution..... | 402 |
| 382. Prayer for an Accounting by Agent..... | 403 |
| 383. Prayer for an Accounting and Injunction to Restrain Cutting Lumber | 493 |
| 384. Prayer for an Accounting and Damages for Infringement of Copyright | 494 |
| 385. Prayer for Damages against Agent for Mismanagement..... | 494 |
| 386. Prayer for an Accounting for Infringing a Patent for Invention | 404 |
| 387. Prayer for an Accounting of Rents and Profits of Testator's Real Estate | 495 |
| 388. Prayer for an Account of Personal Estate of a Testator..... | 495 |
| 389. Prayer in Bill to Quiet Title..... | 496 |
| 390. Prayer in Bill to Quiet Title..... | 496 |
| 391. Prayer for the Foreclosure of a Mortgage..... | 496 |
| 392. Prayer for Foreclosure of Mortgage..... | 497 |
| 393. Prayer to Foreclose a Railroad Mortgage and for Injunction... | 497 |
| 394. Prayer for Redemption of Mortgage—Mortgage in Possession.. | 499 |
| 395. Prayer for Redemption of Personal Property..... | 500 |
| 396. Prayer for Injunction (General Form)..... | 500 |
| 397. Prayer for Injunction to Restrain City from Tearing up Railroad Tracks | 500 |
| 398. Prayer for Injunction to Enjoin Mining..... | 501 |
| 399. Allegations in Seeking Injunctive Relief against Rate Order of State Public Utilities Commission..... | 502 |
| 400. Prayer for Injunction against Infringement of Trade-mark and Unfair Competition | 506 |
| 401. Prayer for an Injunction to Restrain Certifying Assessment for Taxation | 508 |
| 402. Prayer for Injunction to Enjoin Infringement of Patent for Invention | 509 |

TABLE OF CONTENTS.

xvii

| Form No. | Page |
|--|------|
| 403. Prayer for Specific Performance of Contract to Make a Policy of Insurance | 500 |
| 404. Prayer for Specific Performance of Agreement to Execute Mortgage of Indemnity..... | 509 |
| 405. Prayer for Specific Performance of Contract for Sale and Purchase of Real Estate..... | 510 |
| 406. Prayer for Specific Performance of Contract by Vendee to Buy Real Estate..... | 510 |
| 407. Prayer for Payment of Legacies and to Carry the Trusts of a Will into Execution..... | 511 |
| 408. Prayer for Reformation of Deed on the Ground of Mistake... | 511 |
| 409. Prayer for Cancellation of Deed..... | 511 |
| 410. Prayer by Next of Kin for Account and Distribution and to Restrain Sale | 512 |
| 411. Prayer for Cancellation of Land Patent and Deeds..... | 512 |
| 412. Prayer to Have Trust Declared as to Personalty..... | 512 |
| 413. Prayer to Have Trust Declared as to Real Estate..... | 513 |
| 414. Prayer to Have Trust Declared as to Real Estate..... | 513 |
| 415. Prayer for Injunction against Proceeding at Law—Declaration of Trust—Conveyance | 514 |
| 416. Prayer for Attorney's Fees..... | 514 |
| 417. Prayer in Bill of Interpleader..... | 515 |
| 418. Prayer in Bill of Interpleader by an Executor..... | 515 |
| 419. Prayer for a Guardian Ad Litem..... | 516 |
| 420. Prayer for a Conveyance and Deed by Special Master..... | 516 |
| 421. Prayer for Writ of Ne Exeat..... | 516 |
| 422. Prayer for Writ of Certiorari..... | 516 |
| 423. Prayer for Subpoena..... | 517 |
| 424. Prayer for Process where the Government is a Defendant.... | 517 |
| 425. Signature of Bills..... | 518 |
| 426. Verification by Officer of Corporation Plaintiff..... | 518 |
| 427. Verification by Copartnership..... | 519 |
| 428. Verification of Amended Intervening Petition and Cross-Petition | 520 |
| 429. Verification of a Member of a Partnership..... | 520 |
| 430. Verification by a Solicitor..... | 521 |

BILLS IN SPECIAL CASES

| | |
|--|-----|
| 431. Bill to Restrain Disclosures and Use of Trade Secrets..... | 522 |
| 432. A Bill by Creditor Praying the Appointment of a Receiver.... | 528 |
| 433. Stockholder's Bill against Building Association..... | 534 |
| 434. Stockholders against Corporation and Officers Charging Conspiracy to Injure the Corporation..... | 537 |
| 435. Creditor's Bill against a Corporation and its Stockholders to Enforce Statutory Liability..... | 544 |
| 436. Bill to Enforce Statutory Liability of a Stockholder against Real Estate in a Foreign Jurisdiction..... | 548 |

| Form No. | Page |
|--|------|
| 437. For a Dissolution of a Partnership..... | 555 |
| 438. For an Account of Partnership Dealings after a Dissolution, and for a Receiver..... | 558 |
| 439. Foreclosure of Mortgage..... | 560 |
| 440. Bill to Foreclose a Railway Mortgage..... | 562 |
| 441. To Have Goods Redelivered, which Have Been Deposited as a Security for Money Lent..... | 576 |
| 442. To Redeem by Purchaser of an Equity of Redemption from the Assignee in Insolvency of the Mortgagor..... | 577 |
| 443. By Husband of Legatee against Executor..... | 581 |
| 444. On Behalf of Infant Legatees..... | 582 |
| 445. By an Executor and Trustee under a Will, to Carry the Trusts Thereof into Execution..... | 585 |
| 446. To Cancel a Written Instrument—A Bill of Exchange..... | 589 |
| 447. Suit to Determine Legality of Municipal Bonds and for Specific Performance and other Relief..... | 593 |
| 448. To Reform a Policy of Insurance..... | 599 |
| 449. To Cancel Decree of Naturalization..... | 603 |
| 450. For Specific Performance of a Lease..... | 608 |
| 451. For Cancellation of Land Patent..... | 616 |
| 452. To Remove a Cloud on the Title (Amended Bill)..... | 625 |
| 453. For Lien on Cattle and Decree of Sale..... | 627 |
| 454. To Enforce a Lien against a Distillery..... | 631 |
| 455. Of Interpleader, (Old English Form.) Bill by a Lessee against Different Persons, Claiming the Rents by Differ- ent Titles, to Have them Interplead..... | 633 |
| 456. Stipulation for Interpleader..... | 636 |
| 457. Order to Interplead, etc..... | 637 |
| 458. Interplea in Suit on Promissory Notes..... | 637 |
| 459. Prayer of a Bill of Interpleader..... | 641 |
| 460. Form of Affidavit to be Annexed to a Bill of Interpleader..... | 642 |
| 461. Another Form of Affidavit..... | 643 |
| 462. Still Another Form..... | 643 |
| 463. Against an Agent for Mismanagement..... | 644 |
| 464. Bill to Enjoin a Combination under Sherman Anti-Trust Act.. | 647 |
| 465. To Permit One Competitor to Sell Out to Another, Both Having Previously Been Found Guilty of Violating the Sherman Law | 660 |
| 466. To Enjoin the Obstruction of a River..... | 676 |
| 467. Bill to Enjoin the Certification of Value of Telephone Com- pany for Taxation..... | 678 |
| 468. Bill by a Telephone Company to Enjoin a Competitor from Connecting with its Devices..... | 695 |
| 469. Bill to Enjoin the Transfer of Title to Patents under a Part- nership Agreement | 698 |
| 470. Bill to Enjoin Railroads from Refusing to Receive Freight from Connecting Lines | 703 |

TABLE OF CONTENTS.

xix

| Form No. | Page |
|---|------|
| 471. Where Carrier Refuses to Accept Goods in Interstate Commerce | 708 |
| 472. Where Railway Refuses to Carry Liquor into Dry Territory.. | 716 |
| 473. Amendment to Bill to Enjoin a Strike, Bringing in New Parties | 727 |
| 474. Bill in Equity to Subject Property of Absent Defendant to Pay a Judgment..... | 731 |
| 475. Where Postmaster Excludes Mail Matter under the Act of June 15, 1917, 40 Stat. L., 230..... | 733 |
| 476. To Enjoin Enforcement of Order of State Railway Commission | 737 |
| 477. Suit by Trustee Against Bankrupts..... | 748 |
| 478. Bill by the United States for Decree of no Interest where Land Wrongfully Patented..... | 754 |
| 479. To Decree an Alley to be Private Property, to Remove Obstructions, and to Cancel a Deed Thereto..... | 758 |
| 480. Suit by Infant by Prochein Ami for Accounting and Payment Over under a Trust..... | 764 |

BILLS NOT ORIGINAL

| | |
|---|-----|
| 481. Bill to Declare Present and Future Acquired Property of Street Railway Subject to a Trust Deed..... | 769 |
| 482. Petition for Leave to File Supplemental Bill..... | 782 |
| 483. Order to File Supplemental Bill of Complaint..... | 782 |
| 484. Supplemental Bill | 783 |
| 485. Supplemental Bill against the Trustee of a Bankrupt Defendant | 788 |
| 486. Supplemental Bill to an Original and Amended Bill Filed by a Lessee for the Specific Performance of an Agreement to Grant a Further Lease..... | 789 |
| 487. Supplemental Bill in a Patent Case..... | 790 |
| 488. To Perpetuate Testimony..... | 790 |
| 489. Receiver's Supplemental and Ancillary Bill to Enjoin Suit in State Court—Conflict of Jurisdiction..... | 792 |
| 490. Ancillary Bill by Defendant in Pending Suit at Law for Money, to Determine Conflicting Claims, Plaintiff Admitting Possession in Itself..... | 797 |
| 491. Of Revivor (Before Decree) by the Administrator of the Plaintiff in the Original Suit..... | 807 |
| 492. Bill of Revivor in Patent Suit..... | 809 |
| 493. Of Revivor and Supplement where Both Parties in Original Bill are Deceased..... | 813 |
| 494. Of Review to Examine and Reverse a Decree..... | 815 |
| 495. Petition to Appellate Court for Leave to File Bill of Review for New Matter in Court Below..... | 816 |
| 496. Petition for Leave to File a Bill of Review for New Matter.. | 821 |

| Form No. | Page |
|---|------|
| 497. Bill of Review for New Matter..... | 822 |
| 498. To Suspend a Decree..... | 824 |
| 499. To Set Aside a Decree Obtained by Fraud..... | 826 |
| 500. Cross-Bill (General Form)..... | 828 |

SUBPOENAS

| | |
|---|-----|
| 501. Subpoena in Chancery (Under Former Rules)..... | 830 |
| 502. Subpoena and Return (Under Present Rules)..... | 830 |
| 503. Subpoena (Another Form) with Memorandum Thereon Noting Answer Day and Return..... | 832 |
| 503a. Return on Service of Writ..... | 833 |
| 504. Return of Subpoena by Marshal..... | 834 |
| 505. Service by Publication..... | 835 |
| 506. Subpoena to Testify in District Court..... | 835 |
| 507. Subpoena Duces Tecum to Testify in Court..... | 836 |
| 508. Subpoena Duces Tecum to Testify before a Master or Ex- aminer | 836 |

DEMURRERS

| | |
|---|-----|
| 509. Demurrers are Abolished by Equity Rule 20..... | 838 |
|---|-----|

PLEAS

| | |
|---|-----|
| 510. Pleas are Abolished by Equity Rule 20..... | 838 |
|---|-----|

ANSWERS

| | |
|---|-----|
| 511. The Commencement | 838 |
| 512. Same, where there is Only One Defendant to an Original Bill. | 838 |
| 513. Same, by an Infant..... | 838 |
| 514. Same, by Husband and Wife..... | 839 |
| 515. Another Form by Husband and Wife..... | 839 |
| 516. Same, where the Bill Misstates the Names of Defendants..... | 839 |
| 517. Same, by a Lunatic or Idiot, etc..... | 839 |
| 518. Same, by Wife Separately under an Oath..... | 840 |
| 519. Verification of Answer..... | 840 |

COMMON FORMS USED IN FRAMING ANSWERS

| | |
|--|-----|
| 520. Accounts—Reference to Book Containing them..... | 841 |
| 521. Accounts Refused, as Being Useless before Decree..... | 841 |
| 522. Admission for Purposes of the Suit..... | 841 |
| 523. Claims Made by Defendant..... | 842 |
| 524. Craving Leave for Greater Certainty..... | 843 |
| 525. Craving Leave to Refer to Codefendant's Answer..... | 843 |
| 526. Information and Belief..... | 843 |
| 527. Ignorance | 844 |

TABLE OF CONTENTS.

xxi

| Form No. | Page |
|---|------|
| 528. Qualified Denial | 844 |
| 529. Reference to Schedule..... | 844 |
| 530. Release, Craving same Benefit as if Pleadet..... | 845 |
| 531. Settled Accounts—Claim of..... | 845 |
| 532. Submission by Trustees to Act..... | 845 |
| 533. Traverse | 845 |
| 534. Trustee—Desire to be Discharged..... | 846 |
| 535. Vexatious Suit—Settled Accounts..... | 846 |
| 536. Want of Interest in Plaintiff..... | 846 |
| 537. Claim of Benefit of same Defense to Amended, as to Original Bill | 847 |
| 538. Answer of an Executrix Submitting to Act under Indemnity of the Court..... | 847 |
| 539. Answer of the Executors of a Deceased Acting Executor to a Bill of Revivor..... | 848 |
| 540. Answer of a Widow Electing to Take the Bequests Made to Her by a Will, and to Release All Interest in the Devised Estate | 850 |
| 541. Answer to a Bill Charging Infringement of a Patent..... | 851 |
| 542. Answer to Bill to Enjoin Transfer of Patents..... | 851 |
| 543. Answer in Case of Copyright Infringement..... | 854 |
| 544. Cross-Bill at the End of an Answer..... | 867 |
| 545. Allegations of no Jurisdiction in the Answer..... | 876 |
| 546. Answer of Railway in the Hands of Receivers..... | 878 |
| 547. Answer of Receivers of Railway..... | 879 |
| 548. Amended Answer of Street Railway where Receiver is in Charge, Adopting Answer of Receiver..... | 882 |
| 549. Answer of Defendants and Intervenor..... | 883 |
| 550. Supplemental Answer | 889 |
| 551. Second Amended Answer..... | 890 |
| 552. Allegations in Answer of Denial of Jurisdiction in Federal Court, no Federal Question, and not Requisite Juris- dictional Amount | 892 |
| 553. Denial of Jurisdiction of Federal Court to Enjoin State Rail- way Commission | 892 |
| 554. Prayer that Answer be made a Cross-Bill..... | 893 |
| 555. Answer to Amendment to Bill Filed after Answer to Original Bill under Consent of Defendant..... | 894 |
| 556. Answer to Interplea..... | 894 |
| 557. Joint Answer of City, City Treasurer, and Holder of Certificate of Indebtedness | 897 |
| 558. Stipulation Waiving Answer and Nunc Pro Tunc Agreement as to Filing the same..... | 900 |
| 559. Averments in the Answer in Place of Motions..... | 900 |
| 560. Amendment to Answer as Amended..... | 901 |
| 561. Defense of Prior Suit in State Court and Formation of Corpora- tion for Purposes of Federal Suit..... | 902 |

| Form No. | Page |
|---|------|
| 562. Answer and Cross-Petition of Holders of Bonds of Corporation in the Hands of Receiver..... | 905 |
| 563. Order Granting Leave to Intervene and that Petition of Intervention be Considered an Answer to Complainant and Cross-Bill to Another Intervenor..... | 907 |
| 564. Petition of Intervention Considered as Answer and Cross-Bill | 908 |
| 565. Allegation in Answer Denying Jurisdiction and Praying Dismissal | 917. |
| 566. Defense of Res Adjudicata Both in State and Federal Courts.. | 918 |
| EXCEPTIONS | |
| 567. Exceptions are Abolished by Equity Rule 33..... | 919 |
| DISCLAIMER | |
| 568. General Form | 920 |
| REPLICATION | |
| 569. Replications are not Required under the Present Equity Rules. | 920 |
| NOTICES, MOTIONS, ORDERS, DECREES, ETC. | |
| 570. Notice to Codefendants to Join in Appeal..... | 921 |
| 571. Affidavit of Service by One not an Officer..... | 921 |
| 572. Notice of Motion to Dismiss Because no Diversity of Citizenship | 922 |
| 573. Notice of Motion to Advance Cause..... | 923 |
| 573a. Writ to Serve Copy of Notice to Advance, and Marshal's Return Thereon | 924 |
| 574. Notice of Motion to Strike Out Parts of the Answer..... | 925 |
| 575. Notice of Application for Trial..... | 926 |
| 576. Notice of Final Hearing..... | 926 |
| 577. Motion for Severance on Appeal..... | 927 |
| 578. Motion on Special Appearance to Quash Subpoena..... | 928 |
| 579. Motion by Defendant that the Defenses in Point of Law be Separately Heard and Disposed of before the Trial, and to Dismiss the Bill as to Defendant..... | 928 |
| 580. Motion to Make New Parties Defendant, for Personal Service on Absent Defendants, and Affidavit of Solicitor..... | 929 |
| 581. Order Making New Parties Defendant, Authorizing Service on Absent Defendants, etc..... | 931 |
| 582. Motion to Dismiss for Insufficient Facts and for Nonjoinder of Plaintiffs and Defendants..... | 935 |
| 583. Motion for Leave to File Bill in Equity in the Supreme Court of the United States..... | 936 |
| 584. Motion for Preliminary Injunction..... | 936 |

TABLE OF CONTENTS.

xxiii

| Form No. | Page |
|--|------|
| 585. Motion Suggesting Appointment of New District Attorney and Asking His Substitution in the Case..... | 937 |
| 586. Motion for Additional Security for Costs..... | 937 |
| 587. Cost Bond | 938 |
| 588. Appearance | 938 |
| 589. Order Associating Counsel for the Defendant.... | 938 |
| 590. Order to Take Bill Pro Confesso..... | 938 |
| 591. Consent to Take Bill Pro Confesso..... | 939 |
| 592. Decree Pro Confesso..... | 939 |
| 593. Decree Pro Confesso Sustaining Patent..... | 940 |
| 594. Motion to Vacate a Decree Pro Confesso..... | 940 |
| 595. Order Vacating a Decree Pro Confesso..... | 940 |
| 596. Order for Attachment to Compel Answer..... | 941 |
| 597. Attachment to Compel Answer..... | 941 |
| 598. Praeipe for Copy..... | 942 |
| 599. Order to Stand Over to Add New Parties..... | 942 |
| 600. Order to Stand Over to Supply Proofs..... | 942 |
| 601. Petition by Infant for Appointment of a Guardian Ad Litem.. | 943 |
| 602. Petition by Plaintiff for Appointment of Guardian Ad Litem for an Infant Defendant..... | 943 |
| 603. Petition for the Appointment of a Guardian Ad Litem. Notice and Consent to Such Appointment..... | 944 |
| 604. Order Appointing Guardian Ad Litem of Defendant..... | 945 |
| 605. Order Appointing Guardian Ad Litem by Consent..... | 946 |
| 606. Answer of Infant by Guardian Ad Litem..... | 946 |
| 607. Motion to Amend Bill of Complaint by Crossing Out Original and Inserting Amended Bill..... | 947 |
| 608. Motion to Amend Amended Bill of Complaint by Striking Out Words and Inserting Others..... | 947 |
| 609. Motion to Amend Bill by Adding Defendant..... | 947 |
| 610. Motion to Amend Bill by Inserting Matter..... | 948 |
| 611. Nunc Pro Tunc Order Permitting an Amendment to Bill..... | 948 |
| 612. Motion to File a Second Amended Bill..... | 949 |
| 613. Order Granting Leave to File Amended Bill..... | 949 |
| 614. Order for Leave to Amend Bill..... | 949 |
| 615. Amendment to a Bill..... | 950 |
| 616. Motion by Plaintiff to Dismiss His Bill with Costs..... | 950 |
| 617. Motion by Party Late an Infant, on Coming of Age, to Dismiss Bill with Costs, before Decree | 951 |
| 618. Motion for Judgment on Pleadings..... | 951 |
| 619. Order Granting Motion for Judgment on Pleadings..... | 952 |
| 620. Motion to Strike for Insufficient Facts..... | 952 |
| 621. Motion to Dismiss for Insufficient Facts, a Remedy at Law and no Jurisdiction..... | 953 |
| 622. Motion to Dismiss Bill of Complaint for Infringement of Copyright | 953 |

| Form No. | Page |
|---|------|
| 623. Motion to Dismiss for no Equity, Misjoinder, Nonjoinder, Limitations of Statute, Uncertainty, etc..... | 955 |
| 624. Informal Motion and Decree Dismissing Bill in Open Court, and Notice of Exceptions..... | 958 |
| 625. Motion in Answer to Dismiss for no Unconstitutionality Shown, no Federal Jurisdiction, etc..... | 958 |
| 626. Motion to Dismiss Intervening Petition..... | 960 |
| 627. Order Overruling Motions to Dismiss Intervening Petition... | 960 |
| 628. Motion to Dismiss Bill Asking for Receiver..... | 961 |
| 629. Motions for Various Purposes made on Hearing Informally... | 961 |
| 630. Motion to Dismiss made on Special Appearance..... | 963 |
| 631. Separate Motion of Defendant Railway to Dismiss..... | 965 |
| 632. Motion to Dismiss Suit by Individual against the United States | 968 |
| 633. Motion to Vacate Preliminary Injunction in Part..... | 968 |
| 634. Motion to Vacate Order Allowing Fees..... | 969 |
| 635. Order to Withdraw Answer to have it Sworn to by Defendant. | 970 |
| 636. Motion to Amend Answer..... | 970 |
| 637. Motion for Leave to Amend an Answer by Consent..... | 971 |
| 638. Motion to Amend Answer with Notice Accepted..... | 971 |
| 639. Order Granting Leave to File Amended Answer and Fixing Time for Testimony..... | 972 |
| 640. Amended Answer | 972 |
| 641. Motion for Leave to File Supplemental Answer by Consent... | 973 |
| 642. Supplemental Answer | 973 |
| 643. Order Extending Time to Answer..... | 974 |
| 644. Entry of Consolidation of Suits..... | 974 |
| 645. Order Granting Leave to Intervene..... | 975 |
| 646. Order Denying Application to Intervene..... | 976 |
| 647. Motion for Leave to Intervene..... | 976 |
| 648. Order Denying Petition to Intervene (Another Form)..... | 979 |
| 649. Order Allowing Petition to Intervene (Another Form)..... | 979 |
| 650. Petition of a City Intervenor..... | 980 |
| 651. Petition of Intervention | 982 |
| 652. Motion to Assign Time within which Parties shall Take Evidence | 983 |
| 653. An Order Assigning Time within which to Take Testimony... | 984 |
| 654. Order Allowing Testimony by Depositions..... | 984 |
| 655. Order Allowing Particular Deposition to be Taken..... | 985 |
| 656. Order Preserving Oral Testimony Taken in a Suit in Equity... | 986 |
| 657. Stipulation to Read Depositions Taken in Another Case..... | 986 |
| 658. Motion to Take Additional Testimony..... | 987 |
| 659. Order to Reopen Case and Take Further Testimony..... | 987 |
| 660. Order Suppressing Notice of Taking Testimony..... | 988 |
| 661. Order Fixing Time within which to File Briefs..... | 988 |
| 662. Stipulation to Submit Cause on Printed Briefs..... | 989 |
| 663. Motion to Enter a Decree Nunc pro Tunc..... | 989 |

TABLE OF CONTENTS.

xxv

| Form No. | Page |
|---|------|
| 664. Motion to Rectify a Decree or Order..... | 989 |
| 665. Motion for Decree on Mandate..... | 990 |
| 666. Order Directing that Mandate of Circuit Court of Appeals be Spread of Record, and other Orders Consequent Thereupon | 991 |
| 667. Petition for New Trial..... | 992 |
| 668. Order Denying Motion for Rehearing..... | 993 |
| 669. Motion to Retax Costs..... | 993 |
| 670. Cost Bill | 994 |
| 671. Final Record in Equity..... | 994 |
| 672. Order Making Fidelity Title and Trust Company a Party Plaintiff, etc. | 995 |
| 673. Order Making Additional Parties Defendants..... | 996 |
| 674. Nunc pro Tunc Order Admitting Defendants..... | 997 |
| 675. Order Granting Leave to Intervene and File Answer and Cross-petition | 998 |
| 676. Order Overruling Motion to Strike Joint Answer of Defendants and Intervenors | 998 |
| 677. Order of Severance | 999 |
| 678. Writ of Possession or Assistance..... | 1000 |
| 679. Final Decree Dismissing Bill..... | 1001 |
| 680. Decree of Dismissal of Bill (Another Form)..... | 1001 |
| 681. Decree of Dismissal without Prejudice, Stating Reasons..... | 1002 |
| 682. Decree Dismissing Bill with Prejudice..... | 1002 |
| 683. Order Sustaining Motion to Dismiss, and Decree of Dismissal.. | 1003 |
| 684. Order Dismissing Complaint upon Special Appearance to Object to Jurisdiction | 1004 |
| 685. Decree Dismissing Parties Defendant before Hearing..... | 1004 |
| 686. Decree for Amount Due under a Contract and Creating a Lien on Property to Secure the Same..... | 1005 |
| 687. Decree Vesting Title Subject to Easement for Alley Purposes, and Enjoining from Obstructing, etc..... | 1009 |
| 688. Decree Cancelling Release from Liability for Personal Injury... | 1009 |
| 689. Decree Removing Cloud upon Title..... | 1010 |
| 690. Order Directing that Certain Records of a Named State Court be Filed and Made a Part of the Record in a Suit Pending in Federal Court..... | 1011 |
| 691. Order Designating and Appointing Judge in One District to Hold Court in Another District, and Certificate Thereto.. | 1013 |
| 692. Order to Draft Board to Show Cause..... | 1014 |
| 693. Order Appointing Commissioners to Partition..... | 1015 |
| 694. Order Enjoining Transfer or other Disposition of Bonds..... | 1015 |
| 695. Order Modifying Injunction Order..... | 1016 |
| 696. Order to Show Cause Why Certain Matter Should not be Transmitted Through the Mails..... | 1017 |

| Form No. | Page |
|---|------|
| 697. Order to Show Cause against Postponement, Issue of Preliminary Injunction and Delivery of Data into Custody of Court | 1018 |
| 698. Decree Rescinding Contract for Fraud..... | 1019 |
| 699. Decree for Specific Performance of Agreement for Policy of Insurance | 1021 |
| 700. Entry Reversing Decree | 1022 |
| 701. Decretal Order Appointing Special Master..... | 1023 |
| 702. Decree with Order on Receiver to Pay over Funds..... | 1023 |
| 703. Decree for Plaintiff on Bill to Enjoin the Transfer of Title in Patents by a Copartner..... | 1024 |
| 703a. Decree for Property under a Will and Reference to Master.... | 1027 |
| 704. Decree on Bill of Interpleader..... | 1028 |
| 705. Decree on Stockholders' Petitions in a Suit against a Building Association | 1030 |
| 706. Decree in Stockholders' Suit against Building Association..... | 1033 |
| 707. Decree Dissolving Restraining Order and Refusing Leave to Intervene by Purchaser | 1036 |
| 708. Decree for the Plaintiff with Lien and Order for Sale..... | 1038 |
| 709. Interlocutory Decree Granting Permanent Injunction and Appointing Special Master | 1039 |
| 710. Decree Embodying Findings of Fact and Conclusions of Law, Granting Injunction | 1040 |
| 711. Interlocutory Decree in Suit Involving Water Rights..... | 1043 |
| 712. Final Decree in Copyright Infringement..... | 1045 |
| 713. Final Decree where Trustee Sues for Mortgage Bondholders.... | 1047 |
| 714. Decree of Foreclosure of a Railroad Mortgage..... | 1054 |
| 715. Order of Delivery of Property to Reorganized R. R. Co..... | 1070 |
| 716. Decree Confirming Master's Sale and Ordering Conveyance and Possession of a Railroad Property..... | 1073 |
| 717. Decree Quieting Title | 1085 |
| 718. Decree Subjecting Absent Defendant's Property to Payment of Judgment | 1087 |
| 719. Order of Distribution | 1088 |
| 720. Decree Awarding Perpetual Injunction Restraining Municipality from Interfering with Telephone Company..... | 1088 |
| 721. Decree Confirming Sale Ordering Deed and Writ of Possession.. | 1090 |
| STIPULATIONS—MISCELLANEOUS | |
| 722. Stipulation Concerning Facts, Procedure, Costs, etc | 1091 |
| 723. Stipulation Concerning Facts, but Limiting Their Use..... | 1093 |
| 724. Stipulation Concerning Facts and Exhibits in Unfair Competition Case | 1094 |
| 725. Stipulation for Continuance of Case..... | 1096 |
| 726. Stipulation for Change of Venue, Waiving Issuance of Subpoena, for Procedure, etc..... | 1096 |
| 727. Stipulation Amending Bill | 1098 |

PROCEEDINGS BEFORE A MASTER

| Form No. | Page |
|--|------|
| 729. Motion for Appointment of Master to Report on Evidence..... | 1099 |
| 729. Motion to Refer Intervention to Special Master..... | 1099 |
| 730. Order Appointing Master to Report on Evidence..... | 1099 |
| 731. Order Appointing Special Master to Report on Strike..... | 1100 |
| 732. Order Appointing Master to Determine Amount Due..... | 1100 |
| 733. Stipulation as to Special Master..... | 1101 |
| 734. Order Appointing Special Master..... | 1101 |
| 735. Order Appointing Special Master to Hear and Report on Certain Claims | 1102 |
| 736. Order Appointing Master in Chancery Pro Hac Vice..... | 1103 |
| 737. Oath of Special Master | 1103 |
| 738. General Notice for Proceedings before Master..... | 1104 |
| 739. Master's Warrant or Summons..... | 1104 |
| 740. Order to Master to Report Testimony..... | 1105 |
| 741. Motion before Master for Order Requiring Defendant to Submit a Report in Accounting..... | 1105 |
| 741a. Order of the Master Thereon..... | 1107 |
| 742. Affidavit of Defendant Showing Progress of Compiling Report in Accounting before Master..... | 1109 |
| 743. Stipulation for Taking Depositions in other Jurisdictions for Use before Master in Accounting..... | 1110 |
| 744. Notice during Proceedings before Master of Motion in District Court for Order Requiring Witness before Master to Testify | 1110 |
| 745. Notice during Proceedings before Master of Motion in District Court for Order Requiring Production of Books before a Master | 1111 |
| 746. Notice of Motion to Take Surrebuttal Testimony before Master in Accounting, and Objections to Motion..... | 1111 |
| 747. Motion to Take Surrebuttal Testimony before Master in Accounting | 1112 |
| 748. Objections to the Above Motion..... | 1112 |
| 749. Interrogatories for Examination of Witnesses before a Master. | 1113 |
| 750. Interrogatories in Accordance with Equity Rule 58..... | 1114 |
| 751. Report of Special Master..... | 1118 |
| 752. Master's Report | 1119 |
| 753. Report of Master—Introduction (Another Form) | 1119 |
| 754. Notice Accompanying Draft of Master's Report..... | 1120 |
| 755. Exceptions to Master's Report..... | 1121 |
| 756. Exceptions to Report of Special Master..... | 1121 |
| 757. Exceptions to Master's Report and Motion for Allowance (Another Form) | 1122 |
| 758. Receiver's Exceptions to Master's Report because of His Lack of Authority | 1122 |
| 759. The Plaintiff's Exceptions to the Report of the Master on Accounting | 1123 |

| Form No. | Page |
|--|------|
| 760. Exceptions to Report of Special Master (Another Form)..... | 1126 |
| 761. Order Granting Leave to Amend Exceptions to Master's Report. | 1127 |
| 762. Plaintiff's Adoption of Exceptions by Receiver to Master's Report | 1127 |
| 763. Master's Report in Accounting in Suit for Infringement of Patent | 1128 |
| 764. Statement by Master of Objections to His Report (In the Report) | 1129 |
| 765. Return of Master in Accounting for Infringement of Patent (At End of the Report)..... | 1129 |
| 766. Notice of Hearing on Objections to Master's Report..... | 1130 |
| 767. Decree on Master's Report, Where Suit for Infringement of Patent | 1131 |
| 768. Final Decree on Master's Report..... | 1132 |
| 769. Final Decree on Master's Report..... | 1132 |
| 770. Reference to a Master in Special Cases..... | 1133 |
| 771. Contempt Proceedings | 1133 |

RECEIVERS

| | |
|---|------|
| 772. Bill of Judgment Creditor Praying the Appointment of a Receiver | 1134 |
| 773. Bill for the Foreclosure of a Railway and Appointment of Receiver | 1134 |
| 774. Prayer for Receiver of Irrigation System..... | 1134 |
| 775. Allegations Showing Equity Jurisdiction and Asking for a Receiver by a Holder of Corporation Notes..... | 1137 |
| 776. Bill for an Account of Partnership Dealings and Dissolution, and for a Receiver..... | 1143 |
| 777. Affidavit of Insolvency in Support of Bill..... | 1143 |
| 778. Order Taking Jurisdiction and Fixing Day for Hearing..... | 1144 |
| 779. Notice of Application for the Appointment of a Receiver..... | 1145 |
| 780. Motion for the Appointment of Receiver to Take Charge of Mortgaged Property, Collect Rents, etc..... | 1146 |
| 781. Order Concerning Application for Receiver and Extending Time to Answer, etc. | 1146 |
| 782. Entry of Appearance and Answer | 1147 |
| 783. Petition for the Appointment of a Receiver and for an Order of Court Directing the Production of Oil and Gas from the Real Property Involved in this Suit..... | 1148 |
| 784. Order Appointing Temporary Receiver..... | 1154 |
| 785. Order Appointing Receiver for a Railway..... | 1159 |
| 786. Order Appointing a Receiver for a Railroad (Another Form)... | 1162 |
| 787. Order Appointing Receivers of Kansas Natural Gas Company.. | 1166 |
| 788. Order Appointing Receiver with Power to Collect Rents..... | 1173 |
| 789. Order Extending the Receivership..... | 1174 |
| 790. Order to File Amendment and Extending Receivership..... | 1177 |
| 791. Order Appointing Receiver for a Manufacturing Corporation... | 1178 |

TABLE OF CONTENTS.

xxix

| Form No. | Page |
|---|------|
| 792. Motion to Require Clerk of District Court Appointing a Receiver to File Certified Copy of Bill and Order in other Districts | 1179 |
| 793. Order Concerning Resignation of Receiver..... | 1180 |
| 794. Order Accepting Resignation of One Coreceiver, Making other Sole Receiver, etc., Property Being in Three Judicial Districts | 1181 |
| 795. Order to Receivers Concerning Collection, Deposit and Checking Out Moneys | 1183 |
| 796. Order Allowing Claims Approved by Receiver..... | 1183 |
| 797. Order Making Allowances in Receivership..... | 1184 |
| 798. Entry of Order Appointing Receiver for Manufacturing Company, Directing Transfer of Property to Him, Designating His Counsel, etc. | 1185 |
| 799. Judge's Fiat Appointing Receiver for Street Railway..... | 1187 |
| 800. Order Appointing Receiver of Indian Oil Lands, Defining His Powers and Duties, and for Other Purposes..... | 1188 |
| 801. Order Amending Order Appointing Receiver, Continuing Him, Prescribing Duties, etc. | 1193 |
| 802. Petition of Receiver to Bring in Parties, etc | 1196 |
| 803. Order Permitting Receiver to Sue..... | 1197 |
| 804. Petition of Receivers for Authority to Accept Part Payment on Note and to Extend Payment on Balance, and Order of Court Thereon | 1197 |
| 805. Petition to Discharge Receivers Appointed by Federal Court and for Delivery of all Property in Their Hands as such Receivers to the Receivers Appointed by the State Court | 1201 |
| 806. Petition of Receivers of Gas Company for Authority to Execute Certain Contracts, and Order Thereon..... | 1206 |
| 807. Petition of Receivers for Appointment of Attorney and Counsel, and Order Appointing John J. Jones..... | 1210 |
| 808. Petition of Receivers for Order Directing Them to Advertise for Bonds Sufficient to Meet Sinking Fund Payments, and Order of Court Thereon..... | 1211 |
| 809. Order Directing Receivers as to Building and Construction of Betterments under Way, etc..... | 1214 |
| 810. Order Extending Receivership in One Case to the Property Involved in Another Case..... | 1215 |
| 811. Order Giving Surviving Receiver Sole Authority..... | 1215 |
| 812. Order Appointing Ancillary Receivers..... | 1216 |
| 813. Order Confirming and Continuing Receivers, and Authorizing Them to Accept Possession of Property from a State Court | 1220 |
| 814. Oath of Receiver..... | 1221 |
| 815. Bond of Receiver..... | 1221 |
| 816. Order Overruling Petition to Rehear Application for Appointment of a Receiver..... | 1222 |

| Form No. | Page |
|--|------|
| 817. Order that Receivers Give Notice to Stockholders by Publication | 1223 |
| 818. Notice of Petition by Receivers..... | 1223 |
| 819. Answer to Petition..... | 1224 |
| 820. Petition of Defendant for an Order Authorizing Receivers to Deliver to it the Possession of Railway Property in Their Hands | 1227 |
| 821. Petition for an Order upon a Defendant to Deliver to the Receivers the Deed Records, Plats, and Other Muniments of Title | 1228 |
| 822. Order Requiring Defendant to Turn Over to Receivers Books, Plats and Deeds..... | 1230 |
| 823. Petition by Receiver for Authority to Settle Traffic Balance.... | 1230 |
| 824. Order Authorizing Receiver to Settle Traffic Balances..... | 1232 |
| 825. Order to Pay Rent..... | 1233 |
| 826. Petition of Receiver for Permission to Defend Suits and Compromise Claims | 1233 |
| 827. Order Appointing Special Master to Hear and Report Claims.. | 1234 |
| 828. Order Appointing Master to Hear and Report Claims (Another Form) | 1236 |
| 829. Oath of Special Master..... | 1237 |
| 830. Proof of Claim before Master by One Receiver against Another. | 1237 |
| 831. Order to Pay Claims Accruing Prior to the Appointment of the Receiver | 1238 |
| 832. Petition for Order Limiting Time to Present Claims, etc..... | 1239 |
| 833. Verification of Above Petition..... | 1241 |
| 834. Notice to Creditors to Prove Claims before the Master..... | 1241 |
| 835. Receiver's Petition for Authority to Purchase Rails and Ties.. | 1242 |
| 836. Order Authorizing Receivers to Purchase Material, etc..... | 1245 |
| 837. Order Authorizing Receiver to Pay Master's Fees..... | 1245 |
| 838. Petition of S M, Receiver, for Authority to Borrow \$150,000 on Receiver's Certificates..... | 1246 |
| 839. Order Authorizing Receiver to Issue Receiver's Certificates to the — for \$150,000..... | 1248 |
| 840. A Receiver's Certificate..... | 1249 |
| 841. Order Allowing Receiver to Renew Notes..... | 1251 |
| 842. Petition by a Receiver of a Lessee Railroad Company to Replace Bridges under Terms of Lease..... | 1252 |
| 843. Petition of Receiver to Pay for Electric Block System..... | 1254 |
| 844. Order Directing Filing of Receiver's Petition and Service of Copy of this Order on E. A. Ferguson, President Board of Trustees Cincinnati Southern Railway..... | 1255 |
| 845. Order Directing Replacements of Bridges to be Made and Reserving Questions as to Party to be Charged Therewith.. | 1257 |
| 846. Entry Granting Motion to Vacate Order of March 11, 1896, and to Discharge Rule Issued in Pursuance Thereof..... | 1257 |
| 847. Petition for Direction to Receivers..... | 1258 |

TABLE OF CONTENTS.

xxxi

| Form No. | Page |
|---|------|
| 848. Order in re Petition for Direction to Receivers..... | 1263 |
| 849. Petition of Receiver for Protection..... | 1264 |
| 850. Order Directing Marshal to Appoint Deputies to Protect Prop- erty in the Hands of Receiver..... | 1266 |
| 851. Intervening Petition to Recover a Judgment of a State Court.. | 1267 |
| 852. Certified Proceedings before Magistrate—"Exhibit A"..... | 1269 |
| 853. Motion to Refer Intervention to a Special Master..... | 1270 |
| 854. Petition to Intervene to Foreclose a Mortgage..... | 1271 |
| 855. Order Granting Leave to Intervene to Foreclose a Mortgage.... | 1276 |
| 856. Petition for Leave to Intervene to Replevy Goods Furnished a Manufacturing Company | 1277 |
| 857. Motion to Restrain Receivers in Accordance with the above Petition | 1278 |
| 858. Petition for Permission to Make Receiver Party to a Suit in a State Court..... | 1278 |
| 859. Order Granting Leave to Make the Receiver Party to Suit in State Court | 1280 |
| 860. Petition for Leave to Garnishee Receiver..... | 1281 |
| 861. Order on Foregoing Petition..... | 1282 |
| 862. Intervening Petition for Materials Furnished Railway Company Claiming Preference | 1282 |
| 863. Intervening Petition for Materials Furnished R. R., Claiming Preference over Mortgages..... | 1285 |
| 864. Master's Report on Intervention..... | 1291 |
| 865. Decree Confirming Master Commissioner's Report on Interven- tion | 1293 |
| 866. Quarterly Statement of Receiver..... | 1294 |
| 867. Certificate of Special Master to Statement of Receiver..... | 1295 |
| 868. Petition of S. M. for Discharge as Receiver..... | 1295 |
| 869. Order Accepting Resignation of S. M., Receiver, and Appointing J. R. Receiver | 1296 |
| 870. Order Discharging Receiver | 1297 |
| 871. Order Discharging Receiver (Another Form)..... | 1298 |
| 872. Allowing Account and Discharging Receiver..... | 1299 |
| 873. Order Discharging Railway Receivers and Restoring Property.. | 1300 |
| 874. Assignment by Railway Receivers of Choses in Action, etc., on the Surrender of the Property..... | 1307 |
| 875. Acknowledgment to Assignment by Receiver..... | 1308 |
| 876. Deed of Receivers of a Railroad Company, Trustee and the Pur- chasers to the Railroad Property..... | 1309 |

ANCILLARY PROCEEDINGS

| | |
|--|------|
| 877. Ancillary Bill. In re Receivers for a Manufacturing Company where Receivers were Appointed by a State Court before a Federal Court took Jurisdiction..... | 1321 |
| 878. Ancillary Bill for Foreclosure of Railway..... | 1328 |

| Form No. | Page |
|--|-------------|
| 879. Supplemental Ancillary Bill for Foreclosure of Railway..... | 1329 |
| 880. Decree Taking Ancillary Jurisdiction..... | 1331 |
| 881. Order Appointing Ancillary Receivers for a Railroad Property.. | 1334 |
| 882. Stipulation as to Answers to Ancillary Bill..... | 1334 |
| 883. Appearance of Defendant to Ancillary Bill..... | 1335 |
| 884. Answer of Defendant to Ancillary Bill of Foreclosure..... | 1335 |
| 885. Order Appointing Special Master in Ancillary Suit..... | 1338 |
| 886. Order to Print the Records in Ancillary Suit..... | 1339 |
| 887. Petition of Defendant for an Order Authorizing Receivers to Deliver to it the Possession of Railway Property in Their Hands | 1340 |
| 888. Ancillary Decree | 1342 |
| 889. Ancillary Order, Confirming and Directing Sale to a Recognized Manufacturing Company | 1342 |
| 890. Order for Sale..... | 1345 |
| 891. Marshal's Appraisement of Real Estate..... | 1345 |
| 892. Marshal's Report of Sale of Real Estate..... | 1347 |
| 893. Appointment of Special Masters to Sell Property..... | 1348 |
| 894. Advertisement of Railway Foreclosure Sale..... | 1349 |
| 895. Advertisement of Sale by Special Master..... | 1352 |
| 896. Report of Special Master of No Sale for Want of Bidders..... | 1352 |
| 897. Supplemental Report of Special Master to Make Sale, Post- poning Sale | 1354 |
| 898. Report of Special Commissioner to Make Sale of Postponement | 1355 |
| 899. Report of Sale by Special Master..... | 1357 |
| 900. Order Nisi Confirming Sale..... | 1359 |
| 901. Decree Denying Motion to Set Aside Sale and Order Absolute Confirming Sale | 1359 |
| 902. Petition to Open Sale before Confirmation..... | 1361 |
| 903. Petition to Join in Foregoing Petition to Set Aside a Sale..... | 1366 |
| 904. Petitions Consenting to Set Aside a Sale..... | 1366 |
| 905. Order Setting Aside Sale..... | 1367 |
| 906. Decree Confirming Sale of R. R. Property..... | 1369 |
| 907. Special Master's Deed | 1374 |

NE EXEAT

| | |
|--|------|
| 908. Motion for Writ of Ne Exeat | 1390 |
| 909. Affidavit to Obtain a Ne Exeat..... | 1390 |
| 910. Order for Writ of Ne Exeat to Issue..... | 1391 |
| 911. Writ of Ne Exeat Republica..... | 1392 |
| 912. Bond to Marshal upon a Ne Exeat..... | 1393 |
| 913. Notice of Motion for the Discharge of Ne Exeat..... | 1393 |
| 914. Motion to Discharge Writ of Ne Exeat..... | 1394 |
| 915. Order that Writ of Ne Exeat be Discharged on Defendant Giv- ing Security | 1395 |
| 916. Order that Writ of Ne Exeat be Discharged with Inquiry as to Defendant's Damages | 1395 |

INJUNCTIONS

| Form No. | Page |
|--|------|
| 917. Notice of Motion for Preliminary Injunction..... | 1396 |
| 918. Affidavit of Service | 1396 |
| 919. Motion for a Preliminary Injunction..... | 1397 |
| 920. Order Overruling Motion | 1397 |
| 921. Motion for Temporary Injunction and for Restraining Order without Notice | 1398 |
| 922. Restraining Order Granted Prior to Application for Injunction.. | 1399 |
| 923. Order Denying Restraining Order and Setting Down for Hear- ing on Motion for Preliminary Injunction..... | 1400 |
| 924. Order Restraining Certification of Values to Comptroller for Taxation | 1401 |
| 925. Order Restraining the Construction of a Telephone Line in a Municipality | 1402 |
| 926. Restraining Order against Municipality from Interfering with Construction of Telephone Lines..... | 1402 |
| 927. Restraining Order against a Strike Leader..... | 1403 |
| 928. Order Modifying Restraining Order..... | 1404 |
| 929. Order of Reference to Master of Motion for Injunction to Re- port Facts | 1405 |
| 930. Report of Special Master on Motion for Injunction being Re- ferred | 1406 |
| 931. Order Refusing Injunction and Vacating Preliminary Restrain- ing Order | 1407 |
| 932. Order Granting Temporary Injunction against Postmaster, Re- quiring Him to Transmit Matter Through the Mails.... | 1408 |
| 933. Order to Show Cause Why Temporary Injunction Should Not be Issued against the Receiver of a Railroad..... | 1409 |
| 934. Order Granting Temporary Injunction against Receivers of a Railroad | 1410 |
| 935. Decree Granting Preliminary Injunction in Case of Trade-mark, Label, etc. | 1411 |
| 935a. Preliminary Injunction | 1412 |
| 936. Decree Denying Injunction under Sherman Anti-trust Act.... | 1414 |
| 937. Order to Show Cause Why Injunction Should not Issue, etc.... | 1414 |
| 938. Order Allowing Injunction to Restrain Collection of Taxes.... | 1415 |
| 939. Order Granting an Injunction against Municipality Interfering with Telegraph Poles, etc | 1415 |
| 940. Order Granting Injunction against Telephone Company..... | 1417 |
| 941. Order Granting an Injunction against Chief Executive of a Labor Union | 1418 |
| 942. Order Enjoining Striking Workmen from Interfering with Business | 1419 |
| 943. Order of Injunction Extended..... | 1422 |
| 944. Decree Denying Motion to Vacate Preliminary Injunction..... | 1423 |
| 945. Decree Enjoining the Carrying on of a Business in Violation of a Contract | 1423 |

| Form No. | Page |
|---|------|
| 946. Order Allowing Injunction against Use of Copyrighted Forms in Business | 1426 |
| 947. Decree Enjoining Disclosures of Secret Processes in Issue, Even to Experts | 1428 |
| 948. Application for Injunction against Enforcing a Judgment of a State Court | 1429 |
| 949. Decree Enjoining State Court Judgment..... | 1434 |
| 950. Order Enjoining Prosecution of a Pending Suit at Law in the Same Federal Court and Forbidding the Bringing of Suits in a State Court, and to Strike Out..... | 1436 |
| 951. Order for Preliminary Injunction in a Patent Suit..... | 1437 |
| 952. Preliminary Injunction to Restrain the Infringement of a Patent | 1438 |
| 953. Order Refusing Injunction in a Patent Suit upon Defendant Giving Bond | 1439 |
| 954. Bond in Lieu of Preliminary Injunction in a Patent Suit..... | 1439 |
| 955. Writ of Injunction (General Form)..... | 1440 |
| 956. Marshal's Return of Writ of Injunction..... | 1441 |
| 957. Injunction to Restrain Certification of Values to Comptroller for Taxation | 1442 |
| 958. Injunction Restraining a Telephone Company Connecting its Instruments with Those of a Rival Company..... | 1443 |
| 959. Writ of Injunction against Chief Executive of Labor Union.... | 1444 |
| 960. Injunction Bond | 1446 |
| 961. Motion to Modify Injunction..... | 1446 |
| 962. Motion to Dissolve Injunction..... | 1447 |
| 963. Motion to Dissolve Preliminary Injunction..... | 1447 |
| 964. Order Overruling Motion to Dissolve..... | 1448 |
| 965. An Order Granting Motion to Dissolve Injunction and Substituting Bond for Injunction..... | 1448 |
| 966. Order Dissolving Injunction..... | 1449 |
| 967. Final Decree Making a Temporary or Preliminary Injunction Perpetual | 1449 |
| 968. Motion for Restraining Order and Application for Hearing on Injunction under Judicial Code, Section 266..... | 1450 |
| 969. Restraining Order and Order to Appear for Hearing before Three Judges for Preliminary Injunction under Judicial Code, Section 266 | 1450 |
| 970. Marshal's Return on Restraining Order under Judicial Code, Section 266 | 1452 |
| 971. Order by Circuit Judge where District Judge not Available. Setting Down Application for Hearing on Temporary Injunction, Calling Two Judges to Aid, Naming a Place for the Hearing before the Three Judges, and Granting Temporary Restraining Order | 1452 |

TABLE OF CONTENTS.

XXXV

| Form No. | Page |
|--|------|
| 972. Motion to Show Cause Why Temporary Injunction Should not Issue under Judicial Code, Section 266, and for Restraining Order | 1454 |
| 973. Notice of Hearing on Motion for Temporary Injunction under Judicial Code, Section 266..... | 1456 |
| 974. Order to Show Cause Why a Temporary Injunction Should not Issue | 1457 |
| 975. Order Allowing Temporary Injunction with Exceptions Thereto, under Judicial Code, Section 266..... | 1458 |
| 976. Order by Three Judges Enjoining State Officials under Judicial Code, Section 266 | 1460 |
| 977. Order Denying Temporary Injunction Prayed under Judicial Code, Section 266..... | 1463 |
| 978. Order Denying Application for Injunction under Judicial Code, Section 266, and Instructing to Proceed in Equity as Usual (Another Form) | 1464 |
| 979. Order Denying Injunction Pendente Lite and Granting Motion to Dismiss Bill of Complaint, under Judicial Code, Section 266 | 1464 |
| 980. Preliminary Injunction Suspending Enforcement of an Order of the Interstate Commerce Commission Prescribing a Bill of Lading | 1466 |
| 981. Bill Requesting Injunction against United Mine Workers of America to Prevent a Strike..... | 1468 |
| 982. Temporary Restraining Order | 1483 |

1

Forms of Federal Practice

JURISDICTION

ALLEGATIONS OF CITIZENSHIP

No. 1.

Caption.

The District Court of the United States for the ——— Division
of the ——— District of ———.

| | | |
|-------------------|---|----------------------------------|
| A. B., Plaintiff, | } | At Law [or In Equity, Admiralty, |
| vs. | | Bankruptcy, or as may be]. |
| C. D., Defendant. | | No. ———. |

[*Name of Pleading.*]

A caption may be used to help out a defective allegation of citizenship. *Jones v. Andrews*, 1 Wall. 327, 19 L. Ed. 935.

Jurisdiction generally. Section 24 of the Judicial Code invests the district courts with original jurisdiction in certain respects, which may be divided into two classes:

First. In one class the jurisdiction depends entirely on the character of the parties, as (a) a controversy between citizens of different States, (b) a controversy between citizens of a State and foreign States, subjects and citizens, or (c) suits brought by the United States. If these be the parties, it is entirely unimportant what may be the subject of the controversy. In (a) and (b) jurisdiction is usually said to depend upon "diversity of citizenship." *Cohen v. Virginia*, 6 Wheat. 264, 378, 5 L. Ed. 257; *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524; *Reagan v. Farmers Loan & T. Co.*, 154 U. S. 362, 420, 38 L. Ed. 1014; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801; *Traction Co. v. Mining Co.*, 196 U. S. 239, 49 L. Ed. 466.

Second. In the other class, the jurisdiction depends entirely upon the character of the cause, whoever may be the parties. This class includes cases arising under the Constitution, laws and treaties of the United States. In this class the citizenship of the parties is

immaterial, and the jurisdiction is usually said to depend upon a "federal question." *Jetton v. University of the South*, 208 U. S. 489, 52 L. Ed. 584; *Cohen v. Virginia*, 6 Wheat. 264, 378, 5 L. Ed. 257; *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Atchison, etc., R. Co. v. Kindare*, 203 Fed. Rep. 165.

The courts can not, as a source of jurisdiction, resort, in criminal or civil cases, to the common law. *U. S. v. Hudson*, 7 Cranch. 32, 3 L. Ed. 259; *In re Barry*, 42 Fed. 113, 120 and cases there cited; *U. S. v. Eaton*, 144 U. S. 677, 687, 36 L. Ed. 591; *U. S. v. Lewis*, 36 Fed. 449; or to the statutes of a state. *The New Orleans v. Phoebus*, 11 Pet. 175, 9 L. Ed. 677; *Roach v. Chapman*, 22 How. 129, 16 L. Ed. 294; *Toland v. Sprague*, 12 Pet. 300, 328, 9 L. Ed. 1093.

Jurisdiction can be neither restricted nor enlarged by the statutes of a State in respect to suits at law or in equity. *Cowles v. Mercer County*, 7 Wall. 118, 19 L. Ed. 86; *Hyde v. Stone*, 20 How. 170, 15 L. Ed. 874; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *David Lupton's Sons v. Automobile Club*, 225 U. S. 489, 56 L. Ed. 1177; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 209, 36 L. Ed. 942; or in admiralty, *Workman v. New York*, 179 U. S. 552, 45 L. Ed. 663; *The J. E. Randall*, 148 U. S. 1, 19, 37 L. Ed. 345; *Butler v. Boston Steamship Co.*, 130 U. S. 527, 37 L. Ed. 1017; *Maryland v. Miller*, 180 Fed. 796; *Aurora Shipping Co. v. Boyce* (9 Cir.), 191 Fed. 860, 112 C. C. A. 372.

Jurisdiction of the federal courts can not be defeated or impaired by the laws of a State undertaking to give exclusive jurisdiction to its own courts. *Lawrence v. Nelson*, 143 U. S. 215, 36 L. Ed. 130; *Hayes v. Pratt*, 147 U. S. 557, 570, 37 L. Ed. 279; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Cowles v. Mercer County*, 7 Wall. 118, 9 L. Ed. 86; *Barber Asphalt Paving Co. v. Morris* (8 Cir.), 132 Fed. 945, 949, 66 C. C. A. 55 and cases collated in the opinion.

Jurisdiction in each case is determined as of the time of the commencement of the suit. *Emsheimer v. New Orleans*, 186 U. S. 33, 46 L. Ed. 1042; *Fraenkl v. Cerecado*, 216 U. S. 295, 54 L. Ed. 486; *Connolly v. Taylor*, 2 Pet. 556, 563, 7 L. Ed. 518; *Crehore v. Railway Co.*, 131 U. S. 240, 243, 33 L. Ed. 144; *Jackson v. Allen*, 132 U. S. 27, 33 L. Ed. 249; *Anderson v. Watt*, 138 U. S. 694, 34 L. Ed. 1078; *Ex parte Wisner*, 203 U. S. 449, 51 L. Ed. 264; *Dunn v. Clarke*, 8 Pet. 1, 8 L. Ed. 845; *Tug River Coal & Salt Co. v. Brigel* (6 Cir.), 86 Fed. 818, 30 C. C. A. 415; *Baker v. Eastman* (1 Cir.), 206 Fed. 865, 124 C. C. A. 525.

The presumption is that a case is without its jurisdiction, unless the contrary affirmatively appears of record. *Grace v. American Central Ins. Co.*, 109 U. S. 278, 283, 27 L. Ed. 932; *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 419, 55 L. Ed. 521; *Thomas v. Board*

of Trustees, 195 U. S. 207, 211, 49 L. Ed. 160; Börs v. Preston, 111 U. S. 252, 28 L. Ed. 419; Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057.

No. 2.

A Citizen against a Citizen.

[Caption.]

A. B., who is a citizen (1) of the state of —, residing at — in the state of —, plaintiff in this suit, complains of the defendant, C. D., who is a citizen of the state of —, residing at — in the state of —, and an inhabitant of the — division of the — district of — (2) aforesaid, and says:

(1) It is the citizenship, and not the residence, of the parties that confers jurisdiction. *Wolfe v. Hartford Life Ins. Co.*, 148 U. S. 389, 37 L. Ed. 493; *Steigleder v. McQuesten*, 198 U. S. 141, 49 L. Ed. 986; *Morris v. Gilmer*, 129 U. S. 315, 32 L. Ed. 690; *Marks v. Marks*, 75 Fed. 321; *Harton v. Howley*, 155 Fed. 491; *Newcomb v. Burbank* (2d Cir.), 181 Fed. 334, 104 C. C. A. 164.

Citizenship of women. The citizenship of a married woman is the same as that of her husband. *Anderson v. Watt*, 138 U. S. 694, 34 L. Ed. 1078; *Cheely v. Clayton*, 110 U. S. 701, 709, 28 L. Ed. 298; *Pequignot v. Detroit*, 16 Fed. 211; *Broadis v. Broadis*, 86 Fed. 951; *Hatch v. Ferguson*, 57 Fed. 959.

A widow or a divorced woman may acquire a separate domicile and change her citizenship at will. *Williamson v. Osenton*, 232 U. S. 619; *Cheely v. Clayton*, 110 U. S. 701, 28 L. Ed. 298; *Barber v. Barber*, 21 How. 582, 16 L. Ed. 226; *Toledo Traction Co. v. Cameron* (6th Cir.), 137 Fed. 48, 69 C. C. A. 28; *Marks v. Marks*, 75 Fed. 321. Also a wife who has justifiably left her husband may acquire a different domicile from his for the purpose of bringing an action for damages against persons other than her husband. *Williamson v. Osenton*, supra. If she marries again she acquires the citizenship of her second husband. *Pequignot v. Detroit*, 16 Fed. 211; *Marks v. Marks*, 75 Fed. 321.

If an alien woman marries a citizen, she thereby acquires the citizenship of her husband. R. S. Sec. 1994; *Kelly v. Owen*, 7 Wall. 496, 19 L. Ed. 283; *Hatch v. Ferguson*, 57 Fed. 959; *Leonard v. Grant*, 5 Fed. 11; *Broadis v. Broadis*, 86 Fed. 95.

Forms of averment. It has been held a sufficient allegation of citizenship to aver that a party is a "citizen of the United States and a resident" of a particular state. *Gassies v. Ballou*, 6 Pet. 761, 8 L. Ed. 593; *Clausen v. American Ice Co.*, 144 Fed. 723; *Margarete Steiff v. Bing*, 206 Fed. 900; or that he is a "citizen of said county of

Monroe in the state of Michigan." *Toledo Traction Co. v. Cameron* (6th Cir.), 137 Fed. 48, 69 C. C. A. 28.

It is not a sufficient allegation of citizenship to aver that a party is "of" or a "resident" of a particular state. *Wolfe v. Hartford Life Ins. Co.*, 148 U. S. 389, 37 L. Ed. 493; *Everhart v. Huntsville Female College*, 120 U. S. 223, 30 L. Ed. 623; *Denny v. Pironi*, 141 U. S. 121, 35 L. Ed. 657; *Horne v. Hammond Co.*, 155 U. S. 393, 39 L. Ed. 197; *Mayer v. Cohrs*, 188 Fed. 443; or "a bona fide resident" of a state. *Koike v. Atchison, etc., Ry. Co.*, 157 Fed. 623; or that the plaintiff is a citizen of a different state from that of the defendant. *Cameron v. Hodges*, 127 U. S. 322, 324, 32 L. Ed. 132; *Laskey v. Newtown Min. Co.*, 56 Fed. 628; or that the defendant is a citizen of a state or country unknown, but other than the state of the plaintiff. *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932; *Tug River, etc. Co. v. Brigel* (6th Cir.), 67 Fed. 625, 14 C. C. A. 577; or that a party is a "citizen or resident" of a state. *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885; or that the defendant is "the Tax Assessor for the Parish of Vernon, Louisiana" without stating of what state he is a citizen. *Assessor, etc. v. Gould* (5th Cir.), 210 Fed. 894, 127 C. C. A. 553.

A defective averment of citizenship may be cured by amendment at any time, even after verdict. *Mexican Cent. Ry. Co. v. Duthie*, 189 U. S. 76, 47 L. Ed. 715; *McEldowney v. Card*, 193 Fed. 475, 483; *Crosby v. Cuba R. Co.*, 158 Fed. 144; *Kennedy v. Bank of Ga.*, 8 How. 586, 12 L. Ed. 1209; and now even in the Appellate Court, by Section 274c of the Judicial Code, 38 Stat. L. 956 (March 3, 1915); *Swayne v. Barsch*, 226 Fed. 581, 141 C. C. A. 337.

As to the meaning of "inhabitant," see *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 36 L. Ed. 768; *Bicycle Stepladder Co. v. Gordon*, 57 Fed. 529.

In suits under the Tucker Act, 24 Stat. L. 506, Judicial Code, Section 24, paragraph 20, citizenship need not be averred, and the rule as to venue in the district where the plaintiff resides may be waived, in accordance with the general rule re venue in federal courts; hence even an alien may sue under said act. *U. S. v. Hvoslef*, 237 U. S. 1, 59 L. Ed. 813; *Thames and Mersey Ins. Co. v. U. S.*, 237 U. S. 19, 59 L. Ed. 821.

(2) **Venue.** Where jurisdiction depends on diversity of citizenship, the suit may be brought only in the district of the residence of the plaintiff or defendant. Sections 51, 52 and 53 of the Judicial Code; *Smith v. Lyon*, 133 U. S. 315, 317, 33 L. Ed. 635; *Greeley v. Lowe*, 155 U. S. 58, 68, 39 L. Ed. 69; *Doscher v. U. S. Pipe Line Co.*, 185 Fed. 959; *Reich v. Tennessee Copper Co.*, 209 Fed. 880; *Revett v. Clise*, 207 Fed. 673.

The plaintiff may bring the suit in any division of the district in which he resides. *Reich v. Tennessee Copper Co.*, 209 Fed. 880. If the suit is brought in the district of the residence of the defendant, it must be in the division in which the defendant resides. Sections 52 and 53 of the Judicial Code.

Where jurisdiction depends on the presence of a federal question, the suit must be brought in the district and division in which the defendant resides. Sections 51, 52 and 53 of the Judicial Code; *Macon Grocery Co. v. Atlantic Coast Line*, 215 U. S. 501, 54 L. Ed. 300; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 40 L. Ed. 402. For an exception to this rule in patent cases see Section 48 of the Judicial Code.

Where the objection is seasonably made that the suit is brought in the wrong district or division, it will be dismissed. *Revett v. Clise*, 207 Fed. 673, 676, and cases there cited.

The objection that there is not jurisdiction in a particular district may be waived by appearing and pleading to the merits. *In re Moore*, 209 U. S. 490, 52 L. Ed. 904; *Western Loan Co. v. Butte & Boston Mining Co.*, 210 U. S. 368, 52 L. Ed. 1101; *Baltimore & Ohio R. Co. v. Doty* (6th Cir.), 133 Fed. 866, 67 C. C. A. 38; *Campbell v. Johnson* (9th Cir.), 167 Fed. 102, 92 C. C. A. 554, and see *Lehigh Valley Coal Co. v. Yensavage*, 218 Fed. 547, 134 C. C. A. 275.

No. 3.

Co-plaintiffs against Co-defendants.

[Caption.]

A. B., who is a citizen (1) of the state of —, residing at — in the state of —, and S. H., who is a citizen of the state of —, residing at — in the state of —, plaintiffs in this suit, complain of the defendants, The C. D. Company, a corporation duly organized under the laws of the state of — and having its principal place of business at — in said state, and C. D., who is a citizen of the state of —, residing at — in the state of —, and each defendant is an inhabitant of the said division of the — district of — (2) aforesaid, and say:

(1) The plaintiff should aver positively the citizenship of each party, plaintiff and defendant. *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207.

Diversity requisite to jurisdiction. If there are several plaintiffs, each plaintiff must be competent to sue, and if there are several defendants, each defendant must be liable to be sued, in order to sustain the jurisdiction on the ground of diversity of citizenship. *Susquehanna, etc., Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Strawbridge v. Curtis*, 3 Cranch, 267, 2 L. Ed. 435; *Anderson v. Watt*, 138 U. S. 694, 34 L. Ed. 1078; *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. Ed. 486; *Cuebas v. Cuebas*, 223 U. S. 376, 388, 56 L. Ed. 476.

Alignment of parties. Prior to the Judiciary Act of March 3, 1875 (18 Stat. L. 470) the diversity of citizenship of parties was de-

terminated solely according to the position they occupied as plaintiff and defendant in the suit. Removal cases, 100 U. S. 457, 469, 25 L. Ed. 573.

The court will now ascertain the real controversy and arrange the parties on opposite sides of it according to their interests, without regard to the position they occupy in the pleadings. *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932; *Doctor v. Harrington*, 196 U. S. 579, 49 L. Ed. 606; *Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624; *Shipp v. Williams* (6th Cir.), 62 Fed. 4, 10 C. C. A. 247 and 249; *Mason v. Dullaghan*, 82 Fed. 689, 27 C. C. A. 296, 298.

(2) See note (2) to No. 2.

If there are two or more defendants residing in different districts of the state, or in different divisions of the district, which fact should be made to appear in the allegations, the plaintiff may sue in either division or district where any defendant resides and send duplicate writs for the other defendant or defendants to the other division or district where the defendant or defendants reside. Sections 52 and 53 of the Judicial Code; *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 50 L. Ed. 281; *Doscher v. U. S. Pipe Line Co.*, 185 Fed. 959; *Reich v. Tennessee Copper Co.*, 209 Fed. 880.

No. 4.

A Citizen against a Firm.

[Caption.]

A. B., who is a citizen of the state of —, residing at — in the state of —, plaintiff in this suit, complains of the defendants, C. D., B. R., and A. S., co-partners (1) doing business under the firm name and style of C. D. & Company at — in the state of —, all of whom are citizens of the said state of — and inhabitants of the — division of the — district of — (2) aforesaid, and says:

(1) The citizenship of the individual members of a co-partnership determines the jurisdiction when founded upon diverse citizenship. *Great Southern Fireproof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. Ed. 842; *Raphael v. Trask*, 194 U. S. 272, 48 L. Ed. 973; *Jewish Colonization Association v. Solomon*, 125 Fed. 994; *Andrews & Co. v. Puncture Proof Footwear Co.*, 168 Fed. 762.

For purposes of federal jurisdiction, a partnership includes not only commercial firms, but also joint stock companies. *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800; *Great Southern Fireproof Hotel*

Co. v. Jones, 177 U. S. 449, 44 L. Ed. 842; *Boards of Trustees. Thomas v. Board of Trustees*, 195 U. S. 207, 49 L. Ed. 160; and voluntary associations or unions. *Irving v. Joint District Council*, 180 Fed. 896; *Osley Stave Co. v. Coopers' Union*, 72 Fed. 695, affirmed (8th Cir.) 83 Fed. 912, 28 C. C. A. 99; *Seattle Brewing Co. v. Hansen*, 144 Fed. 1011; *Barnes & Co. v. Berry*, 156 Fed. 72; *United States v. Coal Dealers' Assn.*, 85 Fed. 252; *Evenson v. Spaulding* (9th Cir.), 150 Fed. 517, 82 C. C. A. 263; *American Steel & Wire Co. v. Wire Drawers' Union*, 90 Fed. 598.

A partnership can not be sued in a federal court in the firm name without averring the citizenship of its members, although this may be done in the state courts under the state law. *Thomas v. Board of Trustees*, 195 U. S. 207, 49 L. Ed. 160; *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800; *Empire Rice Mill Co. v. Neumond*, 199 Fed. 800; *Bruett & Co. v. Excavator Co.*, 174 Fed. 668; *Rayla Market Co. v. Armour & Co.*, 102 Fed. 530; *Adams v. May*, 27 Fed. 907.

Each partner who is a party to the suit must be a citizen of a different state from each adverse party. *Empire Rice Mill Co. v. Neumond*, 199 Fed. 800; *Bruett & Co. v. Excavator Co.*, 174 Fed. 668; *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731; *Irving v. Joint District Council*, 180 Fed. 896; *Jewish Colonization Assn. v. Solomon*, 125 Fed. 994.

At common law all the partners were required to be joined as defendants in a suit against the firm. But now a suit to enforce a firm obligation may be maintained against the firm and some of the partners without joining others, who are without the jurisdiction of the court. Section 50, Judicial Code; *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731; *Clearwater v. Meredith*, 21 How. 489, 16 L. Ed. 201; *Inbusch v. Farwell*, 1 Black, 566, 571, 17 L. Ed. 168; *Smith v. Consumers' Cotton Oil Co.* (5th Cir.), 86 Fed. 359, 30 C. C. A. 103; *Doremus v. Bennet*, No. 4001 Fed. Cas., 4 McLean, 224; *Martin v. Meyer*, 45 Fed. 435; *Empire Rice Mill Co. v. Neumond*, 199 Fed. 800.

It has been held sufficient to aver, in respect to a partnership association of Michigan, that "each and every member and partner of such partnership association is a citizen of the State of Michigan." *Derk P. Yonkerman Co. v. Fuller's Agency*, 135 Fed. 613; or that "the plaintiffs were a firm of natural persons, associated together for the purpose of carrying on the banking business in Omaha, and had been for a period of eighteen months engaged in such business at said place." *Express Co. v. Kountze Bros.*, 8 Wall. 342, 351, 19 L. Ed. 457.

(2) See notes (2) to Nos. 2 and 3.

If the defendant partners reside in different divisions and districts of the state in which the suit is brought, it should be stated in which division and district each partner resides. Sections 52 and 53 Judicial Code. For form of allegation see No. 6, post.

No. 5.**A Firm against a Citizen.****[Caption.]**

A. B., who is a citizen of the state of —, residing at — in the state of —, and R. S., who is a citizen of the state of —, residing at — in the state of —, co-partners(1) doing business under the firm name and style of A. B. & Co., at —, in the state of —, plaintiffs in this suit, complain of the defendant, C. D., who is a citizen of the state of —, residing at — in the state of — and an inhabitant of the said — division of the — district of — (2) aforesaid, and say:

(1) See note (1) to No. 4.

Where the firm is a plaintiff, all the partners must be joined as co-plaintiffs and the citizenship of each individual averred. *Andrews & Co. v. Puncture Proof Footwear Co.*, 168 Fed. 762.

(2) See note (2) to No. 2.

No. 6.**A Firm against a Firm.****[Caption.]**

A. B., who is a citizen of the state of —, residing at — in the state of —, and F. L., who is a citizen of the state of —, residing at — in the state of —, co-partners (1) doing business under the firm name and style of A. B. & Co., at — in the state of —, plaintiffs in this suit, complain of the defendants, C. D., who is a citizen of the state of —, residing at — in the — division of the — district of said state, and B. R., who is a citizen of the state of —, residing at — in the — division of the — district of said state, co-partners (1) doing business under the firm name and style of C. D. & Co., at — in the state of — (2) aforesaid, and say:

(1) See note (1) to No. 4.

(2) See notes (2) to Nos. 2, 3 and 4.

No. 7.**A Corporation against a Corporation.****[Caption.]**

The A. B. Co., a corporation (1) organized and existing under the laws of the state of —, and having its principal place of business at — in said state, plaintiff in this suit, complains of the defendant, The C. D. Co., a corporation organized and existing under the laws of the state of —, having its principal place of business at — in said state, and an inhabitant (2) of the — division of the — district of — aforesaid, and says:

(1) The Judiciary Acts have never named corporations and a corporation is not a "citizen" within the meaning of the Constitution. *Blake v. McClung*, 172 U. S. 239, 259, 43 L. Ed. 432; *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207.

It is regarded as a citizen for jurisdictional purposes on the theory that a suit by or against it is a suit by or against its members individually, who are conclusively presumed in law to be citizens of the state creating it. For the purpose of showing citizenship, it is therefore necessary to aver under what laws the corporation was brought into existence. *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Marshall v. Baltimore & O. R. Co.*, 16 How. 314, 14 L. Ed. 953; *Doctor v. Harrington*, 196 U. S. 579, 49 L. Ed. 606; *Southern Ry. Co. v. Allison*, 190 U. S. 326, 47 L. Ed. 1078; *Parker-Washington Co. v. Cramer* (7th Cir.), 201 Fed. 878, 120 C. C. A. 216.

The same rule prevails with respect to alien corporations. *Steamship Co. v. Tugman*, 106 U. S. 118, 27 L. Ed. 87.

That a county is a corporation for purposes of federal jurisdiction, see *Lincoln County v. Luning*, 133 U. S. 530, 33 L. Ed. 766.

Likewise a township, see *Loeb v. Columbia Township*, 179 U. S. 472, 45 L. Ed. 280.

Likewise a city, see *Newgass v. New Orleans*, 33 Fed. 196; *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. Ed. 664; *Emsheimer v. New Orleans*, 186 U. S. 33, 46 L. Ed. 1047.

Form of allegation. It has been held sufficient to aver that a party "is a corporation organized and domiciled in the State of New York." *Ward v. Blake Mfg. Co.* (8th Cir.), 56 Fed. 437, 5 C. C. A. 538. Or "is a body corporate by an act of the general assembly of Maryland." *Marshall v. Baltimore & O. R. Co.*, 16 How. 314, 14 L. Ed. 653. Or "is an association of persons duly incorporated under the laws of Maryland." *Baltimore & O. R. Co. v. McLaughlin* (6th Cir.), 73 Fed. 519, 19 C. C. A. 551. Or "is a corporation under the laws of the State of Virginia and a citizen of Virginia and a resident of the western division of that state." *Mathieson Alkali Wks. v. Mathieson* (4th Cir.) 150 Fed. 241, 80 C. C. A. 129. Or "created by, and existing under, the laws of the United Kingdom of Great Britain

and Ireland." *National Steamship Co. v. Tugman*, 106 U. S. 118, 24 L. Ed. 187.

It has been held insufficient to show corporate origin to allege a corporation to be "a citizen" of a particular state. *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Parker-Washington Co. v. Cramer* (7th Cir.), 201 Fed. 878, 120 C. C. A. 216; *Knight v. Lumber Co.* (5th Cir.), 136 Fed. 404, 69 C. C. A. 248; *Atlantic Coast Line v. Whilden* (5th Cir.), 195 Fed. 263; *Dalton v. Milwaukee Mechanics Ins. Co.*, 118 Fed. 876; *Parker-Washington Co. v. Cramer*, 201 Fed. 878, 120 C. C. A. 216. But see *Grand Trunk Ry. Co. v. Tennant* (1st Cir.) 66 Fed. 922, 14 C. C. A. 190; *Chicago Lumber Co. v. Comstock* (7th Cir.), 71 Fed. 477, 18 C. C. A. 207; *Gorham Mfg. Co. v. Weinstraub*, 176 Fed. 927. Or that it "operates a railroad as a common carrier and has an agent" in a certain state. *St. Louis, I. M. & S. Ry. Co. v. Newcom* (8th Cir.), 56 Fed. 951, 6 C. C. A. 172. Or "is a corporation duly organized by law, having its principal place of business in Boston in the State of Massachusetts." *New York & N. E. R. Co. v. Hyde* (1st Cir.), 56 Fed. 188, 5 C. C. A. 461. Or "is a New York corporation." *Pacific Postal Telg. Cable Co. v. Irvine*, 49 Fed. 113. Or "is a body politic in the law of, and doing business in, the State of California." In *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553, 556, 19 L. Ed. 998, Mr. Justice Nelson said: "The court is of opinion that this averment is insufficient to establish that the defendant is a California corporation. It may mean that the defendant is a corporation doing business in that state by its agent; but not that it had been incorporated by the laws of the state." Or "is a corporation with its principal office in the City of Pensacola, Florida." *McGaskill v. Dickson* (5th Cir.), 159 Fed. 704, 86 C. C. A. 572. Or that "the defendant claims to be a corporation organized and existing under the laws of the State of Washington as a boom company," and denies that it has complied with those laws or is entitled to certain rights which it claims as a boom company. *Lownsdale v. Gray's Harbor Boom Co.*, 117 Fed. 983.

(2) See notes (2) to Nos. 2 and 3. Sections 51, 52 and 53, Judicial Code.

The domicile of a corporation is the state in which it was created and it can not change its domicile. *Southern Ry. Co. v. Allison*, 190 U. S. 326, 47 L. Ed. 1078; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 36 L. Ed. 768; *Southern Pacific Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 942; *Baldwin v. Pacific Power, etc., Co.*, 199 Fed. 291.

If a corporation be created by the laws of a state in which there are two judicial districts, it should be considered an inhabitant of that district and division in which its general offices are situated, and in which its general business is done. *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 504, 38 L. Ed. 248; *Harvey v. Richmond, etc., R. Co.*, 64 Fed. 19; *Grabsky v. Belmont Coal Mining Co.*, 210 Fed. 553.

A railroad corporation created under an Act of Congress is not a citizen of any state and the statutes do not confer federal jurisdiction thereover under the rule of diversity of citizenship, whereas in the case of national banks the statute, Judicial Code, Section 24, paragraph 16, state citizenship is conferred for all but a few mentioned kinds of suits. *Bankers Trust Co. v. Texas & Pacific Ry. Co.*, 241 U. S. 295, 60 L. Ed. 1010.

No. 8.

A Citizen against a Corporation (1).

[Caption.]

A. B., who is a citizen of the state of —, residing at — in the state of —, plaintiff in this suit, complains of the defendant, The C. D. Co., a corporation organized and existing under the laws of the state of —, having its principal place of business at —, and an inhabitant of the — division of the — district of — aforesaid, and says:

(1) See notes to Nos. 2 and 7.

No. 9.

A Citizen against a Corporation of Two or More States (1).

[Caption.]

A. B., who is a citizen of the state of —, residing at — in the state of —, plaintiff in this suit, complains of the defendant, The C. D. Co., a corporation organized and existing under and by virtue of the laws of the states of —, of — and of —, by the consolidation of three other corporations, severally created by the laws of those states respectively, and, for the purposes of this suit, is an inhabitant (1) of the — division of the — district of — aforesaid, and says:

(1) See notes to No. 7.

The status of such corporations for jurisdictional purposes is that wherever the corporation sues or is sued in a state by whose laws it has been created, and the question of citizenship is involved, the court will regard the corporation intended as a party as the one created and existing by the laws of the state in which the suit is brought. *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Nashua R. Co. v. Lowell R. Co.*, 136 U. S. 356, 34 L. Ed. 363; *Patch v. Wabash*

R. Co., 207 U. S. 277, 52 L. Ed. 204; *Lake Shore, etc. R. Co. v. Eder* (6th Cir.), 174 Fed. 944, 98 C. C. A. 556; *Williamson v. Krohn* (6th Cir.), 66 Fed. 655, 662, 13 C. C. A. 668.

Where the consolidated corporation is authorized by the reciprocal legislation of two or more states, a citizen of one state authorizing the consolidation, may sue the corporation in a federal court in another state likewise authorizing it. *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Lake Shore, etc. R. Co. v. Eder* (6th Cir.), 174 Fed. 944, 98 C. C. A. 556; *Williamson v. Krohn* (6th Cir.), 66 Fed. 655, 662, 13 C. C. A. 668; *Boston & M. R. Co. v. Hurd* (1st Cir.), 108 Fed. 117, 47 C. C. A. 615.

But he can not sue it in a federal court in the state of which he is a citizen. *Patch v. Wabash R. Co.*, 207 U. S. 277, 52 L. Ed. 204; *Memphis & Charleston R. Co. v. Alabama*, 107 U. S. 581, 27 L. Ed. 518; *Winn v. Wabash R. Co.*, 118 Fed. 55; *Goodwin v. Boston & M. R. Co.*, 127 Fed. 986; *Goodwin v. New York, N. H. & H. R. Co.*, 124 Fed. 358; *Baldwin v. Chicago & N. W. R. Co.*, 86 Fed. 167.

A consolidated corporation can not sue a citizen of one of the states, authorizing the combination, in a federal court of that state, because the corporation is regarded as a citizen of the state in which the suit is brought; but it may bring the suit in a federal court in one of the states of which the defendant is not a citizen, because diversity of citizenship will exist in such cases.

A suit may be maintained by one constituent corporation of a consolidated company against another constituent in a district court for a state other than that creating the plaintiff constituent. In *Nashua R. Co. v. Lowell R. Co.*, 136 U. S. 356, 34 L. Ed. 363, a New Hampshire corporation sued a Massachusetts corporation in the circuit court in Massachusetts. By reciprocal legislation of both states they had been united for the purposes of management and operation and their stock had been fused. The plea that there was no diversity of citizenship was overruled and the jurisdiction sustained.

An action in tort will lie against a consolidated company in the federal court of one state creating it, by a citizen of another state, although the tort complained of was committed in one of the other states authorizing the combination. In *Lake Shore, etc. R. Co. v. Eder* (6th Cir.), 174 Fed. 944, 98 C. C. A. 556, jurisdiction was sustained in a suit against a consolidated company in Ohio by a citizen of Pennsylvania, where the injury was received in Pennsylvania and the company was organized under the laws of Ohio and Pennsylvania. That is to say, one constituent corporation is liable for the negligent acts of another constituent corporation of the same consolidated company. The theory is that, by reason of the relation of the several constituent corporations in the consolidated company, having a com-

mon stock, directors and management, they are jointly liable in such cases. Consequently, either company may be sued. See also discussion by Mr. Justice Harlan in dissenting opinion in *St. Louis, etc. R. Co. v. James*, 161 U. S. 545, 570, 40 L. Ed. 802; and *Pennsylvania R. Co. v. Jones*, 155 U. S. 333, 39 L. Ed. 176.

No. 10.

A Corporation against a Citizen (1).

[Caption.]

The A. B. Co., a corporation organized and existing under the laws of the state of —, and having its principal place of business at — in said state, plaintiff in this suit, complains of the defendant, C. D., who is a citizen of the state of —, residing at — in the state of —, and an inhabitant of the — division of the — district of — aforesaid, and says:

(1) See notes to Nos. 2, 7 and 9.

No. 11.

A Firm against a Corporation (1).

[Caption.]

A. B., who is a citizen of the state of —, residing at — in the state of — and R. S., who is a citizen of the state of —, residing at — in the state of —, co-partners doing business under the firm name and style of A. B. & Co., at — in the state of —, plaintiffs in this suit, complain of the defendant, The C. D. Co., a corporation organized and existing under the laws of the state of —, having its principal place of business at — in said state, and an inhabitant of the — division of the — district of — aforesaid, and says:

(1) See notes to Nos. 4, 7 and 9.

No. 12.

A Corporation against a Firm (1).

[Caption.]

The A. B. Co., a corporation organized and existing under the laws of the state of —, and having its principal place of busi-

ness at — in said state, plaintiff in this suit, complains of the defendants, C. D., who is a citizen of the state of —, residing at — in the — division of the — district of said state, and B. R., who is a citizen of the state of —, residing at — in the — division of the — district of said state, co-partners doing business under the firm name and style of C. D. & Co., at — in the state of — aforesaid, and says:

(1) See notes to Nos. 2, 3, 4 and 7.

No. 13.

An Infant Suing by His Guardian.

[Caption.]

A. B., plaintiff in this suit, who is a minor and a citizen (1) of the state of —, residing at — in said state, sues by his guardian, G. L., who has been duly appointed and qualified by the probate court of the — county in the state of — as his guardian and is now so acting, and complains of the defendant [continue from this point as in No. 2, if the defendant is an individual; as in No. 4 if the defendant is a firm; as in No. 7 if the defendant is a corporation; as in No. 34 if the defendant is an alien; or as may be, according to the character of the defendant].

(1) Where a suit is instituted in the name of the ward by his guardian or next friend, it is on the citizenship of the infant, without regard to the citizenship of the guardian or next friend, that the jurisdiction of the district court depends. *Morgan v. Potter*, 157 U. S. 195, 39 L. Ed. 670; *Blumenthal v. Craig* (3d Cir.), 81 Fed. 320, 26 C. C. A. 427; *Voss v. Neineber*, 68 Fed. 947; *Woolridge v. McKenna*, 8 Fed. 650; *Dodd v. Chiselin*, 27 Fed. 405; *Williams v. Ritchey*, No. 17734 Fed. Cas., 3 Dill. 406. But see *In re McClean*, 26 Fed. 49.

Where the general guardian has the right to bring suit in his own name as such guardian, under the state law, and does so, he is the party plaintiff and it is on his citizenship and not that of the ward that federal jurisdiction depends. *Mexican Cent. R. Co. v. Eckman*, 187 U. S. 429, 47 L. Ed. 245; *Pennington v. Smith* (2d Cir.), 78 Fed. 399, 409, 24 C. C. A. 125.

Citizenship of an Infant. The citizenship of a child is that of his father and he may change the citizenship of the infant by changing his own. *Lamar v. Micou*, 112 U. S. 452, 470, 28 L. Ed. 751; *Toledo Traction Co. v. Cameron* (6th Cir.), 137 Fed. 48, 56, 69 C. C. A. 28;

Marks v. Marks, 75 Fed. 321, 325. After the death of the father the citizenship of the infant is that of the mother, while she remains a widow; and she may likewise change the citizenship of the infant by changing her own domicile. **Lamar v. Micou**, 112 U. S. 452, 470, 28 L. Ed. 751.

When the parents are judicially separated and the custody of the child is awarded to the mother, the citizenship of the infant follows the domicile of the mother. **Toledo Traction Co. v. Cameron** (6th Cir.), 137 Fed. 48, 56, 69 C. C. A. 28. When the widow or divorced woman marries again, she acquires the citizenship of her second husband and does not thereafter possess the power to change the citizenship of the infant. **Lamar v. Micou**, 112 U. S. 452, 470, 28 L. Ed. 751; **Marks v. Marks**, 75 Fed. 321, 325.

An infant can not change his own domicile. **Lamar v. Micou**, 112 U. S. 452, 470, 28 L. Ed. 751; **Marks v. Marks**, 75 Fed. 321, 325. A guardian can not change the citizenship of his ward. **Lamar v. Micou**, 112 U. S. 452, 28 L. Ed. 751.

The citizenship existing at the time of the death of his parents, or the marriage of his widowed mother, continues until another is acquired. **Marks v. Marks**, 75 Fed. 321, 325.

An infant may acquire the domicile of his grandparents, who are his next of kin, where he takes up his residence at their home after the death of his parents. **Lamar v. Micou**, 114 U. S. 218, 29 L. Ed. 94.

Foreign guardians. The authority of a guardian, like that of an executor or administrator, appointed by a court of one state, is limited to that state, and he can not sue in a court, even of the United States, held within any other state, except so far as authorized to do so by its laws. **Morgan v. Potter**, 157 U. S. 195, 39 L. Ed. 670; **In re Kingsley**, 160 Fed. 275.

No. 14.

An Infant Suing by His Next Friend.

[Caption.]

A. B., plaintiff in this suit, who is a minor under the age of twenty-one years, without regular guardian, and a citizen (1) of the state of —, residing at — in said state, sues by his next friend, G. L., and complains of the defendant [*continue from this point as in No. 2, if the defendant is an individual; as in No. 4 if the defendant is a firm; as in No. 7 if the defendant is a corporation; as in No. 34 if the defendant is an alien; or as may be, according to the character of the defendant*].

(1) See note to No. 13.

No. 15.**An Insane Person Suing by His Guardian or Curator.**

[Caption.]

A. B., plaintiff in this suit, who is an insane person and a citizen(1) of the state of —, residing at — in said state, sues by his guardian [or curator], who has been duly and legally appointed and qualified guardian of the said A. B., an insane person, under the appointment of the probate court of — county, in the state of —, and is now so acting, complains of the defendant [continue from this point as in No. 2, if the defendant is an individual; as in No. 4, if the defendant is a firm; as in No. 7, if the defendant is a corporation; as in No. 34, if the defendant is an alien; or as may be, according to the character of the defendant].

(1) Where a suit is instituted on behalf of an insane person by his guardian or curator, it is on the citizenship of the insane person that the jurisdiction of the district court depends. *Stout v. Rigney* (8th Cir.), 107 Fed. 545, 46 C. C. A. 459; *Wilcoxon v. Chicago, Q. & B. R. Co.*, 116 Fed. 444; *Wiggins v. Bethune*, 29 Fed. 51. The citizenship of the guardian or curator is immaterial.

No. 16.**By an Administrator.**

[Caption.]

A. B., plaintiff in this suit, who is a citizen(1) of the state of —, residing at — in said state, says that on or about the — day of —, 19—, E. C. died intestate and that thereafter, to-wit, on the — day of —, 19—, the plaintiff was, by an order of the probate court for the county of —, in the state of —, duly and regularly appointed as his administrator, and that thereafter he duly qualified as such and is now the duly appointed, qualified and acting administrator of said estate and as such administrator he complains of the defendant [continue from this point as in No. 2, if the defendant is an individual; as in No. 4, if the defendant is a firm; as in No. 7, if the defendant is a corporation; as in No. 34, if the defendant is an alien; or as may be, according to the character of the defendant].

(1) In suits brought by or against an administrator or executor, the citizenship of the administrator or executor, and not that of the decedent, beneficiary, legatee or creditor, determines the jurisdiction of the district court founded on diversity of citizenship. *Continental Ins. Co. v. Rhoades*, 119 U. S. 237, 30 L. Ed. 380; *Hess v. Reynolds*, 113 U. S. 73, 76, 28 L. Ed. 927; *Amory v. Amory*, 95 U. S. 186, 24 L. Ed. 428; *Rice v. Houston*, 13 Wall. 66, 20 L. Ed. 484; *Chappedelaine v. Dechenaux*, 4 Cranch. 306, 2 L. Ed. 269; *Childress v. Emory*, 8 Wheat. 642, 667, 5 L. Ed. 705; *Monmouth Inv. Co. v. Means* (8th Cir.), 151 Fed. 159, 80 C. C. A. 527; *Cincinnati, H. & D. R. Co. v. Thiebaud* (6th Cir.) 114 Fed. 918, 52 C. C. A. 538; *Wilson v. Smith*, 66 Fed. 81; *Semmes v. Whitney*, 50 Fed. 666; *Popp v. Cincinnati, H. & D. R. Co.*, 96 Fed. 465; *Goff's Adm. v. Norfolk & W. Ry. Co.*, 36 Fed. 102.

The status of the parties is not affected by the fact that creditors and legatees of the decedent are citizens of the same state with the adverse parties. *Osborn v. United States Bank*, 9 Wheat. 738, 856, 6 L. Ed. 204; *Harper v. Norfolk & W. Ry. Co.*, 36 Fed. 102.

Citizenship of administrator or executor. For jurisdictional purposes, the administrator or executor is a citizen of the state of his domicile, without regard to the situs of the property or the state of his appointment. *Rice v. Houston*, 13 Wall. 66, 20 L. Ed. 484; *Amory v. Amory*, 95 U. S. 186, 24 L. Ed. 428; *Wilson v. Smith*, 66 Fed. 81; *Goff's Adm. v. Norfolk & W. Ry. Co.*, 36 Fed. 299; *Semmes v. Whitney*, 50 Fed. 666; *Laubscher v. Fay*, 197 Fed. 879; *McDuffie v. Montgomery*, 128 Fed. 105.

It is his citizenship at the time the suit is begun that controls. *Rice v. Houston*, 13 Wall. 66, 20 L. Ed. 484; *Goff's Adm. v. Norfolk & W. Ry. Co.*, 36 Fed. 299.

The administrator or executor may change his citizenship at pleasure. *Rice v. Houston*, 13 Wall. 66, 20 L. Ed. 484.

An administrator may be selected for the purpose of conferring jurisdiction. *Cincinnati, H. & D. R. Co. v. Thiebaud* (6th Cir.), 114 Fed. 918, 52 C. C. A. 538; *Goff's Adm. v. Norfolk & W. Ry. Co.*, 36 Fed. 299.

Alien representatives, suing as such, may invoke the jurisdiction of the district court, although their decedents could not have done so. *Chappedelaine v. Dechenaux*, 4 Cranch. 306, 2 L. Ed. 269.

No. 17.

By a Foreign Administrator.

[Caption.]

A. B., plaintiff in this suit, who is a citizen(1) of the state of —, residing at — in said state, says that on or about the

— day of —, 19—, E. C., died intestate and that thereafter, to-wit, on the — day of —, 19—, the plaintiff was, by an order of the probate court for the county of — in the state of —, duly and regularly appointed as his administrator, and that thereafter he duly qualified as such and is now the duly appointed, qualified and acting administrator of said estate by virtue of such appointment, and that on the — day of —, 19—, he obtained ancillary letters of administration from the probate court for the county of — in the state of —, in which state this suit is brought, and that he duly qualified and is now acting as administrator of said estate by virtue of said ancillary letters of administration, and as such administrator he complains of the defendant [*continue from this point as in No. 2, if the defendant is an individual; as in No. 4, if the defendant is a firm; as in No. 7, if the defendant is a corporation; as in No. 34, if the defendant is an alien; or as may be, according to the character of the defendant.*]

(1) See notes to No. 16.

When administrators and executors may sue in states other than that of appointment. An executor or administrator appointed in one state can not, as such, maintain an action in a federal court in another state, which has not, either by the issue of ancillary letters, or some special provision of statute, given him authority to sue in the courts of that state. *Noonan v. Bradley*, 9 Wall. 394, 19 L. Ed. 757; *Dennick v. Central R. Co.*, 103 U. S. 11, 23 L. Ed. 437; *Hayes v. Pratt*, 147 U. S. 557, 37 L. Ed. 279; *Maysville, etc. R. Co. v. Marvin* (6th Cir.) 59 Fed. 91, 8 C. C. A. 21; *Graham v. Lybrand* (7th Cir.), 142 Fed. 109, 73 C. C. A. 333.

In the absence of a state statute giving effect to the foreign appointment, the foreign representative must obtain a grant of administration in accordance with the laws of the state in which he desires to prosecute the suit. *Noonan v. Bradley*, 9 Wall. 394, 19 L. Ed. 757; *Dennick v. Central Ry. Co.*, 103 U. S. 11, 26 L. Ed. 439; *Leahy v. Haworth* (8th Cir.), 141 Fed. 850, 73 C. C. A. 84; *Cornell Co. v. Ward* (2d Cir.), 168 Fed. 51, 93 C. C. A. 473; *Hodges v. Kimball* (4th Cir.), 91 Fed. 845, 34 C. C. A. 103; *Maysville, etc. Ry. Co. v. Marvin* (6th Cir.), 59 Fed. 91, 8 C. C. A. 21; *Dodge v. North Hudson*, 177 Fed. 986, s. c. 188 Fed. 489.

He may do this after the suit is begun, even after trial, and the ancillary letters be averred by amendment. *Cornell Co. v. Ward* (2d Cir.), 168 Fed. 51, 93 C. C. A. 473; *Hodges v. Kimball* (4th Cir.), 91 Fed. 845, 34 C. C. A. 103; *Leahy v. Haworth* (8th Cir.), 141 Fed. 850, 73 C. C. A. 84; *McAleer v. Clay County*, 38 Fed. 707; *Black v.*

Allen Co., 42 Fed. 618; Swatzel v. Arnold, No. 13682 Fed. Cas., 1 Woolw. 383; Dodge v. North Hudson, 188 Fed. 489.

If the state statute gives effect to the foreign appointment, no ancillary letters of administration are necessary. Cincinnati, H. & D. R. Co. v. Thiebaud (6th Cir.), 114 Fed. 918, 52 C. C. A. 538; Beaumont v. Beaumont, 144 Fed. 288; Hayes v. Pratt, 147 U. S. 557, 37 L. Ed. 279; Morgan v. Potter, 157 U. S. 195, 39 L. Ed. 670; In re Kingsley, 160 Fed. 275; Cheney v. Stowe, 29 Fed. 885; Lawrence v. Nelson, 143 U. S. 215, 36 L. Ed. 130.

An executor or administrator may sue without ancillary letters being granted, on a cause of action accruing directly to him in his personal capacity in the district court, having jurisdiction of the case, held in another state. Biddle v. Wilkins, 1 Pet. 686, 7 L. Ed. 315; Moore v. Kraft (7th Cir.), 179 Fed. 685, 103 C. C. A. 231; Moore v. Petty (8th Cir.), 135 Fed. 668, 68 C. C. A. 306; certiorari denied, 197 U. S. 623, 49 L. Ed. 911; Giddings v. Green, 48 Fed. 489; Newberry v. Robinson, 36 Fed. 841.

If he sues in his official capacity on such a cause of action, the words so describing him will be regarded as merely descriptive and be rejected as surplusage. Moore v. Petty (8th Cir.), 135 Fed. 668, 68 C. C. A. 306; certiorari denied, 197 U. S. 623, 49 L. Ed. 911.

No. 18.

By an Administrator de Bonis Non.

[Caption.]

A. B., as administrator de bonis non of the estate of E. C., deceased, plaintiff in this suit, who is a citizen(1) of the state of —, residing at — in said state, says that E. C., died upon the — day of —, 19—, and his estate is being administered in the probate court of the county of —, in the state of —, and in the course of such proceedings A. B., plaintiff as aforesaid, was duly appointed administrator de bonis non of the estate of the said E. C., deceased, upon the — day of —, 19—, by the said probate court having competent jurisdiction to so appoint the plaintiff as such administrator de bonis non, whereby the plaintiff became vested by operation of law with all of the assets of the estate of said E. C., deceased, not theretofore administered, among which assets is a claim against the defendant herein, and he complains of the defendant [*continue from this point as in No. 2, if the defendant is an individual; as in No. 4, if the*

defendant is a firm; as in No. 7, if the defendant is a corporation; as in No. 34, if the defendant is an alien; or as may be, according to the character of the defendant].

(1) See notes to No. 16.

No. 19.

Against an Administrator.

[Caption.]

[In a suit against an administrator, proceed to the words "complains of the defendant" as in No. 2, if the plaintiff is an individual; as in No. 5, if the plaintiff is a firm; as in No. 7, if the plaintiff is a corporation; as in No. 33, if the plaintiff is an alien, and then continue as follows]: complains of the defendant, C. D., as administrator of the estate of L. H., deceased, who is a citizen(1) of the state of —, residing at — in said state, and an inhabitant of the — division of the — district of —(2) aforesaid, and says:

That on or about the — day of —, 19—, L. H. died intestate, and that thereafter, to-wit, on the — day of —, 19—, the defendant was, by an order of the probate court for the county of — in the state of —, duly and regularly appointed as his administrator and that thereafter he duly qualified as such and is now the duly appointed, qualified and acting administrator of said estate.

(1) See note (2) to No. 16.

(2) See note (2) to No. 2.

No. 20.

By an Executor.

[Caption.]

A. B., plaintiff in this suit, who is a citizen(1) of the state of —, residing at — in said state, suing as executor under the last will and testament of L. H., deceased, for M. H., and her children, J. H. and C. H., says that L. H., before then a citizen and resident of the county of —, in the state of —, departed this life about the — day of —, 19—, having before then made his last will and testament, which was afterwards, on the — day of —, 19—, duly admitted to probate in the probate

court of — county, of the state of —, and remains of record there, and that the plaintiff is now the duly appointed, qualified and acting executor under the said will, and as such executor complains of the defendant [*continue from this point as in No. 2, if the defendant is an individual; as in No. 4, if the defendant is a firm; as in No. 7, if the defendant is a corporation; as in No. 34, if the defendant is an alien; or as may be, according to the character of the defendant*].

(1) See note (2) to No. 16.

No. 21.

Against an Executor.

[*Caption.*]

[*In a suit against an executor, proceed to the words "complains of the defendant" as in No. 2, if the plaintiff is an individual; as in No. 5, if the plaintiff is a firm; as in No. 7, if the plaintiff is a corporation; as in No. 33, if the plaintiff is an alien, and then continue as follows*]: complains of the defendant, C. D., in his own right and as executor of the estate of L. H., deceased, who is a citizen(1) of the state of —, residing at — in said state, and an inhabitant of the — division of the — district of —(2) aforesaid, and says:

That L. H., before then a citizen and resident of — county, of the state of —, departed this life about the — day of —, 19—, having before then made his last will and testament, which was afterwards on the — day of —, 19—, duly admitted to probate in the probate court of — county, in the state of —, and remains of record there, and that said C. D. is now the duly appointed, qualified and acting executor under said will.

(1) See note (2) to No. 16.

(2) See note (2) to No. 2.

No. 22.

By a Trustee.

[*Caption.*]

A. B., who is a citizen(1) of the state of —, residing at — in said state, as trustee for The O. S. Co., a corporation duly

organized and existing under and by virtue of the laws of the state of —, plaintiff in this suit, complains of the defendant [*continue from this point as in No. 2, if the defendant is an individual; as in No. 4, if the defendant is a firm; as in No. 7, if the defendant is a corporation; as in No. 34, if the defendant is an alien; or as may be, according to the character of the defendant*].

(1) In suits brought by or against a trustee, the citizenship of the trustee, and not that of the cestui que trust, determines the jurisdiction of the district court founded on diversity of citizenship. *Knapp v. Railroad Co.*, 20 Wall. 117, 22 L. Ed. 328; *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Gardner v. Brown*, 21 Wall. 36, 22 L. Ed. 527; *Dodge v. Tulleys*, 144 U. S. 451, 36 L. Ed. 501; *Mexican, etc. R. Co. v. Eckman*, 187 U. S. 429, 47 L. Ed. 245; *Thomas v. Board of Trustees*, 195 U. S. 207, 218, 49 L. Ed. 160; *Morris v. Lindauer* (6th Cir.), 54 Fed. 23, 4 C. C. A. 162; *Shipp v. Williams* (6th Cir.), 62 Fed. 4, 10 C. C. A. 247; *Rust v. Brittle Silver Co.* (8th Cir.), 58 Fed. 611, 7 C. C. A. 389; *Griswold v. Bacheller*, 75 Fed. 470; *Wade v. Sewell*, 56 Fed. 129; *Allen-West Commission Co. v. Brashear*, 176 Fed. 199; *Mason v. Dullagham*, 27 C. C. A. 296, note on page 298.

The citizenship of the beneficiaries is immaterial. *Dodge v. Tulleys*, 144 U. S. 451, 36 L. Ed. 501; *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Shipp v. Williams* (6th Cir.), 62 Fed. 4, 10 C. C. A. 247; *Griswold v. Bacheller*, 75 Fed. 471; *Glenn v. Walker*, 27 Fed. 577; *Morris v. Lindauer* (6th Cir.), 54 Fed. 23, 4 C. C. A. 162; *Bonnafee v. Williams*, 3 How. 574, 11 L. Ed. 732; *Reinach v. Atlantic, etc. R. Co.*, 58 Fed. 33.

For jurisdictional purposes, the trustee is a citizen of the state of his domicile, even when appointed in another state in which the trust property is situated. *Shirk v. LaFayette*, 52 Fed. 857; *Glenn v. Walker*, 27 Fed. 577. See also *Rice v. Houston*, 13 Wall. 66, 20 L. Ed. 484.

Where a trustee is a mere title holder without power to direct or control litigation, it is the citizenship of the real parties to the controversy and not that of the trustee that determines jurisdiction. *Sharpe v. Bonham*, 224 U. S. 241, 56 L. Ed. 747; *Helm v. Zarecor*, 222 U. S. 32, 56 L. Ed. 77; *Walden v. Skinner*, 101 U. S. 577, 589, 25 L. Ed. 963; *Browne v. Strode*, 5 Cranch, 303, 3 L. Ed. 108 and *McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159, as explained in *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Einstein v. Georgia Southern, etc. Ry. Co.*, 120 Fed. 1008.

The citizenship of such trustees will not defeat jurisdiction over a controversy between the real litigants, having the requisite diversity of citizenship. *Walden v. Skinner*, 101 U. S. 577, 588-9, 25 L. Ed. 963; *Browne v. Strode*, 5 Cranch, 303, 3 L. Ed. 108 and *McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159, as explained in *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179.

Trustees are governed by the general rule that if there are several co-plaintiffs each plaintiff must be competent to sue, and if there are several co-defendants each defendant must be liable to be sued. *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179.

Trustees are regularly aligned on the side with the beneficiaries. *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932; *Blacklock v. Small*, 127 U. S. 96, 32 L. Ed. 70; *Shipp v. Williams* (6th Cir.), 62 Fed. 4, 10 C. C. A. 247; *Farmers Loan & T. Co. v. Lake St. Elevated R. Co.* (7th Cir.), 122 Fed. 914, 59 C. C. A. 140; *Reinach v. Atlantic, etc., R. Co.*, 58 Fed. 33; *Bowdoin College v. Merritt*, 63 Fed. 213; *Allen-West Commission Co. v. Brashear*, 176 Fed. 119; *Caylor v. Cooper*, 165 Fed. 757.

Mere refusal on the part of a trustee to act or bring suit is not sufficient to change this rule. *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932; *Shipp v. Williams* (6th Cir.), 62 Fed. 4, 10 C. C. A. 247; *Farmers Loan & T. Co. v. Lake St. Elevated R. Co.* (7th Cir.), 122 Fed. 914, 59 C. C. A. 140; *Barry v. Missouri, etc. R. Co.*, 27 Fed. 1; *Arapahoe Co. v. Kansas Pacific Ry. Co.*, No. 502 Fed. Cas., 4 Dill. 277; *Allen-West Commission Co. v. Brashear*, 176 Fed. 119. But see *Einstein v. Georgia Southern Ry. Co.*, 120 Fed. 1008; *Bowdoin College v. Merritt*, 63 Fed. 213.

A trustee may be aligned as party defendant where he is antagonistic or adverse to the beneficiaries suing. *First Nat. Bank v. Radford Trust Co.* (6th Cir.), 80 Fed. 569, 26 C. C. A. 1; *Robinson v. Alabama & Ga. Mfg. Co.*, 48 Fed. 12; *Rust v. Brittle Silver Co.* (8th Cir.), 58 Fed. 611, 7 C. C. A. 389; *Kildare Lumber Co. v. National Bank of Commerce* (5th Cir.), 69 Fed. 2, 16 C. C. A. 107; *Redfield v. Baltimore & O. R. Co.*, 124 Fed. 929; *Board of Trustees v. Blair*, 70 Fed. 414.

Also where he is a mere title-holder and the dispute is between claimants to the trust property, and to align him with the plaintiff would virtually decide the merits in their favor. *Sharpe v. Bonham*, 224 U. S. 241, 56 L. Ed. 747; *Helm v. Zarecor*, 222 U. S. 32, 56 L. Ed. 77.

No. 23.

By a Corporation as Trustee under a Mortgage, Deed of Trust, etc.

[Caption.]

The A. B. Company, a corporation organized and existing under the laws of the state of —, having its principal place of business at — in said state, as trustee as hereinafter set forth, plaintiff in this suit, complains of the defendant [*continue from this point as in No. 2, if the defendant is an individual; as in*

No. 4, if the defendant is a firm; as in No. 7, if the defendant is a corporation; as in No. 34, if the defendant is an alien; or as may be, according to the character of the defendant].

The plaintiff, The A. B. Company, at all the times hereinafter mentioned was, and still is, a corporation created and existing under and by virtue of the laws of the state of —, bearing the corporate name of "THE A. B. TRUST COMPANY"; and that at all times hereinafter mentioned it was, and now is, duly authorized and empowered, under the terms of its charter, to take and hold in trust the property transferred and conveyed to it upon the trust hereinafter stated, and to execute and perform the trust upon it imposed under and by virtue of the terms and provisions of the mortgage [*or, deed of trust, or as may be*] hereinafter mentioned.

See notes to No. 22.

No. 24.

By a Trustee in Bankruptcy.

[Caption.]

A. B., as trustee in bankruptcy of H. G., plaintiff in this suit, says that on the — day of —, 19—, a petition in bankruptcy was filed against H. G., in the district court of the United States for the — division of the — district of —; that thereafter on the — day of —, 19—, the said H. G. was duly adjudicated bankrupt and that thereafter plaintiff was duly elected trustee of the estate of said bankrupt and has duly qualified as such trustee and is now so acting; and that the said H. G., bankrupt, is a citizen(1) of the state of — residing at — in said state.

The plaintiff, as such trustee in bankruptcy, complains of the defendant [*continue from this point as in No. 2, if the defendant is an individual; as in No. 4, if the defendant is a firm; as in No. 7, if the defendant is a corporation; as in No. 34, if the defendant is an alien; or as may be, according to the character of the defendant*].

(1) The jurisdiction conferred upon the circuit court in Section 23a of the Bankrupt Act is transferred to the district court by Section 291 of the Judicial Code. Loveland on Bankruptcy, Sec. 70.

In controversies between the trustee in bankruptcy and adverse claimants, the requisite diverse citizenship must exist between the bankrupt and the adverse claimant, without regard to the citizenship of the trustee. Loveland on Bankruptcy, Sec. 75. Section 23a of the Bankrupt Act of July 1, 1898, 30 Stat. L. 544. *Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114; *Mayer v. Cohrs*, 188 Fed. 443.

The citizenship of the parties at the time of the commencement of the suit, and not at the time of bankruptcy, determines jurisdiction in cases by or against a trustee in bankruptcy. See *Emsheimer v. New Orleans*, 186 U. S. 33, 46 L. Ed. 1042 and cases cited in the opinion; *Noyes v. Crawford*, 133 Fed. 796.

That the citizenship of the trustee in bankruptcy is sufficient for jurisdictional purposes where defendant makes no objection that the citizenship of the bankrupt is not averred, and proceeds on the merits, see *McEldowney v. Card*, 193 Fed. 475.

The court has jurisdiction, under the Bankrupt Act, of a suit by the trustee to recover assets, without regard to citizenship or amount involved, where the money of the bankrupt was used by a third party to create a trust for the bankrupt's wife. *Milkman v. Arthe*, 213 Fed. 642.

Proceedings against a trustee in bankruptcy by adverse claimants are regularly begun in the court of bankruptcy administering the estate, which has jurisdiction without regard to citizenship or amount involved. Loveland on Bankruptcy, Sec. 534.

No. 25.

A Trustee under a Will against an Executor and Others.

[Caption.]

A. B., who is a citizen of the state of —, residing at — in said state, and an inhabitant of the — division of the — district of —, (1) as trustee under the last will and testament of L. H., deceased, plaintiff in this suit, for M. H., and her children, J. H., M. L. and her husband, H. L., and K. H., who is a minor under the age of twenty-one years, without regular guardian, and who sues by J. H., her next friend, all of whom are residents of the state of —, complains of the defendants, C. D., individually, and as executor of the last will and testament of W. S., deceased, and E. S., his wife; The N. Savings Bank, a corporation created and existing under the laws of the state of —, located at —, as administrator of the estate of H. G., deceased; A. W. and B. W., partners as "W. & Sons," all of whom are residents of the state of —, and says:

That L. H., before then a citizen and resident of — county, in the state of —, departed this life about the — day of —, 19—, having before then made his last will and testament, which was afterwards, to-wit. on the — day of —, 19—, duly admitted to probate in the probate court of — county, in the state of —, and remains of record there, and that the plaintiff is now the duly appointed, qualified and acting trustee under the said will.

(1) The plaintiff may bring the suit in the district in which he resides where jurisdiction depends upon diversity of citizenship. Sections 51, 52 and 53 of the Judicial Code. *Reich v. Tennessee Copper Co.*, 209 Fed. 880.

As to the diversity of citizenship requisite to jurisdiction, see note to No. 3.

No. 26.

By a Few Suing for Themselves and Others Similarly Situated.

[Caption.]

A. B., who is a citizen of the state of —, residing at — in said state, and S. R., who is a citizen of the state of —, residing at — in said state, suing on behalf of themselves and all other creditors [*or bondholders, or stockholders, or as may be*] who may come in and share the costs of the litigation(1), plaintiffs in this suit, complain of the defendants [*continue from this point as in No. 2, if the defendant is an individual; as in No. 4, if the defendant is a firm; as in No. 7, if the defendant is a corporation; as in No. 34, if the defendant is an alien; or as may be, according to the character of the defendant*].

(1) Suits by or against a few as representatives for a class. In suits by or against one or more, representing a class, the citizenship of the parties to the record when the suit is begun determines jurisdiction. *Chicago v. Mills*, 204 U. S. 321, 51 L. Ed. 504; *Stewart v. Bonham*, 115 U. S. 61, 64, 29 L. Ed. 329; *International Trust Co. v. Townsend, etc. Co.* (6th Cir.), 95 Fed. 850, 854, 37 C. C. A. 396; *Fraser v. Cole* (7th Cir.), 214 Fed. 556, 131 C. C. A. 102.

Other persons similarly situated are not indispensable, although they may be proper or necessary parties to the suit. Section 50, Judicial Code, bringing forward R. S. Section 737. Equity rules 38 and 39. *Rogers v. Penobscot Mining Co.* (8th Cir.), 154 Fed. 606,

615, 616, 83 C. C. A. 288; Sioux City Terminal, etc. Co. v. Trust Co. (8th Cir.), 82 Fed. 124, 126, 27 C. C. A. 73; Hotel Co. v. Wade, 97 U. S. 13, 20, 21, 24 L. Ed. 917; Stewart v. Dunham, 115 U. S. 61, 29 L. Ed. 329.

In *West v. Randall*, No. 17424 Fed. Cas., 2 Mason, 181, Mr. Justice Story considers the reasons for representative suits at some length.

The jurisdiction, once acquired, between the original parties, is not ousted by bringing in, by amendment or intervention, proper or necessary but not indispensable parties. *Stewart v. Dunham*, 115 U. S. 61, 29 L. Ed. 329; *Chicago v. Mills*, 204 U. S. 321, 51 L. Ed. 504; *Belmont Nail Co. v. Columbia Iron & Steel Co.*, 46 Fed. 336; *Osborne & Co. v. Barge*, 30 Fed. 805; *Society of Shakers v. Watson* (6th Cir.), 68 Fed. 730, 15 C. C. A. 632; *Fraser v. Cole* (7th Cir.), 214 Fed. 556, 131 C. C. A. 102.

Among this class of cases are the common suits of creditors, suing on behalf of the rest of the stockholders of a corporation, or seeking an account of the estate of their debtor to obtain payments of their demands. *Stewart v. Dunham*, 115 U. S. 61, 29 L. Ed. 329; *Putnam v. Timothy Co.*, 79 Fed. 454; *Alsop v. Cornwall* (6th Cir.), 188 Fed. 568, 576, 110 C. C. A. 366.

Suits by a bondholder, on behalf of himself and others similarly situated, to enforce the mortgage and obtain payment of their claims, when the trustee refuses to sue. *Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917; *Jackson & Sharp Co. v. Burlington, etc. Ry. Co.*, 29 Fed. 474; *Coann v. Atlanta Cotton Factory Co.*, 14 Fed. 4. But see *Mangels v. Donau Brewing Co.*, 53 Fed. 513.

Legatees, seeking relief and an accounting against executors, may sue in behalf of themselves and all other interested persons, when placed in the same predicament as creditors. *Brown v. Rickett*, 3 Johns. Chan. 553; *Fraser v. Cole* (7th Cir.), 214 Fed. 556, 131 C. C. A. 102.

So also are suits by a stockholder in a corporation, on behalf of himself and other stockholders, for the protection of a right which may properly be asserted by the corporation, and the directors refuse to act. Equity Rule 27 (former Rule 94). *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Chicago v. Mills*, 204 U. S. 321, 51 L. Ed. 504; *Doctor v. Harrington*, 196 U. S. 579, 49 L. Ed. 606; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Delaware & Hudson Co. v. Albany & S. R. Co.*, 213 U. S. 435, 53 L. Ed. 862; *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714.

As to the effect of failure to comply with Equity Rule 94 (now Equity Rule 27), see *Detroit v. Dean*, 106 U. S. 537, 27 L. Ed. 300; *Delaware & Hudson Co. v. Albany & S. R. Co.*, 213 U. S. 435, 53 L. Ed. 862.

Where in such suit the receiver is erroneously made a party defendant, the court may realign to create diversity. *Kelly v. Dolan*, 218 Fed. 966.

Another class of cases is, where a few persons of a voluntary association, or an unincorporated body, have been permitted to sue or defend in behalf of the whole. *Sharpe v. Bonham*, 224 U. S. 241, 56 L. Ed. 747; *Helm v. Zarecor*, 222 U. S. 32, 56 L. Ed. 77; *Society of Shakers v. Watson* (6th Cir.), 68 Fed. 730, 15 C. C. A. 632; *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 695, affirmed (8th Cir.), 83 Fed. 912, 28 C. C. A. 99; *American Steel & Wire Co. v. Wire Drawers' Union*, 90 Fed. 598; *Evenson v. Spaulding* (9th Cir.), 150 Fed. 517, 522, 82 C. C. A. 263; *United States v. Coal Dealers Assn.*, 85 Fed. 252.

This class includes controversies involving religious societies. *Sharpe v. Bonham*, 224 U. S. 241, 56 L. Ed. 747; *Helm v. Zarecor*, 222 U. S. 32, 56 L. Ed. 77.

Social communities. *Society of Shakers v. Watson* (6th Cir.), 68 Fed. 730, 15 C. C. A. 632.

Labor unions. *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 698, affirmed (8th Cir.), 83 Fed. 912, 28 C. C. A. 99; *American Steel & Wire Co. v. Wire Drawers' Union*, 90 Fed. 598; *Kolley v. Robinson* (8th Cir.), 187 Fed. 415, 109 C. C. A. 247; *Evenson v. Spaulding* (9th Cir.), 150 Fed. 517, 522, 82 C. C. A. 263; *The Carpenter Case*, 180 Fed. 896; *Barnes & Co. v. Berry*, 156 Fed. 72, affirmed (6th Cir.), 169 Fed. 225, 94 C. C. A. 501.

No. 27.

By a Representative for a Joint Stock Company (1).

[Caption.]

A. B., who is a citizen of the state of —, residing at — in said state, complains of the defendant [*continue from this point as in No. 2, if the defendant is an individual; as in No. 4, if the defendant is a firm; as in No. 7, if the defendant is a corporation; as in No. 34, if the defendant is an alien; or as may be, according to the character of the defendant, and continue as follows*]: and says:

That he is the president and a shareholder of The A. Express Company, which is a co-partnership organized many years ago as a joint stock association under the laws of the state of —, and ever since existing and doing business as such. Said company consists of about — partners or shareholders owning — shares, all of whom have a joint ownership and interest in the cause of action hereinafter set forth. By the laws of the state of —, under which said company was organized and now

exists, it is authorized and empowered to sue and be sued in the name of the president, who is the plaintiff in this suit, and as such president and shareholder in said company he brings this suit in behalf of said association and all the shareholders thereof, who are too numerous to be joined as parties hereto.

(1) In suits brought by or against a joint stock company, the citizenship of all the individual members composing it, as in a partnership, ordinarily determines the jurisdiction of the district court, when it is based upon diverse citizenship. *Great Southern Fireproof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. Ed. 842; *Chapman v. Barney*, 129 U. S. 677, 682, 32 L. Ed. 800; *Rife v. Lumber Underwriters* (6th Cir.), 204 Fed. 32, 122 C. C. A. 346.

Where the shareholders of a joint stock company are numerous, a suit may be brought by or against the company in the name of an officer whose citizenship alone marks federal jurisdiction. *Johnson v. St. Louis* (8th Cir.), 172 Fed. 31, 96 C. C. A. 617; *Boatner v. American Express Co.*, 122 Fed. 714, 718; *Whitman v. Hubbell*, 30 Fed. 81; *Baltimore & O. R. Co. v. Adams Express Co.*, 22 Fed. 404, 407-8; *Maltz v. American Express Co.*, No. 9002 Fed. Cas., 1 Flip. 611. See also *Meux v. Maltby*, 2 Swanst. 277.

A joint stock company can not sue or be sued in a federal court in the name of an officer, by virtue of the state law authorizing this to be done in state courts. *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800; *Adams v. May*, 27 Fed. 907.

No. 28.

Against a Few as Representatives of a Community or Society (1).

[Caption.]

[In a suit against an unincorporated society or community, proceed to the words "complains of the defendant" as in No. 2, if the plaintiff is an individual; as in No. 5, if the plaintiff is a firm; as in No. 7, if the plaintiff is a corporation; or as may be, according to the character of the plaintiff, and continue as follows]: complains of the defendants, the Society of Shakers at Pleasant Hill, Kentucky, that being the name by which the community of people commonly called Shakers, located in Mercer county, Kentucky, is commonly known, and Stephen Boisseau and James Shelton and Napoleon Brown as trustees or agents of the said Society of Shakers at Pleasant Hill, Kentucky, and as members of said society, all of said defendants being citizens of the state of Kentucky.

And plaintiff says that the said community of people commonly called Shakers, living together and having their property in common, in the county of Mercer in the state of Kentucky, are commonly known by the name or description of the "Society of Shakers at Pleasant Hill, Kentucky," and that the said Stephen Boisseau and James Shelton and Napoleon Brown are members of said community, and are its duly appointed and authorized trustees or agents, selected in pursuance of the articles of covenant of said community hereinafter referred to and exhibited, and as such hold all the property of the society. That said community has a very large membership consisting of more than one hundred people and the number is constantly changing. That said community subscribe to and recognize as binding upon it and the members composing said community, certain articles of covenant, a duly certified copy of which articles is herewith exhibited as "Exhibit A," and said articles of covenant are prayed to be read with this bill. The said articles of covenant are duly recorded in the clerk's office of the county court of Mercer county, Kentucky, as required by said covenant.

That said articles state that it is "fit and proper that certain individuals should be entrusted with the care of the temporal interest of the church as trustees or agents," and then it is therein covenanted that the said trustees or agents and their successors shall be duly invested with the said office of trustees or agents, and "empowered to exercise all the duties thereof," and "that it shall be the duty of the trustees or agents to take the general charge and oversight of all and singular the property, estate and interest dedicated, devoted and given up as aforesaid to the joint interest of the church, with all gifts, grants and donations that may at any time be given or devoted for the benefit of the church or for the relief of the poor or any such charitable use or purpose, and the said joint interest, estate, gifts, grants and donations shall be held by them in the capacity of trustees or agents and shall be and remain forever inviolably under the care and oversight and at the disposal of the trustees and agentship of the church in a continual line of succession," and

That said articles of covenant contain this further provision or covenant, to-wit: "And we do by these presents covenant, promise and agree that all the transactions of the trustees or agents in

the use or disposal of the joint interest of the church shall be for the mutual benefit of the church, and in behalf of the whole body and to no personal end or purpose whatever, but the trustees or agents shall be at liberty in union with the body to make, present and bestow deeds of charity upon such as they may consider the proper objects, that are without; and when by death or other means any trustee or agent shall cease to act in his office as aforesaid, then all and singular the power invested in or duties incumbent upon him shall be transferred and devolved upon his successor, who shall be appointed to fill his place in said office and trust, so that each individual appointed to the office of trustee or agent of the church shall be vested with the power and authority of managing and disposing of the property and interest of the church as aforesaid, and of making all lawful defense for the security and protection of the joint interest and privileges of the church, and all the transactions of such members shall be valid so long as they act in the official capacity of trustees or agents in union with the body according to the tenor of the covenant, and no longer."

That said articles contain this further provision or covenant, to-wit: "And we further covenant and agree that it shall be the duty of the trustees to keep or cause to be kept in a book or books provided for that purpose a true copy of this covenant, together with all other records or matters of a public nature that may be necessary for the information and satisfaction of all concerned, and for the security of the joint interest of the church committed to their care, and further that the trustees shall make application to the proper authority for the covenant to be duly recorded in the county office of this county, together with the names of all the subscribers who previously shall have subscribed to it, and in all deeds, wills, grants, etc. which may thereafter be given or conveyed to the trustees or agents aforesaid for and in behalf of the joint body or church, express reference shall be had to the same, specifying the date or time when it was subscribed or first begun to be subscribed."

That said articles of covenant contain this further provision or covenant, to-wit: "We do freely and cordially covenant, promise and agree together for ourselves that we shall never hereafter make any account of any property, labor or service devoted by us

to the purpose aforesaid, or bring any charge of debt or damages or hold any demand whatever against the church or community or any member thereof, on account of either property or service given, rendered or consecrated to the aforesaid sacred and charitable uses."

(1) The foregoing allegation is taken from the record in *Society of Shakers v. Watson* (6th Cir.), 68 Fed. 730, 15 C. C. A. 632

As to suits generally by or against one or more representing a class, see note to No. 26.

No. 29.

Against a Few as Representatives of a Labor Union (1).

[Caption.]

*[In a suit against a labor union, proceed to the words "com-
plains of the defendant" as in No. 2, if the plaintiff is an indi-
vidual; as in No. 5, if the plaintiff is a firm; as in No. 7, if the
plaintiff is a corporation; or as may be, according to the char-
acter of the plaintiff, and continue as follows]:* complains of the
defendants, The International Printers' Union, C. D. and G. H.,
both of whom are citizens of the state of —, residing at —
in said state, and inhabitants of the — division of the —
district of — aforesaid, and says:

That The International Printers' Union (hereinafter called the union) is a voluntary association composed of persons employed in the printing and publishing business in the United States, whose duties involve the operation and care of printing presses and appliances and who are employed by various firms and individuals requiring their services; that said association is commonly known as a labor union; that it has a constitution; that its principal office is located at —, in the state of —; that the defendant, C. D., is the president of the said union and the defendant, G. H., is its secretary-treasurer; that said C. D. is the executive head of said union and that the business and affairs of said union are transacted at its said principal office at —, in the state of —, by the said C. D. and G. H.; that its other officers are W. L., first vice president; J. G., second vice president, and P. J., third vice president; that the said association has a board of directors, the present personnel of which is

made up of the officers above named and which has its principal place of business at the office of the said union at —, in the state of —; that the said union is national in scope; that it is made up of branches or subordinate unions, called local unions, organized in various cities and places in the United States; which have local officers and agents elected by the members of said local unions, the names of which officers and agents are unknown to plaintiff; that there is a large number of such local unions affiliated with and a part of said union, the number of which local unions is unknown to plaintiff, but which exceeds one hundred; that the number of officers and agents of said local unions is unknown to your orators, but comprises several hundred; that the total membership of said union and its locals is unknown to plaintiff, but comprises several thousands; that the said local unions from time to time elect delegates to general conventions of said union held at stated times and places, and said delegates are the authorized representatives of said local unions to elect the officers of said union and to transact such other business of the union as may come before said conventions, and said delegates have power and authority to enter into contracts or authorize their agents or committees to enter into contracts in behalf of the members of said union and its locals, including contracts with said plaintiff, specifying the terms and conditions of their employment.

(1) Taken from the record in *Barnes & Co. v. Berry* (6th Cir.), 169 Fed. 225, 94 C. C. A. 501.

As to suits against labor unions generally, see *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 698, affirmed (8th Cir.), 83 Fed. 912, 28 C. C. A. 99; *American Steel & Wire Co. v. Wire Drawers' Union*, 90 Fed. 598; *Kolley v. Robinson* (8th Cir.), 187 Fed. 415, 109 C. C. A. 247; *Evenson v. Spaulding* (9th Cir.), 150 Fed. 517, 82 C. C. A. 263; *The Carpenter Case*, 180 Fed. 896; *Barnes & Co. v. Berry*, 156 Fed. 72, affirmed (6th Cir.), 169 Fed. 225, 92 C. C. A. 501.

No. 30.

By a National Bank.

[Caption.]

The A. B. National Bank, a national banking association organized and existing as such under the laws of the United States,

located at —, in the state of —, and a citizen of said state (1), plaintiff in this suit, complains of the defendant [*continue from this point as in No. 2, if the defendant is an individual; as in No. 4 if the defendant is a firm; as in No. 7, if the defendant is a corporation; or as may be, according to the character of the defendant*].

(1) A national bank is, for the purposes of jurisdiction of the federal courts in suits by or against it, admitted to be a citizen of the state in which it is located. Section 24, paragraph 16 of the Judicial Code, bringing forward Section 4 of the Act of August 13, 1888, 25 Stat. L. 433; *Continental National Bank v. Buford*, 191 U. S. 119, 48 L. Ed. 119; *Petri v. Commercial National Bank*, 142 U. S. 644, 35 L. Ed. 1144; *Whittemore v. Amoskeag National Bank*, 134 U. S. 527, 33 L. Ed. 1002; *Danahy v. Bank*, 64 Fed. 148.

A national bank located in a territory or the District of Columbia can not sue or be sued in a federal court on the ground of diverse citizenship. *American National Bank v. Tappan*, 174 Fed. 431.

A national bank may sue on the ground of a federal question being involved without regard to citizenship. *Cummings v. Merchants National Bank*, 101 U. S. 153, 25 L. Ed. 903.

Cases for winding up the affairs of a national bank do not depend on citizenship. Section 24, paragraph 16 of the Judicial Code; *International Trust Co. v. Weeks*, 203 U. S. 264, 51 L. Ed. 204; *In re Chetwood*, 165 U. S. 443, 459, 41 L. Ed. 782; *Guarantee Co. v. Hanway*, 104 Fed. 369.

No. 31.

Against a National Bank.

[Caption.]

[*In a suit against a national bank, proceed to the words "complains of the defendant" as in No. 2, if the plaintiff is an individual; as in No. 5, if the plaintiff is a firm; as in No. 7, if the plaintiff is a corporation; or as may be, according to the character of the plaintiff, and continue as follows*]: complains of the defendant, The C. D. National Bank, a national banking association organized and existing as such under the laws of the United States and located at —, in the state of —, and an inhabitant of the — division of the — district of — (1) aforesaid, and says:

(1) See note (1) to No. 30 and note (2) to No. 2.

No. 32.**By an Assignee of a Chose in Action (1).****[Caption.]**

A. B., who is a citizen of the state of —, residing at — in said state [*if the plaintiff is a firm make the averment as in No. 5; if the plaintiff is a corporation, as in No. 7; or as may be, according to the character of the plaintiff, and continue as follows*]: complains of the defendant [*continue from this point as in No. 2, if the defendant is an individual; as in No. 4, if the defendant is a firm; as in No. 7, if the defendant is a corporation; or as may be, according to the character of the defendant, and continue as follows*]:

That the defendant C. D., by a certain writing dated —, 19—, which the said defendant signed and delivered to S. W., who is a citizen of the state of —, residing at — in said state, which said writing, with the endorsements of the said S. W. thereon, is filed herewith and marked "Exhibit A," promised to pay to the said S. W. \$—, — days after the date of said writing; that the said S. W., with his written endorsement on said note, assigned and delivered it to this plaintiff before its maturity and for full and valuable consideration paid by this plaintiff therefor.

(1) In a suit by an assignee of a promissory note, or other chose in action, the plaintiff must show affirmatively that both he and the original assignor were citizens of a state or states other than the state of which the defendant is a citizen. Section 24 of the Judicial Code; *New Orleans v. Benjamin*, 153 U. S. 411, 435, 38 L. Ed. 764; *Parker v. Ormsby*, 141 U. S. 81, 35 L. Ed. 654; *Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 32 L. Ed. 905; *Benjamin v. New Orleans* (5th Cir.), 74 Fed. 417, 20 C. C. A. 591, affirming 71 Fed. 758; *Gorman-Wright Co. v. Wright* (4th Cir.), 134 Fed. 363, 67 C. C. A. 345; *Utah-Nevada Co. v. DeLamar* (9th Cir.), 133 Fed. 113, 66 C. C. A. 179; *United States Nat. Bank v. McNair*, 56 Fed. 323; *Houck and Wife v. Bank*, 242 Fed. 881, 155 C. C. A. 469; *Springstead v. Crawfordsville State Bank*, 231 U. S. 541, 58 L. Ed. 354.

In *Benjamin v. New Orleans* (5th Cir.), 74 Fed. 417, 20 C. C. A. 591, it was held insufficient to aver that the assignors were citizens, respectively, of states other than the state of Louisiana, and competent, as such citizens, to maintain a suit in this court.

The citizenship of the original assignor or payee is immaterial in suits on foreign bills of exchange. Section 24 of the Judicial Code; *Buckner v. Finley*, 2 Pet. 586, 7 L. Ed. 528.

The citizenship of the assignor or payee is immaterial in suits on choses in action, payable to bearer and made by a corporation. Section 24 of the Judicial Code; *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. Ed. 664; *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. Ed. 118; *Falk v. Moebs*, 127 U. S. 597, 32 L. Ed. 266; *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801; *Lake County v. Dudley*, 173 U. S. 243, 43 L. Ed. 684.

Jurisdiction of suits by assignees of choses in action. Section 24 of the Judicial Code bringing forward Section 1 of the Act of August 13, 1888, 25 Stat. L. 433, prohibits suits in the district courts to recover upon promissory notes, or other choses in action brought in favor of assignees, except in three classes of cases, namely: First. Suits upon foreign bills of exchange. Second. Suits that might have been prosecuted in said court to recover upon such notes or choses in action, if no assignment had been made. Third. Suits upon choses in action, payable to bearer and made by a corporation. Section 24 of the Judicial Code; *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. Ed. 664; *Newgass v. New Orleans*, 33 Fed. 196; *Wilson v. Knox County*, 43 Fed. 481.

A similar provision was contained in Section 11 of the Judiciary Act of 1789 and carried forward into Section 629 of the Revised Statutes. It appears in the Act of March 3, 1875 (18 Stat. L. 470) in somewhat different phraseology, and the restrictions as to suits on promissory notes was removed, but it was restored by the Act of 1888, and brought forward in Section 24 of the Judicial Code.

For the history of the legislation on this subject, see *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. Ed. 664.

First. Foreign bills of exchange include bills drawn in one state on persons in another, and bank checks. See *Buckner v. Finley*, 2 Pet. 586, 7 L. Ed. 528; *Bull v. Bank of Kasson*, 123 U. S. 105, 31 L. Ed. 97. See also observation by Mr. Justice Bradley in *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 706, 28 L. Ed. 866.

Second. With the exceptions mentioned above, in suits by an assignee of a chose in action, jurisdiction exists only if the plaintiff and the original assignor or payee are citizens of a different state or states from the defendant. *Parker v. Ormsby*, 141 U. S. 881, 35 L. Ed. 654; *Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 32 L. Ed. 905; *New Orleans v. Benjamin*, 153 U. S. 411, 435, 38 L. Ed. 764.

As to what the term "assignee" covers, see *Plant Investment Co. v. Jacksonville R. Co.*, 152 U. S. 71, 38 L. Ed. 358; *Corwin v. Black Hawk County*, 105 U. S. 659, 665-6, 26 L. Ed. 1128; *Sere v. Pitot*, 6 Cranch. 332, 335, 3 L. Ed. 240; *Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 32 L. Ed. 905; *Glass v. Concordia Parish Police Jury*, 176 U. S. 207, 44 L. Ed. 436.

Jurisdiction depends on the citizenship of the parties at the time the suit is begun and not when the assignment is made. *Emsheimer v. New Orleans*, 186 U. S. 33, 46 L. Ed. 1042.

The citizenship of intermediate assignees, holders or owners is immaterial. *Farr v. Hobe-Peters Land Co.* (7th Cir.), 188 Fed. 10, 16, 110 C. C. A. 160; *Portage City Water Works v. Portage*, 102 Fed. 769; *Milledollar v. Bell*, No. 9549 Fed. Cas., 2 Wall. Jr. 334 (opinion by Mr. Justice Grier); *Moore Bros. Glass Co. v. Drevet Mfg. Co.*, 154 Fed. 737; *Wilson v. Fisher*, No. 17803 Fed. Cas., Baldw. 133; *Lipschitz v. Napa Fruit Co.*, 223 Fed. 698, 139 C. C. A. 228.

Jurisdiction is not defeated because the assignment was made to enable the purchaser to sue in a district court, if the transfer was absolute and for good consideration. *Blair v. Chicago*, 201 U. S. 400, 448, 50 L. Ed. 801; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 191, 44 L. Ed. 423; *Marine & R. etc. Mfg. Co. v. Bradley*, 105 U. S. 175, 26 L. Ed. 1034; *New Providence v. Halsey*, 117 U. S. 336, 29 L. Ed. 904.

If the transfer was not made in good faith, the court has no jurisdiction. *Waite v. Santa Cruz*, 184 U. S. 302, 325, 46 L. Ed. 552; *Lake County v. Dudley*, 173 U. S. 243, 252, 43 L. Ed. 684; *Williams v. Nottawa*, 104 U. S. 209, 26 L. Ed. 719.

If payee is merely an agent and authorized to transfer promissory notes, having no beneficial interest therein, nor right of action thereon, his citizenship is immaterial. *Baltimore Trust Co. v. Screven County*, 238 Fed. 834.

Third. In suits by holders of instruments payable to bearer and made by a corporation, it is sufficient if the requisite diverse citizenship exists between them, without regard to the citizenship of the original, or any intermediate holder of it. Section 24 of the Judicial Code; *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. Ed. 664; *Lake County v. Dudley*, 173 U. S. 243, 43 L. Ed. 684; *Blair v. Chicago*, 201 U. S. 400, 447, 50 L. Ed. 801; *Loeb v. Columbia Township*, 179 U. S. 472, 485, 45 L. Ed. 280; *Waite v. Santa Cruz*, 184 U. S. 302, 324, 46 L. Ed. 552; *Rollins v. Chaffee County*, 34 Fed. 91; *Board of Commissioners v. Irvine* (8th Cir.), 126 Fed. 689, 61 C. C. A. 607; *Citizens Sav. Bank v. Newburyport* (1st Cir.), 169 Fed. 766, 95 C. C. A. 232; *Keene Five Cent Sav. Bank v. Lyon County*, 90 Fed. 523.

No. 33.

By an Alien.

[Caption.]

A. B., of —, who is a subject (1) of the Emperor [or King, or Queen, or as may be, or a citizen of the Republic] (1) of —, plaintiff in this suit, complains of the defendant [continue

from this point as in No. 2, if the defendant is an individual; as in No. 4, if the defendant is a firm; as in No. 7, if the defendant is a corporation; or as may be, according to the character of the defendant].(2)

(1) Where federal jurisdiction depends upon the controversy being between a citizen of a state and an alien, the first pleading should aver of what foreign state the alien is a subject or citizen. *Stuart v. Easton*, 156 U. S. 46, 39 L. Ed. 341; *Börs v. Preston*, 111 U. S. 252, 28 L. Ed. 419; *Hennessy v. Richardson Drug Co.*, 189 U. S. 25, 47 L. Ed. 697; *Suravitz v. Pristasz* (3d Cir.), 201 Fed. 335, 119 C. C. A. 573.

It is also necessary to aver the citizenship of the American citizen. *Piquignot v. Pennsylvania R. Co.*, 16 How. 104, 14 L. Ed. 863; *Jackson v. Twentymen*, 2 Pet. 136, 7 L. Ed. 374.

The word "subject" properly describes a person owing allegiance to a monarch. *Rondot v. Rogers* (6th Cir.), 79 Fed. 676, 25 C. C. A. 145, and "citizen" properly describes a member of a republic. *Hennessy v. Richardson Drug Co.*, 189 U. S. 25, 47 L. Ed. 697.

It is not necessary to allege that he is an alien, where the pleading properly describes a subject or citizen of a foreign state. *Hennessy v. Richardson Drug Co.*, 189 U. S. 25, 34, 47 L. Ed. 697.

It has been held a sufficient description of an alien to aver that the plaintiffs "were citizens of the Republic of France." *Hennessy v. Richardson Drug Co.*, 189 U. S. 25, 34, 47 L. Ed. 697. Or that the plaintiff is "a resident of Washington and a citizen of Sweden." *Nicholas Lumber Co. v. Franson*, 203 U. S. 278, 51 L. Ed. 181. Or that the plaintiff is "a citizen of Ireland." *Mahoning Valley R. Co. v. O'Hara* (6th Cir.), 196 Fed. 945, 116 C. C. A. 495. Or, "is a subject and citizen of Cuba." *Betancourt v. Mutual Reserve Fund Life Assn.*, 101 Fed. 305.

It has been held an insufficient description of an alien that the plaintiff is "a citizen of London, England." *Stuart v. Easton*, 156 U. S. 42, 39 L. Ed. 341. Or, that the plaintiff is "a citizen of the British Empire." *Von Voight v. Michigan Cent. R. Co.*, 130 Fed. 398. Or, that the plaintiff is a "resident of Ontario, Canada, and a citizen of the Dominion of Canada and of the Empire of Great Britain." *Rondot v. Rogers* (6th Cir.), 79 Fed. 676, 25 C. C. A. 145. Or, where the defendant was described as "the consul at the port of New York for the kingdoms of Norway and Sweden." *Börs v. Preston*, 111 U. S. 252, 28 L. Ed. 419. Or, "all of whom reside in the City of Mexico, Republic of Mexico." *International Bank & Trust Co. v. Scott* (5th Cir.), 159 Fed. 58, 86 C. C. A. 248. Or, that a citizen of the United States has "become permanently domiciled in the town of Grand Forks in the Province of British Columbia and now resides there, and that he intends to become a naturalized citizen of that country." *Bishop v. Averill*, 76 Fed. 386.

An American woman who marries a foreigner, takes the nationality of her husband. Section 3 of the Act of March 2, 1907, 34 Stat. L., 1228; *United States v. Cohen* (2d Cir.), 179 Fed. 834, 103 C. C. A. 28; *Mackenzie v. Hare* (California), 134 Pac. 813; as to citizenship of married women, see note in 65 C. C. A. 5, to *Hopkins v. Fachant*, 65 C. C. A. 1.

A defective allegation of alienage may be cured by amendment. *Stuart v. Easton*, 156 U. S. 46, 39 L. Ed. 341; *Rondot v. Rogers* (6th Cir.), 79 Fed. 676, 26 C. C. A. 144; *Betzoldt v. Amer. Ins. Co.*, 47 Fed. 705.

(2) A suit by an alien against a citizen must be brought in the division and district of the residence of the defendant, or defendants, unless waived by the defendant. Sections 51-2-3 of the Judicial Code; *Galveston, etc. R. Co. v. Gonzales*, 151 U. S. 496, 38 L. Ed. 248; *Colosino v. Pittsburg, etc. R. Co.*, 210 Fed. 550; *Grabsky v. Belmont Coal Mining Co.*, 210 Fed. 553; *Adzenoska v. Erie R. Co.*, 210 Fed. 571; *M'Aulay v. Moody*, 185 Fed. 144; *Friborg v. Pullman Co.*, 176 Fed. 981.

Jurisdiction of suits by or against an alien. Section 24 of the Judicial Code vests the district court with jurisdiction of controversies between citizens of a state and foreign states, citizens or subjects, where the requisite jurisdictional amount is involved.

Foreign citizens or subjects include aliens residing in this country. *Breedlove v. Nicollet*, 7 Pet. 413, 431, 8 L. Ed. 731; *Nichols Lumber Co. v. Franson*, 203 U. S. 278, 51 L. Ed. 181; *Mahoning Valley Ry. Co. v. O'Hara* (6th Cir.), 196 Fed. 945, 116 C. C. A. 495.

Also aliens not residing in this country. *Hennessy v. Richardson Drug Co.*, 189 U. S. 25, 47 L. Ed. 697; *National Steamship Co. v. Tugman*, 106 U. S. 118, 27 L. Ed. 87.

And also corporations organized under the laws of a foreign country. *National Steamship Co. v. Tugman*, 106 U. S. 118, 27 L. Ed. 87; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964.

The residence of an alien does not affect federal jurisdiction. He may reside in the same state as the adverse party, or another state, or abroad. *Breedlove v. Nicollet*, 7 Pet. 413, 8 L. Ed. 731; *Nichols Lumber Co. v. Franson*, 203 U. S. 278, 51 L. Ed. 181; *Jewish Colonization Association v. Solomon*, 125 Fed. 994.

An alien may be either plaintiff or defendant, but a suit between aliens can not be maintained. *Montalet v. Murray*, 4 Cranch. 46, 2 L. Ed. 545; *Merchants Cotton Press Co. v. Insurance Co.*, 151 U. S. 368, 385-6, 38 L. Ed. 195; *Gage v. Riverside Trust Co.*, 156 Fed. 1002; *Pooley v. Luco*, 72 Fed. 561.

In suits by or against aliens, the adverse party must be a citizen of a state. *Hepburn v. Ellzey*, 2 Cranch. 445, 2 L. Ed. 332; *Hodgson v. Bowerbank*, 5 Cranch. 304, 3 L. Ed. 108; *Montalet v. Murray*, 4 Cranch. 46, 2 L. Ed. 545; *Pooley v. Luco*, 72 Fed. 561.

A resident in the District of Columbia (*Land Co. v. Elkins*, 20 Fed. 545), or a resident of a territory (*New Orleans v. Winter*, 1 Wheat. 91, 4 L. Ed. 44; *Fraenkl v. Cerecedo*, 216 U. S. 295, 54 L. Ed. 486), or a citizen of the United States, domiciled abroad (*Hammerstein v. Lyne*, 200 Fed. 165), or a state (*O'Connor v. Texas*, 202 U. S. 501, 50 L. Ed. 1120), is not a citizen of a state nor an alien within the meaning of the judiciary acts.

An Indian is not an alien within the meaning of the judiciary acts. *Paul v. Chilsoquie*, 70 Fed. 401; *Karrahoo v. Adams*, 1 Dill. 344, No. 7614 Fed. Cas.

The citizenship and alienage must exist at the time the suit is begun. *Cook v. Lillo*, 103 U. S. 792, 26 L. Ed. 460; *Jackson v. Allen*, 132 U. S. 27, 33 L. Ed. 249; *Anderson v. Watt*, 138 U. S. 694, 34 L. Ed. 1078; *Ex parte Wisner*, 203 U. S. 449, 51 L. Ed. 264.

No. 34.

Against an Alien.

[Caption.]

[In a suit against an alien, proceed to the words "complaints of the defendant" as in No. 2, if the plaintiff is an individual; as in No. 5, if the plaintiff is a firm; as in No. 7, if the plaintiff is a corporation; or as may be, according to the character of the plaintiff, and continue as follows]: complains of the defendant, C. D., (1) of —, who is a subject of the Emperor [or King, or Queen, or as may be, or, a citizen of the Republic] of —, (2) and says:

(1) See notes to No. 33.

(2) A suit against an alien individual or corporation may be brought in any district in which service may be had upon the defendant. *In re Hohorst*, 150 U. S. 653, 659, 37 L. Ed. 1211; *Barrow Steamship v. Kane*, 170 U. S. 100, 112; *Vestal v. Ducktown, etc. Iron Co.*, 210 Fed. 375; *Ladew v. Tennessee Copper Co.*, 179 Fed. 245, 253, affirmed 218 U. S. 357, 54 L. Ed. 1069.

No. 35.

By an Alien Corporation.

[Caption.]

The A. B. Co., a foreign corporation (1) organized and existing by virtue of the laws of the kingdom [or republic] of —, and having its principal offices for the transaction of its business

at — in said kingdom [or republic], plaintiff in this suit, complains of the defendant [*continue from this point as in No. 2, if the defendant is an individual; as in No. 4, if the defendant is a firm; as in No. 7, if the defendant is a corporation; or as may be, according to the character of the defendant*].

(1) A suit by or against an alien corporation, in its corporate name, is presumed to be a suit by or against the members of the corporation, who are conclusively presumed to be citizens or subjects of the foreign state creating the corporation. For purposes of jurisdiction in the federal courts, a corporation of a foreign state is deemed constructively to be a citizen or subject of such state. *Steamship v. Tugman*, 106 U. S. 118, 27 L. Ed. 87.

See also notes to No. 33.

No. 36.

Against an Alien Corporation.

[Caption.]

[*In a suit against an alien corporation, proceed to the words "complains of the defendant" as in No. 2, if the plaintiff is an individual; as in No. 5, if the plaintiff is a firm; as in No. 7, if the plaintiff is a corporation; or as may be, according to the character of the plaintiff, and continue as follows*]: complains of the defendant, The C. D. Co., a foreign corporation(1) created and existing under and by virtue of the laws of the kingdom [or republic] of —, and having its principal offices for the transaction of its business at —, in said kingdom [or republic], and having an office, or general manager and place of business at —, in the state of —, within the territorial jurisdiction of this court.(2)

(1) See note to No. 35.

(2) A foreign corporation may be sued in any district or division in which it may be served. *In re Hohorst*, 150 U. S. 653, 659, 37 L. Ed. 1211; *Barrow Steamship v. Kane*, 170 U. S. 100, 112; *Vestal v. Ducktown, etc. Iron Co.*, 210 Fed. 375; *Ladew v. Tennessee Copper Co.*, 179 Fed. 245, 253, affirmed 218 U. S. 357, 54 L. Ed. 1069.

No. 37.**Citizen against an Alien and a Citizen.****[Caption.]**

A. B., who is a citizen of the state of —, residing at — in said state, plaintiff in this suit, complains of the defendants, C. D., who is a citizen of the state of —, residing at — in said state, and an inhabitant of the — division of the — district of —, and E. G., who is a subject of the Emperor [*or King, or Queen, or as may be, or, a citizen of the republic*] of —, (1) and says:

(1) An alien may be joined with a citizen of a different state from that of the adverse party. *Puget Sound Traction, etc. Co. v. Lawrey*, 202 Fed. 263; *Roberts v. Pacific, etc. Navigation Co.* (9th Cir.), 121 Fed. 785, 58 C. C. A. 61; *Ladew v. Tennessee Copper Co.*, 179 Fed. 245, affirmed 218 U. S. 357, 54 L. Ed. 1069.

An alien can not be joined with a citizen of the same state as that of the defendant. *King v. Cornell*, 106 U. S. 395, 27 L. Ed. 60; *Watson v. Evers*, 13 Fed. 194; *Hervey v. Midland Ry. Co.*, No. 6434 Fed. Cas., 7 Biss. 103.

Aliens can not be on both sides of the case. *Montalet v. Murray*, 4 Cranch. 46, 2 L. Ed. 545; *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368, 385-6, 38 L. Ed. 195; *Gage v. Riverside Trust Co.*, 156 Fed. 1002; *Pooley v. Luco*, 72 Fed. 561; *Laird v. Assurance Co.*, 44 Fed. 712.

No. 38.**State against a State (1).****[Caption.]**

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Plaintiff, the state of Ohio, and one of the states of the United States of America, by A. B., its attorney general, presents this bill of complaint [*or petition*] against the state of West Virginia, also one of the states of the United States of America, by virtue of the direction and authority contained in a joint resolution of the general assembly of the state of Ohio, adopted on the 25th day of March, 1919, a copy of which joint resolution is hereto attached, marked "Exhibit A," and as fully made a part hereof as if copied herein, and also by the written direction of

the governor of the state of Ohio under authority of Section 333 of the General Code of Ohio; and thereupon plaintiff says:

(1) Controversies between states are within the original jurisdiction of the United States Supreme Court, and are in no wise affected by the Eleventh Amendment to the United States Constitution. *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956; Article III, Section 2 of the United States Constitution; Section 233 of the Judicial Code. And the mentioned section of the Judicial Code makes such jurisdiction exclusive. A great variety of questions arising in connection with such suit has been considered by the court in the interesting litigation between Virginia and West Virginia, 206 U. S. 290, 51 L. Ed. 1068, and 209 U. S. 514, 220 U. S. 1, 222 U. S. 17, 231 U. S. 89, 234 U. S. 117, 238 U. S. 202, 241 U. S. 531, and 246 U. S. 565, 62 L. Ed. 883.

For a list of the cases decided in the United States Supreme Court between states, see 246 U. S., in the footnote on page 591, and in 62 L. Ed. 886.

And as to the enforcement of its decision in such cases, see the opinion in 246 U. S. 565, at page 589 to 606, 62 L. Ed., pages 885 to 892.

No. 39.

United States (1) against a Corporation.

[Caption.]

Now comes the United States of America, by James H. Wilkerson, United States attorney for the northern district of Illinois, and brings this action on behalf of the United States against the Chicago, Rock Island and Pacific Railroad Company, a corporation organized and doing business under the laws of the states of Illinois and Indiana, and having an office and place of business at Blue Island in the state of Illinois; this action being brought upon suggestion of the attorney general of the United States at the request of the interstate commerce commission, and upon information furnished by said commission.

(1) The district court has jurisdiction in such case, in both law and equity, in civil suits. The Judicial Code, Sec. 24, paragraph 1; the jurisdiction here conferred extends to any suit in which the United States properly appears as plaintiff. *U. S. v. Allen*, 171 Fed. 907. Where the receiver of a national bank sues. *Murray v. Chambers*, 151 Fed. 142. And to proceedings in eminent domain. *Kohl v. U. S.*, 91 U. S. 367, 23 L. Ed. 449.

It is immaterial of course that the defendant is an individual, the language of the Judicial Code being general, "brought by the United States or by an officer thereof, etc." Section 24, paragraph 1.

But if the suit is brought by the United States against a state, Section 233 of the Judicial Code will govern and the supreme court has exclusive jurisdiction. *U. S. v. Texas*, 143 U. S. 621, 36 L. Ed. 285, in which the question of jurisdiction is considered on its merits at great length. *U. S. v. Michigan*, 190 U. S. 379, 47 L. Ed. 1103.

No. 40.

United States against a State.

ORIGINAL No. —.

OCTOBER TERM, —.

United States, Plaintiff,

vs.

State of Michigan, Defendant.

} Bill of Complaint.

To the Chief Justice and the Associated Justices of the Supreme Court of the United States, in Equity:

Philander C. Knox, attorney general of the United States of America, for and in behalf of said United States, brings this bill of complaint against the state of Michigan, and thereupon complains and says:

See note under No. 39.

No. 41.

Commencement where Corporation (1) Sues a County.

[Caption.]

The plaintiff complains of defendant and for cause of action alleges:

I. That it is now and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the state of Washington, and a citizen of said state.

II. That the defendant is now and was at all the times herein mentioned a county, created, organized and existing under and by virtue of the laws of the state of Montana, and a citizen of said state.

(1) See notes under No. 7.

FEDERAL JURISDICTION.**No. 41a.****Allegations of Federal Question (1).****[Caption.]**

Further complaining, your orator avers that the said pretended law (of the state of Arizona) is unconstitutional, null and void, because the same is repugnant to the Fourteenth Amendment to the Constitution of the United States and repugnant more particularly to that clause of said amendment which provides that no state shall deprive any person of life, liberty or property without due process of law, and particularly to that clause of said amendment which prohibits any state from denying to any person within its jurisdiction the equal protection of the laws; that said pretended law is repugnant to and in violation of the provisions of Section 1979 of the Revised Statutes of the United States, in that it pretends to justify the said defendant Truax and does colorably warrant the said defendant Truax, in depriving this complainant of the right, privilege and immunity secured to him by the constitution and laws of the United States, to-wit: the right, privilege and immunity, without discrimination as an alien, to be employed in the lawful employment of which he is now threatened to be deprived by said defendant Truax. Said pretended law is further repugnant to the Fourteenth Amendment to the Constitution of the United States in that it is in letter and spirit calculated to deprive and will deprive this complainant and all others in like situation with him, of the right freely to contract for the sale of their said labor, of the right to certain employment and of the right to life and liberty within the meaning of said Fourteenth Amendment.

Complainant avers that this suit is authorized by law to be brought by him to redress his deprivation, under the color of a law and statute of a state, of the right, privilege and immunity secured to him by the Constitution of the United States, and by the laws of the United States, within the meaning of subdivision 14, of section 24, of an act of congress of March 3, 1911, being an act to codify, modify and amend the laws relating to the judiciary.

(1) As to federal question, see the Judicial Code, Section 24, paragraph 1, in which the requirement of a jurisdictional amount is prescribed, and the following paragraphs of the same section setting forth many specific cases in which suit depends on the federal question without a requirement of amount, and in many other statutes which are special and contain generally the requirements for jurisdiction.

That the controversy involves a federal question, or arises under the federal Constitution or a federal law, must appear in the record by plaintiff's pleading. *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 48 L. Ed. 287; hence if defendant alone invokes the Constitution and laws of the United States the case does not "arise under" them. *Ibidem*.

An allegation that plaintiff's franchise was impaired by the action of a municipal council (ordinance having been set forth) and its property taken thereunder without due process of law, sets out a case arising under the Constitution and laws, and is sufficient for jurisdictional purposes. *Pac. El. Ry. Co. v. Los Angeles*, 194 U. S. 112, 48 L. Ed. 896.

Where a plaintiff brings his suit for infringement under the patent laws his case "arises under" the laws of the United States; jurisdiction can not be conferred by the answer, nor can it be lost by any denial in the answer; and if the plaintiff make a substantial claim under an Act of Congress there is jurisdiction, whether the claim ultimately be held good or bad. *The Fair v. Kohler Die Co.*, 228 U. S. 22, 57 L. Ed. 716; likewise in *Mutual Film Co. v. Industrial Commission of Ohio*, 215 Fed. 138, where a petition raises federal questions it is sufficient to confer jurisdiction although they are decided adversely or never passed upon; and in *M. C. R. R. v. Freeland*, 227 U. S. 59, 57 L. Ed. 417, although the supreme court had just previously decided that the Federal Employers' Liability Act was unconstitutional and this case was based upon said Act, the defense being the unconstitutionality thereof, and the previous decisions had been against the same complainant in other suits, yet the court considered other pertinent questions in the case.

A suit on an attachment bond given in a federal suit is a suit involving a federal question, since plaintiff is enforcing rights secured to him under the Constitution and laws of the United States. The distinction is expressed that in district court the federal question must appear in plaintiff's pleading, while in the supreme court on error from a state court it is sufficient if the question is clear on the transcript of the record filed. *Files v. Davis*, 118 Fed. 465.

A complaint sets up rights in opposition to the adjudication and the appointment of trustees in a proceeding in bankruptcy, to which complainants are not parties; they seek to have the trustees restrained from prosecuting a suit against complaints in a state court, and allege: (a) That bankruptcy proceedings were void for lack of jurisdiction. (b) That the entire proceedings were a fraud on the Bankruptcy Act, and (c) That even if the proceedings were valid the

appointment of the trustees is void; a construction of the said Act is necessary to determine the suit, hence a federal question is raised. *Hull v. Burr*, 234 U. S. 712, 58 L. Ed. 1557.

In a suit by a trustee in bankruptcy upon a bond given in a previous action to enjoin disposal of property claimed for the bankrupt estate, it was averred "your petitioner further avers that the said 1311 bales of cotton were at the time of the bankruptcy proceedings and have ever since been the property of ——— and that as trustee in bankruptcy of the said ——— your petitioner as aforesaid is the owner and has the right, title and interest in and to the said 1311 bales of cotton, and is therefore entitled to proceed against and to demand, collect and receive the principal sum of the bond filed by the said ——— and the said ——— as surety," and in an amended petition these allegations were emphasized; the sole question was as to the title to the cotton, and that did not raise a federal question, merely because a trustee in bankruptcy is suing, the court saying that "the petition must assert grounds of recovery which involve a controversy concerning such laws" (i. e. federal laws). *Lovell v. Newman*, 227 U. S. 412, 57 L. Ed. 577.

In *McGoon v. N. P. R. Co.*, 204 Fed. 998, Judge Amidon discusses the authorities bearing upon the question whether a suit "arises under" the laws of the United States at great length, holding that a suit against a carrier for damages to live stock shipped in interstate commerce "arises under" Section 20 of the Act to Regulate Commerce, inasmuch as the complaint sets forth a cause of action of which federal law is an essential ingredient. Here the answer raised only questions of fact, but the plaintiff by his own statement of the cause of action can not show whether the defendant will take issue as "to matters of fact or of law" and the plaintiff must be permitted to set out his case as it exists at the time he pleads, and this is clearly the majority holding.

Although a petition alleges that the cause of action arises under the constitution and laws of the United States, yet the court will find the mere averment insufficient; it must appear that the suit "substantially and really involves a dispute or controversy respecting the validity, construction or effect of some law of the United States upon the determination of which the result depends." *Norton v. Whiteside*, 239 U. S. 144, 60 L. Ed. 186.

In an action in ejectment it was alleged that the plaintiffs were owners in fee and entitled to the possession of the land, and defendants had forcibly taken possession and were wrongfully keeping plaintiffs out, to their damage in a sum named. Then follow the allegations that defendants are asserting ownership under a certain deed which is void because of legislation by Congress restricting alienation of lands allotted to the Choctaw and Chickasaw Indians. Held, that these latter allegations had no proper place in the petition, and were apparently intended to anticipate a defense and must be disregarded in determining whether the suit is one arising under the

federal laws; that question must be determined from what necessarily appears in plaintiff's statement of his case unaided by any allegations of anticipated defenses. *Taylor v. Anderson*, 234 U. S. 74, 58 L. Ed. 1218. Same rule in *L. & N. R. Co. v. Mottley*, 211 U. S. 149, 53 L. Ed. 126; *Boston, Montana, etc., Co. v. Montana Ore, etc., Co.*, 188 U. S. 632, 47 L. Ed. 626, and *Tennessee v. Union & Planters Bank*, 152 U. S. 454, 38 L. Ed. 511.

A frivolous federal question is found in *Deming v. Carlisle Packing Co.*, 226 U. S. 102, 57 L. Ed. 140, such question not conferring federal jurisdiction.

An allegation "that the said defendants committed the trespass hereinbefore complained of against the said plaintiff under color of the authority of an Act of the General Assembly of Virginia which is in the words and figures following, to-wit: (not copied), which Act is repugnant to the constitution of the United States and invalid for the following reasons, to-wit: In that it deprives a person of his liberty without due process of law, punishes a citizen without trial, without a proper warrant for his arrest and without a trial by jury * * * ." This allegation was attacked by demurrer as anticipating a defense, but the objection was not sustained inasmuch as the entire allegation was needed to state a case. *Cox v. Gilmer*, 88 Fed. 343. Further as illustrative of the anticipatory allegation, see *Lancaster v. Kathleen Oil Co.*, 241 U. S. 551, 60 L. Ed. 1161, where the suit was brought to recover possession of land leased and for an injunction restraining defendant from asserting any rights under its lease and from interfering with the rights of plaintiff under plaintiff's lease, and the further allegation was made that defendants' lease was void because of an Act of Congress providing for the descent of lands allotted to Indians, free from restrictions against leasing, and plaintiff's lease had been so obtained earlier than defendants', and that if the Act contained restrictions against leasing it was unconstitutional; this was held non-anticipatory, merely a statement of plaintiff's case, and embodying a federal question.

In the case of *St. Anthony's Church v. Penna. R. Co.*, 237 U. S. 575, 59 L. Ed. 1119, the operation of the railroad trains cast soot, black smoke, cinders and noxious gases upon the adjoining property of complainant, and it was averred that "said acts of defendant have taken from your orator property consisting of the easement of light and air to which your orator is legally entitled, and deprives it of the same without due process of law and without just compensation, or any compensation whatever, and that such acts of defendant * * * have been and now are, in violation of the provisions of the constitution of the United States;" the court ruled that they were not averments "expressly and clearly made" as required by the rule laid down in *Hull v. Burr*, 234 U. S. 712, 720.

A suit on a state statute does not impliedly and necessarily raise the question whether such statute is violative of the federal constitution. *Missouri v. C. & A. Ry.*, 216 Fed. 562.

Contracts for street paving were properly awarded to plaintiff and subsequently the city council set aside the awards, and suit for specific performances was brought, in which it was alleged that plaintiff would be deprived of large profits to accrue from the contract, and that the action of the city "is in violation of the constitution of the United States and is an attempt to deprive the plaintiff of property without due process of law," urging that plaintiff had a vested interest in the contract; but the court held that the allegation did not confer federal jurisdiction, for breach of contract is the essence of the complaint, and breach is not taking property without due process of law nor is the obligation of a contract thereby impaired in the sense of the federal constitution. *McCormick v. Oklahoma City*, 236 U. S. 657, 59 L. Ed. 771.

Where a complaint against a city for fixing unreasonable rates for a public utility avers that "no power to regulate the rates charged by your orator or other telephone companies has been granted by the constitution or laws of the state of Kentucky, or in any other way, and the enactment of the said ordinance is void and an assumption of power and authority on the part of the said common council unwarranted and unfounded," no federal question was involved for the state had not acted; on the contrary the state by the terms of the complaint was exonerated. *City of Louisville v. Cumberland Tel. Co.*, 155 Fed. 725, 84 C. C. A. 151. To same effect is *Mayor, etc., of Savannah v. Holst*, 132 Fed. 901, 65 C. C. A. 449, and *Barney v. City of New York*, 193 U. S. 430, 48 L. Ed. 737, where it appeared that the city was acting in opposition to plain prohibitions of the state law. But where it was alleged that an ordinance which undertook to reduce the rates of street car fares below the rate contained in the contract embodied in the franchise, violated the provisions of Section 1 of Article X of the constitution of the United States, since it impaired the obligation of contract, a federal question was stated, and any inquiry as to whether the state has authorized the wrong is irrelevant. *Portland Ry., Light & Power Co. v. City of Portland*, 210 Fed. 667; and see *Home Tel. Co. v. Los Angeles*, 227 U. S. 278, 57 L. Ed. 510, distinguishing *Barney v. New York*, above. On the general proposition of lowering rates of a public utility as involving a violation of federal law, see also *City of Owensboro v. Cumberland Tel. Co.*, 174 Fed. 739, 99 C. C. A. 1.

In a suit to foreclose a mortgage of the Texas & Pacific Railway Company, it was alleged that defendant is a corporation created by and existing under the laws of the United States, has its principal place of business and its principal operating and general offices in the northern district of Texas and is a resident of that district and an inhabitant thereof; that the act of congress creating said corporation provides that said company by that name shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States; that said

company acting in pursuance of the authority conferred by said act of congress executed and delivered the mortgage in suit; that said mortgage was duly filed and recorded in the Department of the Interior pursuant to said act of congress; that the said company has defaulted in the performance of the terms and conditions of the said mortgage; that this suit involves the requisite jurisdictional amount and arises under the constitution and laws of the United States. Held that although mere federal incorporation conferred federal jurisdiction as frequently decided, yet the act of January 28, 1915, 38 Stat. L., 803, had prescribed a different rule in the case of railroads so incorporated; further, the provisions of the creating act conferring the right to sue, etc., in any court within the United States, confers no particular jurisdiction upon federal courts, and so on ground of a federal question there was no jurisdiction to entertain this suit. Further, the court decided the very interesting question whether a corporation created by congress may be brought into a federal court on the ground of diversity of citizenship, holding that such corporation can not be a citizen of any state and answering the question in the negative. *Bankers Trust Co. v. Texas & Pacific Railway Co.*, 241 U. S. 295, 60 L. Ed. 1010.

In a suit to enjoin a labor union plaintiff avers that it is engaged in the manufacture of munitions for the United States from materials furnished thereby, in a building equipped and erected thereby, under a contract requiring preference for such work, and all supplies shipped in and products shipped out move in interstate commerce for government purposes, and that large supplies of food for men engaged in such work have been provided by the government, all to the end that munitions in large quantities may be furnished quickly, as contemplated in the acts of congress in that behalf; held, a federal question is involved on the theory that plaintiff is a government agency to as great an extent as though it had been incorporated under and in pursuance of federal laws. The court expressly declined to base federal jurisdiction on the Sherman Anti-trust Law, or the Pure Food Act, or the Sabotage Act or the Sedition Act, as urged by plaintiff, but placed it on a "much larger and broader ground" as above stated. *Wagner Electric Mfg. Co. v. District Lodge, etc.*, 252 Fed. 597.

Liberty Loan Bonds are by the tenor of the acts providing for their emission exempt from taxation, and a suit against a state taxing officer to prevent their taxation, on the ground that they are owned by a bank and hence should be taxed as "value of shares owned by the stockholders," involves a federal question. *Iowa L. & T. Co. v. Fairweather*, 252 Fed. 605.

And generally on this question, see the notes in *Bailey v. Mosher*, 11 C. C. A. 308; *Montana, etc., Co. v. Boston, etc.*, 35 C. C. A. 7; *Earnheart v. Switzler*, 105 C. C. A. 262.

No. 41b.**Allegations of Amount Involved (1).****[Caption.]**

Plaintiff further alleges that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars (\$3000.00).

(1) This allegation is frequently not made in a formal manner, but the requisite jurisdictional amount must be made to appear in the plaintiff's pleading. The Judicial Code, section 24, paragraph 1, provides for the general jurisdiction of the district court, and requires that more than three thousand dollars exclusive of interest and costs be involved where the jurisdiction is predicated upon (a) diversity of citizenship or (b) the presence of a federal question. Therefore in order to make a complete showing of jurisdiction in such cases the requisite amount must be involved and alleged.

Parties may not waive the amount in controversy. *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 44 L. Ed. 374; *Pepper v. Rogers*, 128 Fed. 987.

In a suit on two promissory notes of \$1,000 each in which attorney's fees were stipulated, more than the minimum jurisdictional amount was found to be involved (under earlier statute). 231 U. S. 541.

The amount must appear by distinct averment upon the face of the petition or otherwise in the proofs. *Pinel v. Pinel*, 240 U. S. 594, 60 L. Ed. 817; in this case two children alleging statutory intestacy as to each, unite in a suit averring "complainant, Herman Pinel, is entitled to an undivided one-eighth interest, and complainant, Sarah Slyfield, to an undivided two-eighths interest, or in all both complainants together to an undivided three-eighths interest in the aforesaid property, which said interests are of the value of \$4,500 and upwards, over and above all incumbrances," and they ask that their title to that be established. But the court found that the interests were separate and distinct and each must equal the jurisdictional amount, and under the facts this did not appear. In *Shewalter v. Lexington*, 143 Fed. 161, it was alleged "that the matter in dispute, which is the title to certain real estate, exceeds the sum or value of \$2,000, which real estate is situated within the territorial jurisdiction of this court, and by these proceedings your orator seeks to quiet the title to said real estate, remove a cloud from the title thereof, and to decree the title to be in your orator, as against the defendant herein, who, as hereinafter alleged more fully, is setting up a claim and lien to the said real estate, and is threatening to sell the same and acquire the title thereto." Here the cloud existed in the form of a street improvement certificate of less than two thousand dollars, and the court held that that was the amount involved and not the value of the land.

Where a one-third interest in land was claimed, the allegation was "complainants are informed and believe that the whole of said lands, situated as they are, adjoining an incorporated town, and improved as they are, are worth \$12,000, and the amount demanded by them herein is more than two thousand dollars;" this was held argumentative, leaving the court to make a calculation, and hence insufficient. *Dupree v. Leggette*, 140 Fed. 776.

In a case where jitney auto operators were required by statute to give an indemnity bond, one of them sued on behalf of himself and about three hundred others in a similar situation, and alleged that "the amount involved is greater than \$2,000," but this was held an insufficient allegation, because the interests affected were separate and the damages suffered could not be aggregated. *Nolen v. Reichman*, 225 Fed. 812. In a suit to foreclose a mortgage securing a note, plaintiff alleged that he "advanced to defendant the sum of \$2,000 and advanced to pay the fee for recording said deed the sum of \$2.25, for which defendant is liable to him," inasmuch as the indebtedness of \$2.25 was expressed as a conclusion of law and no facts were averred showing an agreement to reimburse, the amount was not sufficiently averred. *Less v. English*, 85 Fed. 471.

"Defendants unlawfully entered upon said lands and dispossessed plaintiff thereof, and have since that date unlawfully withheld from the plaintiff the possession thereof, to his damage \$2,000; that the value of said land is \$5,000," and amending, it was averred that "all of said defendants jointly have taken possession of said land, that the entire land is the subject of controversy as between plaintiff and each and all of said defendants," this amended petition shows a joint claim against the defendants and on its face shows a controversy involving \$7,000, and is sufficient. *Smithers v. Smith*, 204 U. S. 632, 51 L. Ed. 656.

In an action against an initial carrier for loss on the line of a connecting carrier, the petition merely set forth the shipment and loss and stated that the wool shipped was delivered to the carrier in Iowa to a destination in Pennsylvania, naming places, but did not state that the action was based on the provisions of the Carmack amendment, although the statement of facts clearly showed that the shipment was made in interstate commerce; the value of the wool was stated to be \$1,500. Since the value involved here was insufficient to give jurisdiction, in its petition to remove the plaintiff averred that the case arose under the act to regulate interstate commerce, section 20, but the court held that that fact did not appear from the initial petition, and remanded the case to the state court. *Adams v. Chicago & G. W. Ry. Co.*, 210 Fed. 362. But in *Hartford Fire Ins. Co. v. K. C., M. & O. Ry. Co.*, 251 Fed. 332, under a very similar statement of facts it was held that federal jurisdiction was shown, since the various acts of congress regulating interstate commerce govern an interstate shipment.

In *Barry v. Edmunds*, 116 U. S. 550, 29 L. Ed. 729, it was alleged "that the defendant, so knowing the law, levied on and seized the plaintiff's property in contempt of and in defiance of the law, and with the deliberate intention of defying the constitution of the United States and the judicial power thereof; that in contempt and defiance thereof the defendant had made public advertisement in many parts of the county of Fauquier that he had levied on and seized plaintiff's property because plaintiff was delinquent as a taxpayer and that he would sell the same at public auction on a day named at the court house in said county; that he did expose and sell, etc., in the presence of many of the plaintiff's neighbors and friends and fellow citizens and countrymen, and publicly proclaimed that the plaintiff was a defaulter and delinquent taxpayer. That by reason thereof plaintiff's credit and standing were greatly injured, and his feelings cruelly wounded and mortified. That while the said defendant was unlawfully and wrongfully on plaintiff's premises as aforesaid, he did many other wrongs and injuries to the plaintiff of a malicious nature, by all of which wrongs and injuries the plaintiff has been injured and damaged \$6,000 and therefore he brings this suit." The value of the property taken in this case was alleged to be one horse worth \$125, and the court held that exemplary damages were recoverable if the *ad damnum* were properly laid, and here the amount in controversy appeared sufficient for federal jurisdiction.

To make the requisite amount a counterclaim may be added to the plaintiff's claim, if under the laws of the state a counterclaim must be set up or be barred in any subsequent suit. *Lee v. Continental Ins. Co.*, 74 Fed. 424, and contrarywise if the state law does not bar it. *McKown v. Kansas, etc., Co.*, 105 Fed. 657, discussing the cases pro and con on this proposition. In a late case, *Central Commercial Co. v. Jones-Dusenberry Co.*, 251 Fed. 13, 163 C. C. A. 263, held that where defendant pleaded a set-off it may be added to plaintiff's claim to determine amount involved for jurisdictional purposes, making no mention of the law of the state, and citing authorities. The position of the United States Supreme Court is probably indicated in its discussion of the legal effect of asserting a counterclaim in *Merchants Heat, etc., Co. v. Clow*, 204 U. S. 286, 51 L. Ed. 288, although not on this point.

On motion to dismiss for lack of requisite amount the affidavit filed in support of the motion setting out values may be taken to supplement the complaint and answer. *Federal Wall Paper Co. v. Kempner*, 244 Fed. 240.

In suit against a water company to restrain proposed schedule of rates as unreasonable and violative of franchise, the defendant petitioned for removal thus: "That said suit is of a civil nature, wherein is involved the question of the right of your petitioner to establish and maintain in the operation of its plant a metered service and to charge a meter rate therefor, and that the amount and value in con-

trover in the suit exceeds, exclusive of interest and costs, \$3,000." The motion to remand denied allegation of amount but no proofs were offered and court held that jurisdictional amount was shown. *Martin v. City Water Company*, 197 Fed. 462.

A declaration contains a special count upon a policy of insurance of \$2,250 for specific property, alleges a total loss and concludes to the damage of the plaintiff, \$2,000, "for the recovery of which with just costs the plaintiff brings this suit;" also the common money counts were included claiming damage, \$2,000, "for the recovery of which, etc.," as above; held jurisdictional amount sufficiently shown. *Platt v. Phoenix Assurance Company*, 37 Fed. 730.

Three complainants, on behalf of themselves and many others similarly situated, each holding an insurance policy for \$3,000, all issued at different dates, having survived the term of payment became entitled to share in a fund created by excess premiums under the contract, and suing, they allege that the fund was being diverted to purposes inconsistent with their rights. Defendant objected, inter alia, because of insufficient jurisdictional amount, inasmuch as each complainant's interest is separate under the contract, and although they may sue as a class yet they have several interests and aggregating can not be permitted to show jurisdictional amount, and so held. *Eberhard v. N. W. Mut. L. Ins. Co.*, 241 Fed. 353, 154 C. C. A. 233; in this case on a previous appeal, the mandate had required complainants to set out amount of their interest in the fund, but they did not do so, and in such case the court must assume the interest to be less than the jurisdictional amount.

An allegation "the act of the defendant constitutes an invasion of complainant's business privileges to his loss and irreparable injury of over \$1,000," no objection was made in the trial court, and now on appeal the court holds that the matter is foreclosed saying, "And there is authority for our holding that we may infer that unliquidated damages alleged to be over \$1,000 are not less than \$2,000 exclusive of interest and costs, because of the conduct of the parties, citing *Giles v. Harris*, 189 U. S. 475, 485. *Williams v. Molther*, 198 Fed. 460, 117 C. C. A. 220.

"Wherefore the plaintiff prays judgment against the said defendant for the said sum of \$530 with interest thereon from the respective dates of the notes which are now past due, together with the further sum of \$1,664.04, which will become due and payable on the 1st and 8th days of December, 1891 (the following month), with interest thereon from the respective dates of said notes, and the plaintiff prays that it recover a judgment for all of its costs paid out and expended in this action, and for all reasonable costs of collection of the above mentioned indebtedness (to become due) and for attorney's fees in the sum of \$250," this expressed the required jurisdictional amount although it was not all due at the date of the suit. *Schunk v. Moline Co.*, 147 U. S. 500, 37 L. Ed. 255.

Suit by assignee of claims aggregating \$2,336.64, no one of which equalled the jurisdictional amount, and court held that they could be aggregated. *Tennent-Stribling Shoe Co. v. Roper*, 94 Fed. 739, 36 C. C. A. 455.

In *O. R. and N. Co. v. Shell*, 143 Fed. 1004, it is said that where the allegation of amount in the petition is put in issue by the answer, it must be sustained by proof or it fails.

Generally, on this subject, see the notes in *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459; *Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 288.

SUITS AT LAW*

DECLARATIONS AND PETITIONS

* In civil suits at law in the district courts of the United States the pleadings conform as near as may be to the pleadings in like causes in the courts of record in the states within which such federal court is held, except in those particulars which are regulated by federal statutes.

Section 914 of the Revised Statutes of the United States provides that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

This provision applies generally to civil actions at law, *Robertson v. Perkins*, 129 U. S. 233; *U. S. v. Parker*, 120 U. S. 94; *R. R. Co. v. Horst*, 93 U. S. 291, but does not affect the personal conduct or administration of the judge in the discharge of his separate functions, as with respect to written instructions to a jury, or what papers may be sent to the jury room, or his discretion in granting a new trial; *Nudd v. Burrows*, 91 U. S. 441-2; *R. R. Co. v. Horst*, 93 U. S. 300; or the practice in the supreme court or the circuit courts of appeals, *Andes v. Slauson*, 130 U. S. 438; *In re Chateaugay Iron Co.*, 128 U. S. 553; *Ky. Life, etc., Co. v. Hamilton*, 63 Fed. Rep. 93, 11 C. C. A. 47; *Lincoln*

v. Power, 151 U. S. 442; *Western Union Telegraph Co. v. Aldridge*, 219 Fed. 836, 135 C. C. A. 506; or where there is a regulation by congress, *Ex parte Fisk*, 113 U. S. 713; *Coffey v. U. S.*, 117 U. S. 235; *Lancaster v. Keeler*, 123 U. S. 376; or where the form of writ of summons is prescribed by the district court, even where it differs from the state prescribed form, *Shepard v. Adams*, 168 U. S. 618, 42 L. Ed. 602; or to empower the district court to set aside its judgment after the term in which it was rendered, although the state statute permits such setting aside at any time within one year, *Wellman v. Bethea*, 213 Fed. 367; or where to follow the state statute would defeat or incumber the administration of the law under federal statutes, *Buckeye Powder Company v. E. I. DuPont de Nemours Powder Company*, 196 Fed. 514.

In *Berry v. Mobile and Ohio R. R. Co.*, 228 Fed. 395, it is said that the conformity act applies only in the absence of direct legislation upon a subject by congress.

A summary statement of the application of the conformity act is found in *Hein v. Westinghouse Air Brake Co.*, 168 Fed. 766, at page 769, as follows: "Under the statute and decisions the following rules may be stated: The conformity act (Rev. St., Section 914) provides that in cases at law the practice, pleadings and forms shall conform, as near as may be, to the practice, pleadings and forms in like causes in the state courts. (1) The practice must conform, except as to matters covered by congressional legislation, matters of jurisdiction, substituted service of process, charging juries, other matters relating to the personal administration of the judge, joinder of legal and equitable remedies, actions in rem, etc. (2) The federal courts may by standing rule, change subordinate provisions which they deem unsuited to their procedure. (3) In their discretion they may reject collateral or subordinate provisions of the state practice, pleadings or forms, which tend to obstruct the administration of justice. This they may do in a particular case, presenting unusual features, without making any standing rule. They can not reject the local system as a whole, or in any substantial part; but they may dispense with matters of technical form, not affecting substantial rights or operating to the prejudice of a party. They can not change the local system designed to produce an issue of law or fact, but they are not bound to slavishly follow subordinate technical requirements of form, when justice will be subserved by departing from them."

In preparing pleadings the practitioner must consult the forms required by the state rules of pleading. The following forms are precedents for use in states where codes have been adopted as well as where common law still exists.

The attorney will also keep in mind the rules of practice in the United States courts; see *Dewhurst's Rules of Practice in the United States Courts*, 2d Ed., Annotated.

No. 42.**Declaration against Railway Company for Damages for Personal Injuries from Collision of Trains.**

[Caption.]

Plaintiff, a citizen of the state of —, sues the defendant, The C. & D. Railroad Company, a corporation organized under the laws of the state of —, and a citizen of said state, and an inhabitant of the —, district of —, for — dollars damages, for this: That on the — day of — plaintiff was on a train, upon defendant's railroad, going from — to —. Both on the line of said railroad, and while so upon said train, and going from said — station to — station as aforesaid, the same at or near the city of —, collided with another train upon said road, moving from the opposite direction; and that plaintiff in said collision and by reason thereof sustained great and permanent bodily injuries, and was put to much and long physical and mental suffering, and great expense. Plaintiff avers that the train upon which he was riding, and the train in collision therewith, as aforesaid, were both then and there being operated by the defendant, and were under its control and management; that plaintiff was rightfully upon said train at the time of said collision, and that said collision was caused by, and resulted from the unlawful, wrongful and negligent acts of defendant, and plaintiff was thereby injured as above stated, without fault upon his part, therefore he sues and asks a trial by jury.

R. X.,

[Verification.]

Attorney for Plaintiff.

No. 43.**Petition against R. R. Co. for Personal Injuries to an Employee (1).**

[Caption.]

Now comes A. B., a citizen of the state of —, the plaintiff herein, and for his cause of action against the said defendant,

the C. D. Ry. Co., says, that the defendant is a railroad corporation organized under the laws of the state of —, and controlling and operating a railroad within the state of — and within the state of —.

At the time of receiving the injuries hereinafter complained of, the plaintiff was, and for some time prior thereto, had been, in the employ of the defendant as a brakeman upon its freight trains. On or about the — day of —, the plaintiff, under the instructions and orders of the defendant through its representatives, was engaged in the performance of his duties as such brakeman upon one of the defendant's freight trains running over the portion of the defendant's road lying between — and —, in the state of —. Upon the arrival of the said train at Sanford, a station upon the defendant's said line of road, it became and was the plaintiff's duty, as such brakeman, under the orders of the conductor of the said freight train, to assist the other persons engaged in operating said train in removing from defendant's switch, or side-track, at said station, certain cars loaded with wood, and adding them to the said freight train then standing upon the defendant's main track. Plaintiff says that the locomotive attached to said train having backed down upon said side-track, and couplings having been made for the purpose of drawing out the said cars of wood, which were separated from said locomotive by a box car, so-called, the said locomotive and cars then moved forward toward the defendant's main track, and as the same were approaching the said main track, the plaintiff, in the discharge of his said duties, was required to and did descend from the top of the said box car, on which he had taken his position for the purpose of giving such signals as might be necessary in moving said cars; that as he was descending on the rear end of the said box car on the rungs, or steps, provided for such purpose, and as the said cars were passing a pile of wood, which had been placed close to the said side-track, a portion of the plaintiff's body having ex-

tended slightly beyond the outer edge of the said box car, the plaintiff was suddenly struck by a certain piece or pieces of the wood so piled along said track, and thereby thrown violently to the ground, dragged and thrown against the said track, and under the said cars of wood, thereby sustaining severe injuries as hereinafter more specifically set forth.

And plaintiff further says that said wood had been carelessly and negligently piled upon the said premises of the defendant so closely to the defendant's said side-track that there was constant danger to brakemen, engaged in switching cars upon such track, of being injured thereby; that it had been placed in such position by the permission of the defendant several months prior to the time of the plaintiff's receiving his said injuries; that the defendant had notice and knowledge at the time such wood was piled upon its said premises, and shortly thereafter, that the same was carelessly and negligently piled so close to the defendant's said side-track that the defendant's employees, discharging duties similar to those devolving upon the plaintiff, were in constant danger of being thrown from the cars moving along the said side-track; that at all the times above mentioned the premises occupied by the said pile of wood, as well as the said side-track, cars and train, were under the entire control and supervision of the said defendant; that, notwithstanding such facts, such premises were by the defendant permitted to be and continue in such dangerous condition; that at and prior to the time of receiving the injuries herein mentioned, plaintiff had no knowledge whatsoever of the dangerous and unsafe condition of the said premises, or of the fact that the said wood, or any part thereof, had been placed so near the said side-track that the plaintiff in the discharge of any of his duties as such brakeman, would be in danger of coming in contact with any portion of it; that the said injuries were received by the defendant at a time when, by reason of darkness and a prevailing storm, he was unable to see the danger to which he was exposed; that the

same were received without any negligence on his part, and were caused solely through the carelessness and negligence of the defendant in the premises.

Plaintiff further says, that when he was thrown as aforesaid under the said cars, and against said track, the wheels of the said cars of wood passed over his right arm, near the shoulder, so fracturing and injuring the same that it became necessary to amputate said arm close to the shoulder joint; that at the same time plaintiff's head and face were cut and bruised in several places and his right leg severely cut, bruised and lacerated in many places, his back strained and wrenched, suffering thereafter from all such injuries great bodily and mental pain; that, as a consequence of such injuries, plaintiff was confined and treated at a hospital for a period of five weeks, incurring thereby large expense for necessary attendance and treatment; that, on account of his said injuries, he has been incapacitated from work; that such injuries are permanent in their nature, and that by reason of the premises the plaintiff has sustained damages in the sum of \$20,000.00.

Wherefore, plaintiff prays for judgment against the defendant in the sum of twenty thousand dollars.

R. X.,
Attorney for Plaintiff.

[*Verification.*]

(1) Taken from *Flint & Pere Marquette R. Co. vs. McPherson*, 105 Fed. Rep. 210.

No. 44.

Petition for Damages for Personal Injury (1).

[*Caption.*]

Plaintiff is a citizen and resident of the state of ——. Defendant is, and at all times hereafter stated, was, a corporation created by and organized and existing under the laws of the state of ——, and a citizen and resident of said state, and an inhabitant of the —— district of ——.

On the — day of —, the city of —, in the state of —, a municipal corporation of said state, did, by and through its city council, by ordinance duly enacted, grant to The M. Railroad Company and the I. Railroad Company, both corporations created by and organized under the laws of said state, and owning and operating railroads in said city, permission and right to lay down, use and operate with cars and locomotive engines, railway tracks upon and in Water street, Front street and the Public Landing of said city from Smith street in the western part of said city to the depot of the said The M. Railroad Company in the eastern part of said city. Said Water street, Front street and said Public Landing were then and there, have ever since been, and still are, public highways, and public commons of said city of — and state of —. The said corporations to whom said grant was made, did under and in pursuance thereof lay down railroad tracks upon and in said Water street, Front street and said Public Landing extending from Smith street to the depot of said The M. Railroad Company, and did use and operate the same with locomotive engines and cars; and thereafter, and long before the committing of the wrong hereinafter set out, said The M. Railroad Company did lease, let and demise its said railway and all appurtenances, including said tracks laid as aforesaid upon and in said public highways and public commons, to the defendant The P. Railway Company, for a term yet unexpired; and thereafter, and at all times hereinafter stated, and until the present time, the defendant has possessed, used and operated, and does now possess, use and operate, with locomotive engines and cars, said railway including said tracks laid as aforesaid upon and in said public highways, and public commons, under and in virtue of the ordinance aforesaid and not otherwise. Said ordinance, under and in virtue of which said tracks were laid and were and are used and operated as aforesaid upon and in said public highways and public commons, provided among other things, as follows:

"The hours which said track may be used for the transmission of freight and passengers shall be as follows: From the 1st of April, to the 1st of October, from 8 o'clock p. m. to 6 o'clock a. m., and from the 1st of October to the 1st of April from 7 o'clock p. m. to 6 o'clock a. m., and no cars shall be drawn on the track at any other hours. The companies to have the privilege of using the steam or horse power, as they may in their judgment think best; subject, however, to the approval of the city council. But in no case shall cars be drawn through the city at a greater speed than six miles per hour."

Said ordinance is, and ever since the date of its passage aforesaid has been, unrepealed, unmodified and in full force and effect.

On the — day of —, at the hour of six o'clock and fifty minutes a. m., H. H. was upon said public highways and public commons, viz.: said public landing and said Water street, between Smith street and the depot of said The M. Railroad Company, and between Main and Sycamore streets of said city — with a heavily loaded wagon drawn by two horses. Said H. H. was then and there the driver of said horses and was in charge, possession and control of them and said wagon, he being then thereunto employed and hired, for reward, as their servant, by the owners thereof. And then and there, while said H. H. was so upon said public highways and public commons with said horses and wagon, the defendant, at the hour of six o'clock and fifty minutes a. m., of said day, the — day of —, did wrongfully, unlawfully and with gross and wanton negligence drive, run and operate a locomotive engine and train of freight cars upon, over and in said public highways and public commons, viz.: said Public Landing and Water street, between said Smith street and said depot of said The M. Railroad Company, and upon and over the said track there aforesaid laid and maintained under and in virtue of said ordinance. Said locomotive engine and cars

were so driven, run and operated by defendant with much noise and at a greater rate of speed than six miles per hour. And then and there, by said wrongful, unlawful and negligent driving, running and operating of said locomotive engine and cars, said horses drawing said wagon were much frightened, and were caused to become unmanageable, and were caused to run away with said wagon, and were caused to knock down and throw violently to the ground said H. H., and were caused to run and draw said heavily loaded wagon to which they were attached, upon and over the body of said H. H., whereby said H. H. was so injured in his person that he soon thereafter died thereof.

Said H. H. left one Elizabeth H., his widow, surviving him, and also John H. aged 27 years, Richard H. aged 24 years, William H. aged 19 years, Louis H. aged 16 years, Lillie A. H. aged 10 years and Ella H. aged 7 years, his only children and next of kin, which widow and four last-named children were dependent on him for support, and said four last-named children were dependent on him for education also, and all of whom have been otherwise injured by the death of said H. H. to the amount of ten thousand (\$10,000.00) dollars.

Thereafter, on the — day of —, plaintiff was in and by the county court of — county, in the state of —, the county and state wherein said H. H. was domiciled, and of which he was a citizen and resident at the time of his death — duly appointed, and he did on that day duly qualify, as administrator of the estate of said decedent. Under and by the laws of the state of —, said county court had jurisdiction, power and authority to grant administration upon the estate of deceased persons.

Wherefore plaintiff as such administrator, prays judgment against defendant for ten thousand (\$10,000.00) dollars and costs.

R. X.,

Attorney for Plaintiff.

(1) Taken from *P. C. C. & St. L. R. Co. vs. Hood*, 94 Fed. Rep., 618, 36 C. C. A. 423.

No. 45.**Verification by Corporation Officer.**

State of New York, }
 County of New York, } ss.:
 City of New York, }

A. D. Chambers, being duly sworn, deposes and says: That he is the secretary and treasurer of the above named petitioner; The Delaware, Lackawanna and Western Railroad Company; that he has read the foregoing petition and that it is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

That the reason why this petition is not verified by the petitioner, is that it is a foreign corporation, and that deponent is an officer thereof as aforesaid; that the sources of deponent's knowledge and the grounds of his belief as to all the matters therein not stated to be on knowledge, are statements and reports received from officers and agents of defendant, having in charge the matters referred to in said petition.

A. D. CHAMBERS.

Subscribed and sworn to before me this 21st day of May, 1913.

[SEAL.]

Joseph Fiell,
 Notary Public, No. 1077,
 New York County.

No. 46.**Verification of Complaint by Testamentary Guardian.**

[*Caption and Venue.*]

Garland A. Thomason being duly sworn, says that he has read the foregoing complaint, that the same is true to the knowledge of affiant, except as to those matters stated therein on information and belief, and as to those matters, he believes it to be true.

Affiant further swears that he is the testamentary guardian, as set forth in the complaint, and the authorized agent of the plaintiff; that the material allegations of the complaint are all within the personal knowledge of affiant; that affiant was present at the trial in the United States court at Ashville, of the case of Ernest Thomason v. The Southern Railway Company, in which all of the facts of plaintiff's injury as set forth in the complaint, were testified to by the witnesses on said trial; and that affiant of his own knowledge is acquainted with most of the facts and circumstances as to the plaintiff's injury as described in the said complaint; that this complaint is not verified by the plaintiff, Ernest Thomason, for the reason that he is a minor and now in a hospital in the state of Pennsylvania, where he is undergoing treatment on account of the injury described in the complaint.

GARLAND A. THOMASON.

No. 47.

Declaration in Tort for Carrier's Negligence—in Massachusetts.

[Caption.]

COUNT 1. TORT: And the plaintiff says that she is a citizen of Chevy Chase in the county of Montgomery, and the state of Maryland, and that the defendant is a corporation and a citizen of Boston in the county of Suffolk, and commonwealth of Massachusetts.

And the plaintiff says that the defendant is a corporation duly organized under the laws of the commonwealth of Massachusetts, operating and controlling an electric railway in and about the city of Boston as a common carrier of passengers, and was acting as such at all times hereinafter set forth: that on or about the twenty-third day of August, A. D. 1914, the plaintiff was accepted by the defendant company, by its agents, servants and employes, as a passenger for hire at the Park Street station of the Boston subway so called, controlled and maintained by said defendant

company in the operation of said railway; that on said day the plaintiff entered upon the platform of the said station to wait for a southbound car, and that the car which the plaintiff desired to board entered said station and came to a stop opposite a stopping place; that the plaintiff walked across the platform towards the said car, but when close to it and before she could get aboard the same, the defendant company, by its agents, servants and employes, negligently, carelessly and without right restarted the said car and moved it along said platform to another stopping place where it again came to a stop; that the plaintiff followed along the platform close to said car to the place where said car had again stopped, intending to board it, but the defendant company, by its agents, servants and employes, being under a duty to transport the plaintiff safely over its line, and to provide safe and suitable means of ingress to said car, wholly regardless of said duty to said plaintiff in that behalf, and in violation thereof, negligently, carelessly and without right stopped its car on a curve at said last stopping place in such a position that there was a wide, unsafe and improper space between the edge of the platform at said station and the running board of said car at the point which the plaintiff was about to get aboard; that the plaintiff was at said time unfamiliar with said station, and by reason of the stopping and negligent restarting of said car before making it stop on the curve at said station as aforesaid, the plaintiff was induced to go along said platform to said stopping place on said curve, and in attempting to board the said car, because of said inducement and because of the fact that the defendant company, by its agents, servants and employes so negligently left unprotected said space by stopping said car in said position on said curve, and because of lack of warning by said defendant company, by its agents, servants and employes as aforesaid, the plaintiff fell into said space; that the plaintiff was at all times aforesaid in the exercise of due care and diligence, but that by reason of the negligence of the defendant company, by its agents, servants and employes as aforesaid, she sustained severe and permanent injuries to her hip, leg, back and body, and has suffered, and still continues to suffer great pain and anguish in body and mind and has incurred great expense for medical treatment.

Wherefore the plaintiff prays damages against this defendant in the sum of fifteen thousand dollars (\$15,000) as set forth in her writ.

COUNT 2. TORT: And the plaintiff says that she is a citizen of Chevy Chase in the county of Montgomery, and state of Maryland, and that the defendant is a corporation and a citizen of Boston, county of Suffolk, and commonwealth of Massachusetts.

And the plaintiff says that the defendant is a corporation duly organized under the laws of the commonwealth of Massachusetts, operating and controlling an electric railway in and about the city of Boston as a common carrier of passengers, and was acting as such at all times hereinafter set forth; that on or about the twenty-third day of August, A. D. 1914, the plaintiff was accepted by the defendant company, by its agents, servants and employes, as a passenger for hire at the Park Street station of the Boston subway so-called, controlled and maintained by said defendant company in the operation of said railway; that the said defendant company used the said station at all times as a stopping place for a greater number of cars than the platform was built to accommodate, so that the first stopping place of said cars at said station was then and there regularly located on a curve in the track and platform of said station; that on said day the plaintiff entered upon said platform to wait for a southbound car; that the car which the plaintiff desired to board entered into the said station and came to a stop opposite a stopping place; that the plaintiff walked across the platform towards said car and was close to it, but before she could get aboard the same the defendant company, by its agents, servants and employes, negligently, carelessly and without right restarted the said car and moved it along said platform to said stopping place known as Number one (1), where it again came to a stop; that the plaintiff followed along the platform to where the car had again stopped, intending to board it, but the defendant company, by its agents, servants and employes, being under a duty to transport the plaintiff safely over its line, and to provide safe and suitable means of ingress to its cars, but wholly regardless of said duty to the said plaintiff on that behalf, and in violation thereof, negligently, carelessly and without right

stopped its car on said curve at said stopping place numbered one (1) in such a position that there was a wide, unsafe and improper space between the edge of the platform at said station and running board of said car at the point where the plaintiff was about to get aboard the same; that the plaintiff was a stranger in Boston and unfamiliar with said station, and by reason of the stopping and negligent restarting of said car before stopping on said curve on place Number one (1) aforesaid, the plaintiff was induced to go along the said platform to said stopping place on said curve and in attempting to board said car, because of said inducement and on account of the fact that the defendant so negligently left such space unprotected by stopping said car in said position on said curve and without warning to the plaintiff by the defendant company, its agents, servants and employes aforesaid, the said plaintiff fell into said space whereby the plaintiff sustained severe injuries to her hip, leg, back and body, and has suffered and still continues to suffer great pain and anguish in body and mind and has incurred great expense for medical treatment.

Wherefore, the plaintiff prays damages against the said defendant in the sum of fifteen thousand dollars (\$15,000) as set forth in her writ.

Counts one (1) and two (2) are for one and the same cause of action.

By her Attorneys,
A. B.,
C. D.

No. 48.**Declaration by a Minor by His next Friend for Damages for Personal Injury.**

[Caption.]

First Count: The plaintiff, who is a minor, a citizen of the —, state —, sues by his next friend, S. B., who is a widow, and unmarried, and a citizen of the —, state of —, sues the defendant for twenty-five thousand dollars damages for this: Plaintiff avers that he is a minor about 12 years of age; that his father is dead, and that he sues by his mother, S. B., who is a widow and unmarried. Plaintiff avers that the defendant is a corporation duly incorporated under the laws of the —, state of —, and owns a line of railroad in and through the states of —, —, —, —, and —, and that it has main railroad track and switch tracks along and upon which the said defendant corporation runs and operates passenger and freight cars, propelled by steam locomotive engines. Plaintiff avers that upon the — day of —, that he was rightfully, legally and lawfully upon a certain wagon which was being driven on and along a public dirt road, to wit, the state line road, which runs east and west along the state line between — and —, and plaintiff avers that the state line dirt road crosses the main track and line of road belonging to the said defendant railroad company and certain switch tracks of and belonging to said railroad company at or near Fulton. And the plaintiff avers that while he was so legally, lawfully and rightfully on said wagon which was being driven rightfully, legally and cautiously on and along said state line dirt road and that when the said wagon being so driven approached and got near to where said dirt road crossed said main track and switch tracks of said defendant railroad company, the said road was so unobstructed by any cars or engines of and along said defendant railroad company that it appeared prudent and safe for the said wagon to be driven on and along said dirt road and across said main

switch track and dirt road or highway. And plaintiff avers that while said team drawing and pulling said wagon was in the manner aforesaid being driven rightfully across one of the switch tracks of and belonging to said defendant railroad company at or near South Fulton, that a certain car or certain cars which were then on said switch tracks was by locomotive engine managed and operated and was then being run or controlled by certain agents, employes and servants of the defendant railroad company, carelessly, negligently, recklessly and unlawfully pushed or backed violently on and against the said wagon upon which plaintiff was then and there riding and the plaintiff was then and there by reason of said wrongful, unlawful, careless, reckless act or acts, upon the part of said agents, servants and employes of the said defendant railroad company, knocked or thrown violently from the said wagon, and on or near the rails upon which said cars or car or engine were moving, and the plaintiff was then and there and in the state of Tennessee, negligently and carelessly and recklessly run on, against and over by certain wheel or wheels of one or more of the said cars and plaintiff was then and there greatly damaged, to wit, both of plaintiff's legs were then and there by the said cars or wheels thereof bruised, crushed, mangled and broken and it became and was necessary to have both of said legs cut off and amputated, and both of plaintiff's legs were necessarily amputated to save the life of plaintiff. Plaintiff avers that he suffered great mental anguish and physical pain and that he, plaintiff, lost his said legs and was rendered a cripple for life, and unable to earn wages and make a living. Plaintiff avers that at the place where said state line dirt road crosses the said main railroad track and switch tracks of the defendant railroad company is a public place and it is necessary to cross the same by citizens and travelers who wish to travel on and along said state line dirt road and highway at and along said point. Plaintiff avers that when said wagon being driven across the said main railroad track, that

while and at the time it was crossing one of the switch tracks of and belonging to said defendant company that a certain car or certain cars which were on said switch track, was or were by the agents and employes of the defendant railroad company, managing and operating a certain locomotive engine being pushed or backed negligently, carelessly and recklessly on and against the wagon on which the plaintiff was riding and the plaintiff was by said wrongful, negligent and careless acts, thrown violently from said wagon onto or near the track or rail of said switch track, upon which said car or cars and locomotive engines were moving and was wrongfully and negligently, carelessly and recklessly run over and against by the wheel or wheels of one of the said cars, when and whereby both of plaintiff's legs were broken, crushed and mangled, and it became and was necessary to have both the plaintiff's legs amputated or cut off and both of said legs were cut off for the purpose of saving the life of the plaintiff, greatly to plaintiff's damage, and plaintiff avers that he suffered great mental anguish, anxiety and suffered great physical pain, and suffering and anguish to plaintiff's damage in all twenty-five thousand dollars, wherefore he sues and demands a jury to try the issues to be joined and assess his damage.

R. X.,
Attorney for Plaintiff.

No. 49.

**Petition by an Administrator for Damages for Death at a
R. R. Crossing.**

[Caption.]

Now comes the plaintiff S. B., a citizen of the —, state of —, and avers that he is the duly appointed, qualified and acting administrator of the estate of E. F., deceased; and was so duly appointed by the probate court of — county, in the state of —, by letters of administration on said estate duly issued to him thereby; and the defendant, The C. & D. Railroad Company, is a corporation duly organized under the laws

of the state of — and is engaged in conducting and operating a public railroad in — township, in the county of —, state of —, and was so engaged on —; that in said township there is a certain railroad crossing, known as McCullough's Crossing, at which place there is a flag station on the line of the defendant's railroad, kept and maintained by it in connection with The Southern Railway Company, the track of which last named company, at that point, and for some distance north and south therefrom, is parallel with and immediately adjoining the track of defendant company; that on the said — day of —, at about 6 o'clock a. m., as said E. F. was about to pass over the track of said defendant at said crossing, exercising due care on his part, he was struck by a locomotive of the defendant, running southerly upon the track of defendant, and so injured that he died soon thereafter.

Plaintiff says that said locomotive was being run and operated at an extremely high rate of speed, to wit, about fifty miles per hour, and that no bell was rung, nor whistle sounded as said locomotive approached said crossing; that there was a sharp down grade at that point and for some distance northwardly therefrom, and said locomotive was quietly running, by its own momentum, and that of the cars attached thereto, constituting a passenger train; that the same was about thirty minutes behind its schedule time, and that no warning or signal of its approach was given as it approached said crossing and passed over the same.

Plaintiff says further that said decedent approached said crossing and was about to cross over the track of the defendant company, there was a heavily loaded freight train with a locomotive at each end thereof, going to the north upon the track of the Lake Shore Railway, immediately alongside of and parallel with the track of the defendant, which was known to the defendant's agents in charge of said train, and the noise occasioned thereby was such that decedent was pre-

vented from hearing and was unable to hear the approach of the train running southwardly upon the track of defendant, already mentioned, and that at said crossing and northwardly therefrom there was a dense fog which obstructed decedent's view of the approaching train upon defendant's track, and prevented him from seeing the approach of said train thereon.

Plaintiff says that said E. F. was rightfully upon said crossing, which had been used as such for many years, all of which was known to said defendant, and exercised due care in entering upon and attempting to pass over the same; that the defendant was negligent in failing to give any signal or warning of the approach of said locomotive and train, and in failing and neglecting to keep any lookout for pedestrians upon and at said crossing, and in failing and neglecting to stop said train or to slacken its speed when it knew that said crossing was in constant use by pedestrians, the same having been provided and maintained by it for that purpose, and when it knew that the view of the approaching train which collided with decedent was obstructed by the fog so that the same could not be seen by decedent, in passing over said crossing, and knew that the train upon the track of the Southern Railroad was passing said crossing as it approached the same.

Plaintiff says that said E. F., at the time of his death, was of the age of thirty-one years, was sober and industrious, and was capable of earning, and was earning two dollars per day; that he left surviving him Rachel F., his widow, and May F. and Viola F., his only children and heirs at law, said children being minors, for whose benefit this action is brought.

Plaintiff says that by reason of the negligence of the defendant, as herein alleged, said widow and children have been damaged in the sum of — dollars (\$—), for which amount judgment is asked.

R. X.,

Attorney for Plaintiff.

No. 50.**Petition against Receivers for Damages for Ejectment from
Railway Train.**

[Caption.]

The plaintiff, A. B., says that he is a resident of — county, state of —, and that the C. & D. Railroad Company is a corporation incorporated under the laws of the state of —. The plaintiff says that said corporation has constructed a railroad across the state of —, and that its said road runs through the village of — and the city of — in said state.

This plaintiff says that K. C and O. G. are the duly and legally appointed, qualified and acting receivers of said railroad company; that the said receivers, defendants, were at the time herein complained of, and are now, operating said railroad, and said road so operated by them, as receivers, was on the — day of —, a common carrier for hire of passengers and their baggage over its said line of railway.

That prior to the — day of —, this plaintiff had purchased a certain book of mileage tickets, being Book No. 3370, issued to him by the E. & F. Railway Company, at its office in the city of —, state of —.

Plaintiff avers that he was then and there the lawful owner and possessor of said book of mileage tickets, and that said mileage tickets in said book entitled him to passage over said road operated by said defendants.

Plaintiff says that on the above named day he boarded a train of said defendant road at — Station, —, bound for —, a station on said road in said state, and having complied with all the conditions attached to his contract of passage on said mileage ticket book, he presented said mileage ticket in said book to he defendants' agent and conductor of said train for payment of his passage to his said place of destination.

Plaintiff avers that said defendants' agent and conductor refused to accept said mileage ticket for passage on said train.

Plaintiff avers that in the presence of the passengers of said train said defendants' agent and conductor, while acting in the discharge of his duties as said agent and conductor, accused this plaintiff of riding on a bogus mileage book, and assaulted this plaintiff, and threatened to put him off the train unless he paid the fare to the place of destination, which this plaintiff then and there refused, whereupon said defendants' agent and conductor of said train ejected this plaintiff from the train in the presence of divers persons, to his great injury, and to his damage in the sum of — dollars (\$—).

Wherefore, plaintiff asks a judgment against the defendants for the sum of — dollars (\$—).

R. X.,

[*Verification.*]

Attorney for Plaintiff.

No. 51.

Petition to Recover on Township Bonds.

[*Caption.*]

The plaintiff, The Brattleboro Savings Bank, is a corporation organized under the laws of the State of Vermont, and is a citizen of the said State of Vermont.

The defendant is the board of township trustees of Hardy Township, a civil township in Holmes County, Ohio, organized and existing under and by virtue of the laws of Ohio, and within the Northern District of Ohio, Eastern Division.

1st Cause of Action.

Paragraph 1. Heretofore, to wit, on the fourth day of February, A. D. 1893, the defendant duly executed, sold and delivered twenty (20) certain negotiable coupon refunding bonds of said Hardy Township, of the denomination of one thousand dollars (\$1,000.00) each, numbered consecutively from No. 1 to No. 20, both inclusive, bearing date of Feby. 4th, 1893, and to become due and payable as follows:

Bond No. 1, for the sum of one thousand dollars, on July 1st, 1898.

Bond No. 2, for the sum of one thousand dollars, on July 1st, 1899. [*Set out other bonds in like manner.*]

Each of said bonds was made to bear interest at the rate of six (6) per cent per annum, payable semi-annually on the first day of January and the first day of July in each year, and the said several payments of interest to accrue upon said bonds to the maturity thereof, respectively, were evidenced by interest coupons attached to said bonds, respectively; both principal and interest, to be payable by said defendant, as the same should become due, at the township treasurer's office of said Hardy Township, at Millersburg, Ohio.

Said bonds were so issued under and by authority of an act of the General Assembly of the State of Ohio, entitled, "An Act to authorize the trustees of Hardy Township, in Holmes County, Ohio, to issue and sell the bonds of said township, for the purpose of paying off and satisfying the present existing, outstanding indebtedness of said township," which act was passed on February 1st, 1893.

The following is an exact copy of each of said bonds, except as to the number and the time of maturity thereof, to wit: [*Here set out bond in haec verba.*]

Paragraph 2. Plaintiff is the owner and holder of the bond numbered one (1) of said series of bonds, which became due and was payable on the first day of July, 1898, payment of which defendant has refused and still refuses to make. The following is a true copy of said bond, to-wit: [*Set out bond.*]

There are no credits or endorsements on said bond, and there is due the plaintiff from said defendant thereon the sum of one thousand dollars (\$1,000.00), with interest on said sum from July 1st, 1898.

2d Cause of Action.

Plaintiff makes the allegations of paragraph 1 of its first cause of action herein a part of this, its 2d cause of action, as though the same were here fully repeated and set forth.

Plaintiff is the owner and holder of the interest coupon representing the 9th installment of interest on bond Number One (1) of said series of bonds, which became due and payable on the first day of July, 1897, payment of which defendant has refused and still refuses to make.

The following is a true copy of said interest coupon, to-wit:
"No. 9. July 1, 1897.

The Township of Hardy, in Holmes County, State of Ohio, will pay the bearer thirty dollars, at the Township Treasurer's office, Millersburg, Ohio, being six months' interest due on its refunding bond No. 1.

G. U. Duer, Township Clerk."

There are no credits or endorsements on said coupon, and there is due the plaintiff thereon from said defendant the sum of thirty dollars (\$30.00), with interest on said sum from July 1, 1897.

3d Cause of Action.

Plaintiff makes the allegations of paragraph 1 of its first cause of action herein a part of this, its 3d cause of action, as though the same were here fully repeated and set forth.

Plaintiff is the owner and holder of the interest coupon representing the 10th installment of interest on bond numbered 1 of said series of bonds, which became due and payable on the first day of January, 1898, payment of which defendant has refused and still refuses to make.

The following is a true copy of said interest coupon, to-wit:
"No. 10. January 1, 1898.

The Township of Hardy in Holmes County, State of Ohio, will pay the bearer thirty dollars, at the Township Treasurer's office, Millersburg, Ohio, being six months' interest due on its refunding bond No. 1.

G. U. Duer, Township Clerk."

There are no credits or endorsements on said coupon, and there is due the plaintiff thereon from said defendant the sum of thirty dollars, with interest on said sum from the first day

of January, 1898. [*In like manner make assessments for other coupons and conclude as follows:*] Plaintiff therefore prays judgment against said defendant for the sum of — dollars, with interest on — dollars (\$—) from —, and on — dollars (\$—) from —, and on — dollars (\$—) from —, and on — dollars (\$—) from —, and costs of suit.

[*Verification.*]

R. X.,
Attorney for Plaintiff.

No. 52.

Petition by County Treasurer for Back Taxes (1).

[*Caption.*]

The above named Joseph L. Yost, citizen of the State of Ohio, says that he is the duly elected, qualified and acting treasurer of Lucas County, Ohio, and that the Lake Erie Transportation Company is a corporation duly organized under the laws of the State of Michigan, and that he, said Yost, as such treasurer, has in his hands all the duplicates of said county containing the unpaid personal property taxes due him as such treasurer; that on said duplicates the above named defendant Lake Erie Transportation Company is charged with the following personal property taxes, to-wit:

| | |
|---|------------|
| For the year 1893 upon \$119,700.00, taxes due. . . . | \$3,423.42 |
| For the year 1894 upon \$243,180.00, taxes due. . . . | \$6,954.95 |
| For the year 1895 upon \$220,665.00, taxes due. . . . | \$6,399.29 |
| For the year 1896 upon \$200,400.00, taxes due. . . . | \$6,252.48 |
| For the year 1897 upon \$182,160.00, taxes due. . . . | \$5,428.37 |
| For the year 1898 upon \$165,750.00, taxes due. . . . | \$5,502.90 |

Making an aggregate sum now due and payable of thirty-three thousand nine hundred and sixty-one and 41-100 dollars (\$33,961.41); that said defendant is indebted to said plaintiff in said sum and the same is due and wholly unpaid. That in addition to said sum of \$33,961.41 now due and pay-

able, there is a further sum of 5 per cent. thereon due as penalty which said plaintiff as such treasurer is entitled to receive as compensation for collecting delinquent personal property taxes, making an additional sum as such penalty of \$1,698.07; that said two sums make an aggregate sum of \$35,659.48, which is now due from said defendant to said plaintiff.

That a copy of the certificate containing a statement of said taxes issued by the auditor of said county to this plaintiff is hereto attached marked exhibit "A," and herewith filed. In view of the foregoing facts said plaintiff demands a judgment against said defendant for the said sum of thirty-five thousand six hundred and fifty-nine and 48-100 dollars, and interest thereon from the date of the filing of this petition.

R. X.,

[*Verification.*]

Attorney for Plaintiff.

(1) Taken from *Yost vs. Lake Erie Transportation Co.*, 112 Fed. Rep. 746.

No. 53.

Declaration on Policy of Accident Insurance.

[*Caption.*]

The plaintiff, citizen of the state of—, as administrator of C. H. B., sues the defendant, the Fidelity and Casualty Company of New York, chartered under the laws of the state of New York, having its main office in the city of New York, and a branch office in the state of —, for — dollars, interest upon a policy of insurance issued to plaintiff's intestate on —, insuring said intestate in consideration of the sum of — dollars paid for the period of 12 months against bodily injuries sustained through external violent and accidental means. Said policy of insurance is here to the court shown.

Plaintiff further avers that said intestate received bodily injuries sustained by external, violent and accidental means;

the said injuries were sustained on —, from which injuries he died on —, thereafter.

Plaintiff avers that all the conditions, stipulations and provisions in said policy have been complied with both by himself and his intestate and demand for payment thereof duly made the same has been refused. Plaintiff therefore sues for said twenty-five hundred dollars and interest thereon, the same being due, owing and unpaid.

X. & X.,
Attorneys for Plaintiff.

No. 54.

Declaration to Recover on Policy of Fire Insurance.

[Caption.]

A. B., plaintiff, a citizen of the state of —, doing business in —, under the name of A. B. Produce Company, for the use of the Union Bank & Trust Company, which is a corporation chartered under the laws of —, having its place of business in —, sues the defendant, C. D. Insurance Company of America, which is a corporation chartered and organized under the laws of the state of —, for — dollars, the value of certain goods, to-wit, Irish potatoes in bags, which defendant insured against loss or damage by fire by a policy of insurance for — dollars, issued in the state of —, on — day of —, by the defendant to plaintiff, A. B., under the name A. B. Produce Company, said policy being No. —, and here to the court shown; which goods were in a certain storehouse, in the city of —, to-wit, house No. 149, on the west side of South street, loss, if any, made payable to said Union Bank and Trust Company, as its interest may appear, which goods were lost or destroyed by fire, on, to-wit, the — day of —, of which the defendant had notice and on account of which said defendant on, to-wit, —, denied all liability under said policy. Plaintiffs also sue

in this action for interest on the amount due and owing to the plaintiff as aforesaid.

On January —, said goods were assigned as collateral security to the Union Bank and Trust Company by said A. B. Produce Company, of which the defendant had notice, to secure the payment of six thousand dollars, borrowed from said Union Bank and Trust Company and owing by said A. B. Produce Company, which — remain unpaid.

Plaintiff demands a jury to try the issues in this cause.

R. X.,
Attorney for Plaintiff.

No. 55.

Complaint on Insurance Policy.

[Caption.]

The plaintiff, by Ellison & Ellison, its attorneys, respectfully shows to the court and alleges on information and belief,

First. That at all the times hereinafter mentioned, the plaintiff was and now is a corporation existing under and by virtue of the laws of the state of Kansas, and a citizen of said state.

Second. That at all of said times the defendant was and now is a corporation organized and existing under the laws of the state of New York and having its principal place of business in the borough of Manhattan in the city and county of New York, and was duly authorized to and was transacting the business of fire insurance therein and elsewhere in said last mentioned state.

Third. That on or about the 6th day of February, 1914, the defendant, at the said city and county of New York, made and issued to the plaintiff a certain policy of insurance No. 178,716 in writing in the New York standard form, wherein and whereby

in consideration of the payment of the sum of sixteen thousand eight hundred and forty and 20/100 dollars (\$16,840.20) premium then paid to, received, and ever since retained by the defendant, the said defendant insured the plaintiff and for account of whom it might concern, the loss, if any, payable to them for the term of one year from the 19th day of January, 1914, at noon, against all direct loss or damage by fire except as in said policy of insurance provided, to the amount of six million four hundred and seventy-seven thousand dollars (\$6,477,000) on the following described property, viz.:

"On iron tanks and foundations, pipes, valves, fittings and fixtures connected therewith, numbered specifically in the policy; also on petroleum and its products while contained in above described tanks, which said policy of insurance and endorsements therein, also provided that in case of loss not exceeding \$5,000 to be paid on any one tank and foundations, pipes, valves, fittings and fixtures connected therewith, nor more than \$70,000 on any one tank and petroleum and its products therein.

"This policy covers its pro rata proportion of each of the above amounts.

"This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or wind storm), not exceeding the sum insured, nor the interest of the insured in the property and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property, this company shall be liable only pro rata with such other insurance for any direct loss by lightning, whether such other insurance be against direct loss by lightning or not.

"Petroleum and its products subject to the 90% co-insurance clause as follows:

"It is hereby understood and agreed that, in the event of loss, this insurance shall be liable for no greater proportion of said loss than the sum hereby insured bears to ninety per cent. (90%) of the cash value of the petroleum and its products contained in said tanks at the time when such loss shall happen.

"Permission to make additions, alterations and repairs, without limit of time, to work at all hours, for tanks to be empty, for other insurance, to keep on hand, use and do on the premises all things necessary for the conduct of the business and for tanks to stand on leased ground.

"It is understood and agreed that any error in description or location of above described property shall not operate to the prejudice of the assured.

"It is understood that the Western Adjustment and Inspection Company will act for the underwriters in the adjustment of any loss that may occur under this policy.

"Provided present limits as above be not exceeded, all alterations, additions and increases attach hereto from date of mail or other advices being sent to Johnson & Higgins, New York, at pro rata premium."

Fourth. That on or about September 2, 1914, a fire occurred at tanks No. 8, 9 and 13, which are among those mentioned in said policy, at Barney Farm, Drumright, Oklahoma, and that by said fire property consisting of said tanks with their contents of petroleum, and belonging to the plaintiff The Prairie Oil & Gas Company, exclusively, was damaged and destroyed by said fire to an amount exceeding in value the sum of one hundred and two thousand one hundred and forty-six and 86/100 dollars (\$102,146.86), and that said fire did not happen nor was it caused by any of the causes excepted in said policy of insurance.

Fifth. That before the commencement of this action, the plaintiff duly performed all of the conditions of said policy on its part to be performed.

Sixth. That at the time of the loss aforesaid, there was other insurance upon the said property, and the proportion of the said loss and damage by the fire aforesaid of and due by the defendant under said policy of insurance was the sum of fifteen thousand three hundred and twenty-two and 03/100 dollars (\$15,322.03).

Seventh. That this action was commenced within one year from the date of the said fire.

Eighth. That under the terms of said policy of insurance, said sum of fifteen thousand three hundred and twenty-two and 03/100 dollars (\$15,322.03) became due to the plaintiff on or about the 16th day of April, 1915, and that no part of said sum has been paid, although payment thereof has been demanded of the defendant.

Wherefore, the plaintiff demands judgment against the defendant for the sum of fifteen thousand three hundred and twenty-two and 03/100 dollars (\$15,322.03) with interest thereon from the 16th day of April, 1915, together with the costs and expenses of this action.

A. B. and C. D.,
Attorneys.

No. 56.

Petition on a Credit Indemnity Bond (1).

[Caption.]

The plaintiff states that it is a corporation organized and doing business under the laws of the state of —, and is a citizen of said state, having its principal place of business at —, — county, —, in this circuit, and that the defendant is a corporation organized and doing business under the laws of the state of —, and is a citizen of said state, having its principal place of business in —, state of —, and that the amount in controversy in this case is more than two thousand dollars, exclusive of interest and costs.

The plaintiff further states that the defendant was at the dates hereinafter mentioned authorized by its charter to engage in and carry on the business of indemnifying and guaranteeing merchants and manufacturers against loss resulting from the insolvency of debtors to whom goods and merchandise has been sold, or consigned for sale, upon the payment of a premium therefor.

That on the — day of —, the said defendant, in consideration of the payment of a premium of — dollars, which

was then and there paid, the said defendant issued to this plaintiff, who was then and has ever since been engaged in the manufacture and sale of paper, its certain bond of indemnity, wherein in consideration of said premium it guaranteed the plaintiff to an extent not exceeding the sum of twenty thousand dollars resulting from the insolvency of debtors as hereinafter defined, over and above the loss of two thousand dollars, first to be borne by the plaintiff on total gross sales, shipments and deliveries of goods, wares and merchandise amounting to four hundred thousand dollars or less, said sales, shipments and deliveries to be made between the — day of —, and the — day of —, both days inclusive, to firms, corporations or individuals actively engaged in mercantile pursuits in the United States of America, but no one debtor was to be recovered for more than ten thousand dollars net loss.

That by condition eleven of said bond it was provided as follows: "The term insolvency of debtors wherever used in this bond is defined to be: Where a debtor has made a general assignment for the benefit of his creditors; where an attachment for debt shall have been levied on his general stock in trade; where a writ of execution against him shall have been issued in favor of the indemnified or any other creditor and returned unsatisfied, except where such execution has been so issued and returned after a receiver has been appointed, where a receiver of the general stock in trade of a debtor shall have been appointed. It is agreed and understood that liability on the part of the said Credit Indemnity Company for claims against debtors whose affairs have gone into the hands of a receiver shall be established only where the said debtor proves to be insolvent, and the said A. B. Company shall furnish the said Credit Indemnity Company during the term of this bond a sworn certificate by the receiver showing that the estate of such debtor is insolvent, and that it is not possible

to so administer the estate as to pay its indebtedness in full."

It was a further condition, numbered four, that notifications of claims must be delivered to the said defendant on blanks furnished and in the manner prescribed by it within twenty days after the indemnified shall have had information of the insolvency of any debtor, and must be received at the central office of the company at —, during the term of the bond, but the indemnified was allowed twenty days after the expiration of said bond in which to file notifications of claims on debtors who have been insolvent during the last twenty days of the term of said bond; and it was further provided that accounts in litigation, but not settled at the time of adjustment under this bond, may be proven under any subsequent renewal, provided the litigation shall be terminated during the term of said renewal.

It was further provided by Condition 12c that a final statement of all claims which have been filed in accordance with condition number four shall be made by the indemnified and forwarded to the central office of said company at —, in the manner prescribed and upon blanks to be furnished upon application, which final statement must be received at said office within thirty days after the expiration of said bond; and it was provided that the adjustment should be had within sixty days after the receipt of said final statement by the company, and the amount then found to be due, it was provided, should then become due and payable, and by condition five it was further provided that the loss first to be borne by the indemnified should be one-half of one per cent. on total gross sales of four hundred thousand dollars, and in like ratio upon sales in excess of said sum.

The plaintiff further states that on the — day of —, the defendant, in consideration of a further sum of — dollars then and there paid by the plaintiff to the defendant, rerenewed the said bond of indemnity from the — day of

—, to the — day of —, both days inclusive, on substantially the same terms and conditions, except that the initial loss to be borne by the indemnified was raised to — dollars, or one and one-half per cent. on — dollars of sales, and the same ratio on all sums in excess of that.

It was further provided in the eighth condition of said renewal as follows: "In case this bond is a renewal and the premium has been paid at or before the expiration of the preceding bond, covered losses occurring during the term of this bond on shipments made during the term of the said preceding bond may be proven hereunder, subject also to the terms, conditions and limitations of said preceding bond."

The plaintiff further states that during the year covered by the first mentioned bond the plaintiff's gross sales amounted to — dollars (\$—), so that its initial loss to be borne by it was — dollars (\$—); that said plaintiff had sold and delivered merchandise to the L. M. Paper Company, of —, during the term of said bond, from which there arose and was existing an indebtedness shortly prior to —, of — dollars, (\$—).

That within less than twenty days prior to said date said L. M. Paper Company became insolvent and all of its assets were taken possession of by a receiver, M. O., appointed by the Common Pleas Court of — county, state of —, and that on — this defendant received at its office in — the plaintiff's notification of said insolvency and loss, which was within twenty days from the time the plaintiff obtained information of said insolvency; and on —, said defendant received at its said office in — from the plaintiff an affidavit of said receiver setting out the information and in accordance with the terms of condition eleven of said bond and a final statement of said loss, no part of which has been paid.

That, furthermore, during the term of said bond this plaintiff has sold and delivered to the partnership firm of

H. T. and Company, of —, large amounts of merchandise; that on —, the said H. T. and Company became insolvent and all of the assets thereof were taken possession of by a chattel mortgagee; and on —, said defendant received at its office in —, a notification from this plaintiff of said insolvency and loss, which was less than twenty days after the plaintiff first obtained information thereof, and on —, a final statement thereof was received by said defendant.

That at the time said H. T. and Company became insolvent they were indebted to this plaintiff in the sum of — dollars (\$—), no part of which has since been paid.

That shortly after the failure of said H. T. and Company this plaintiff sued the individual members of said partnership in the Circuit Court of — county, —, upon said claim in several suits upon notes that had been given for a part of said account, and upon the balance as an open account; and all of said suits were contested and the whole of said indebtedness was in litigation on and after —, but on the — day of —, this plaintiff obtained a judgment against H. T. and J. M., partners as H. T. and Company, the only members of said firm within the jurisdiction of said court, which was a court having jurisdiction of the subject matter of said suits, and on the — day of —, caused an execution to issue thereon, which was returned unsatisfied by the sheriff of said — county, —, and on the — day of —, this plaintiff made its final statement of said loss to the defendant, which was received at its office in the city of —, on the — day of —, no receiver having been appointed of said H. T. and Company's assets; but said defendant has ever since the first notification of said loss repudiated all liability for any part of the same and has never since adjusted or paid any part thereof.

Wherefore plaintiff prays judgment against said defendant

for the sum of — dollars, with interest from —, and its costs.

R. X.,

Attorney for Plaintiff.

[*Verification.*]

(1) Taken from *Champion Coated Paper Company vs. American Credit & Indemnity Co.*, 103 Fed. Rep. 609.

No. 57.

Petition to Recover for Libel.

[*Caption.*]

W. C., a citizen of the state of —, brings this, his civil action at law against E. C. and O. O., the defendants, who are citizens of the state of — and reside in the — District thereof; and thereupon the said plaintiff complains for that the said W. C. is now a good, true, honest, just and faithful citizen, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said E. C. and O. O., as hereinafter mentioned, was always reputed, esteemed and accepted by and amongst all his neighbors and other good and worthy citizens to whom he was in any wise known, to be a person of good name, fame and credit, to wit, in the — District of —, aforesaid.

And whereas, also, the said W. C. hath not ever been guilty, nor until the time of the committing of the said several grievances by the said E. C. and O. O. as hereinafter mentioned, been supposed to have been guilty of theft, embezzlement, larceny, or any other such crime or dishonesty.

By means of which said premises, he, the said W. C., before the committing of the said several grievances by the said E. C. and O. O., as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy citizens to whom he was in any wise known, to wit, in the — District of —, aforesaid.

Yet the said E. C. and O. O. well knowing the premises, but greatly envying the happy state and condition of the said

W. C., and contriving and wickedly and maliciously intending to injure the said W. C. in his said good name, fame and credit, and to bring him into public scandal, infamy and disgrace, with and amongst all his neighbors and other good and worthy citizens, and to cause it to be suspected and believed by those neighbors and citizens that he, the said W. C., had been and was guilty of theft, larceny and embezzlement, and to subject him to the pains and penalties by the laws of the state of —, made and provided against and inflicted upon persons guilty thereof; and to vex, harass, oppress, impoverish and wholly ruin him, the said W. C. heretofore, to wit, on the — day of —, at —, in the — District of —, aforesaid, falsely and maliciously did compose and publish, and cause and procure to be published of and concerning him, the said W. C., a certain false, scandalous, malicious and defamatory libel containing, amongst other things, the false, scandalous, malicious, defamatory and libelous matter following, of and concerning him, the said W. C., that is to say, "that after a little more than a year's service, the Dayton Company" (Thereby meaning the E. F. Company of —, of which the said E. C. was president, and of which the said O. O. was general manager, and in which the said E. C. and O. O. had respectively large pecuniary interests,) "dispensed with the services of the said C." (by the said C., meaning him, the said W. C., and meaning that he, the said C. had been in the employ of, and had rendered services to the said E. F. Company for upwards of a year,) "about which time" (thereby meaning the time at which the services of the said C. to the said E. F. Company terminated), "the said W. C." (thereby meaning W. C., the plaintiff) "carried from the office of the Dayton Company" (thereby meaning the office of the said E. F. Company) "certain drawings of a computing scale" (thereby meaning that the plaintiff, W. C., had unlawfully taken and carried away certain of the personal goods of the E. F. Company, and thereby meaning that the

said W. C., the plaintiff, was guilty of theft, larceny and embezzlement), "practically the same as the scale now made by the K. S. Company," (thereby meaning and intending a corporation of the name of the K. S. Company, organized and existing under the laws of the state of —, at — in the said state) "and for the manufacture of which suit was brought on the 6th inst. for infringement" (thereby meaning that suit had been brought by the said E. F. Company against the said K. S. Company for infringement of certain letters patent for invention of the United States of America), and the said W. C. hereunto annexes and makes part hereof a copy in full of the said false, scandalous and malicious, defamatory and libelous matter marked Exhibit "A."

By means of the committing of which said several grievances by the said E. C. and O. O. as aforesaid, he, the said W. C., has been and is greatly injured in his said good name, fame and credit, and brought into public scandal, infamy and disgrace with and amongst his neighbors and other good and worthy citizens, in so much that divers of those neighbors and citizens to whom the innocence and integrity of said W. C. in the premises were unknown, have, on account of the committing of the said grievances by the said E. C. and O. O. as aforesaid, from thence hath suspected and believed and still do suspect and believe him, the said W. C. to have been and to be a person guilty of theft, larceny and embezzlement, and have by reason of the committing of the said grievances by the said E. C. as aforesaid, from thence hath wholly refused and still do refuse to have any transaction, acquaintance or discourse with him, the said W. C., as they were before used and accustomed to have, and otherwise would have had, and the said W. C. has been and is by means of the premises otherwise greatly injured, to wit: at the — District of — aforesaid, wherefore the said W. C. saith that he is injured

and has sustained damage to the amount of one hundred thousand dollars. And therefore he brings his suit.

X, and X.,
Attorneys for Plaintiff. (1)

[*Verification.*]

(1) Taken from *Culmer v. Canby*, 101 Fed. 195.

No. 58.

**Declaration in Action for Damages for Defamation by Calling
a White Man a Negro.**

[*Caption.*]

First Count.

The plaintiff sues the defendants for \$25,000 as damages, by reason of the following facts, to-wit:

Plaintiff is a white man.

The defendants on or about the 30th day of December, 1913, being confederated together in an unincorporated association, known as the "Brotherhood of Locomotive Firemen and Engineers, Clinchfield Lodge No. 763," by Walter L. Spratt, their agent thereunto authorized falsely and maliciously wrote and published of and concerning the plaintiff in a letter addressed and delivered to one H. F. Staley of Erwin, Tennessee, the following false and defamatory matter, with intent to defame the plaintiff, to-wit:

"Brotherhood of Locomotive Firemen and Enginemen, Clinchfield Lodge No. 763.

"December 30th, 1913.

"Mr. H. F. Staley, M. M.,

"Erwin, Tenn.

"Dear Sir:

"Some time ago evidence came into our possession of *Isac Cousins* not being *fool* blooded white, and by a unanimous vote of the members of the B. of L. F. & E. he, *Isac Cousins* was expelled from the Brotherhood on account of falsely answering questions. By request of the Brotherhood I as chairman ask that the run he holds be vacated on the grounds that he is a non-

promotable man. If you desire any further evidence of the above being one quarter negro please notify us at once and we will furnish you with same.

"Yours Resp.

"W. L. Spratt, Chairman."

Meaning thereby that the plaintiff, Isaac Cousins, is not a white man, but a negro.

Plaintiff was at that time and is now, married to a white woman, to-wit, Mrs. Annie Cousins, by whom he had then two children. Plaintiff's marriage to said Annie Cousins, then Annie Mumpower, took place in the state of Tennessee and they lived together in said state as man and wife for some time. These facts were then well known to defendants and to H. F. Staley, to whom said letter was addressed.

It was then and is now by the laws of Tennessee a crime, to-wit, a felony, for a person having one-fourth negro blood to marry a white person or for them to live together in this state as man and wife, of which fact defendants had knowledge, or were charged with knowledge.

Plaintiff says that under these circumstances the said publication constituted a charge that plaintiff was guilty of a crime under the laws of Tennessee, to-wit, a felony, which exposed him, and still exposes him, to a prosecution for such felony. He says that such charge has, for many other reasons, caused him and his wife annoyance, humiliation and embarrassment.

Plaintiff was greatly injured in his character and reputation by reason of the above facts.

Plaintiff says that said publication was made maliciously with intent to injure plaintiff; that it was made wantonly, and that defendants negligently failed to make such inquiry as they should have made to ascertain whether or not the allegations made in the above quoted letter were true. By reason of which facts plaintiff says that he is entitled to punitive damages, for which he asks.

Plaintiff, therefore, avers that he has a right of action against the defendants for the sum above demanded, and, therefore, he sues, and demands a jury to try this cause.

Second Count.

The plaintiff sues the defendants for \$25,000 as damages by reason of the following facts, to-wit:

Plaintiff is a white man, and was on and for over three years prior to December 30, 1913 a locomotive fireman in the employ of the Carolina, Clinchfield & Ohio Railway, running out of Erwin, Tennessee. Plaintiff was (and is, except to the matters set out below) in good standing with said railway, there being nothing against his record as such fireman. Defendants were, also, locomotive firemen in the employ of said Carolina, Clinchfield & Ohio Railway. Plaintiff held in the employ of said railway what is known as a "promotable run," by virtue of which he was eligible to promotion to the more lucrative and desirable position of locomotive engineman on said railway. Most of the defendants were junior to plaintiff in point of service and not entitled to be promoted to enginemen until plaintiff had first been promoted, by reason of which fact said defendants were in position to be benefited by plaintiff's discharge from the service of said railway or by his removal from said promotable run to a non-promotable run.

Plaintiff avers that his said promotable run was and is more valuable and desirable than a non-promotable run for many reasons, among them the following:

A fireman holding such (1) is eligible to promotion to engineman, while holding a non-promotable run is not so eligible; (2) is required to do no night work, or very little, while non-promotable runs involve a great deal of night work; (3) receive more pay than a man holding a non-promotable run.

Plaintiff avers that by a custom or unwritten law of said Carolina, Clinchfield & Ohio Railway, no negro fireman could, at the time hereinbefore mentioned or can now, hold a promotable run, or serve as engineman, which fact was well known to defendants.

Plaintiff alleges that he had a contract of employment with said Carolina, Clinchfield & Ohio Railway, which contract was in writing, and protected him in all the rights above enumerated and against discharge, except for good cause, and after a hearing. Said contract was made with said railway for a representative of the firemen on behalf of plaintiff and all other firemen employed by said road.

Plaintiff says that the circumstances and conditions being as above, defendants, who were confederated together in an unincorporated association known as the "Brotherhood of Locomotive Firemen and Enginemen, Clinchfield Lodge No. 763," on or about the 30th day of December, 1913, by Walter L. Spratt, their agent thereunto authorized, falsely and maliciously wrote and published of and concerning the plaintiff, in a letter addressed and delivered to H. F. Staley of Erwin, Tennessee, the following false and defamatory matter, with intent to defame the plaintiff and injure him in his trade and calling, to-wit:

"Brotherhood of Locomotive Firemen and Enginemen, Clinchfield Lodge No. 763.

"December 30, 1913.

"Mr. H. F. Staley, M. M.,

"Erwin, Tenn.

"Dear Sir:

"Some time ago evidence came into our possession of *Isac Cousins* not being *fool* blooded white, and by a unanimous vote of the members of the B. of L. F. & E. *Isac Cousins* was expelled from the Brotherhood on account of falsely answering questions. By request of the Brotherhood I as chairman ask that the run he holds be vacated on the grounds that he is a non-promotable man. If you desire any further evidence of the above being one quarter negro please notify us at once and we will furnish you with same.

"Yours Resp.

"W. L. Spratt, Chairman."

Meaning thereby that *Isaac Cousins* is not a white man, but a negro.

Said H. F. Staley, to whom the above mentioned letter was delivered, was then master mechanic of Carolina, Clinchfield & Ohio Railway, having authority to employ firemen and enginemen for said railway, to dismiss them and to transfer them from promotable runs to non-promotable runs, and to promote them to enginemen. By reason of the false and defamatory matter contained in the above described letter, said H. F. Staley did, soon after the 30th of December, 1913, transfer plaintiff from his promotable run to a non-promotable run, whereby plaintiff was

deprived and is still deprived of the above described profits and advantages incident to the holding of said promotable run, was injured in his trade and calling and in his character and reputation.

Plaintiff says that said publication was made maliciously with intent to injure plaintiff, that it was made wantonly and that defendants negligently failed to make such inquiry as they should have made to ascertain whether or not the allegations made in the above quoted letter were true. By reason of which facts plaintiff says that he is entitled to punitive damages, for which he asks.

Plaintiff, therefore, avers that he has a right of action against the defendants for the sum above demanded, and, therefore, he sues, and demands a jury to try this cause.

Third Count.

Plaintiff adopts in full the first five paragraphs of the second count, and says further:

That, defendants being then confederated together in an unincorporated association known as the "Brotherhood of Locomotive Firemen and Enginemen, Clinchfield Lodge No. 763," well knowing the terms and conditions of plaintiff's contract of service with said Carolina, Clinchfield & Ohio Railway, maliciously conspired together to interfere with said contract relations for the purpose of injuring plaintiff or of benefitting defendants, or some of them, at plaintiff's expense, which object they accomplished in the following manner, to-wit; on or about December 30, 1913, defendants caused Walter L. Spratt, their agent, to write and deliver to H. F. Staley, master mechanic of the Carolina, Clinchfield & Ohio Railway, a letter in the words and figures following:

"Brotherhood of Locomotive Firemen and Enginemen, Clinchfield Lodge No. 763.

"December 30, 1913.

"Mr. H. F. Staley, M. M.,

"Erwin, Tenn.

"Dear Sir:

"Some time ago evidence came into our possession of *Isac* Cousins not being *fool* blooded white, and by a unanimous vote of the members of the B. of L. F. & E. *Isac* Cousins was

expelled from the Brotherhood on account of falsely answering questions. By request of the Brotherhood I as chairman ask that the run he holds be vacated on the grounds that he is a non-promotable man. If you desire any further evidence of the above being one quarter negro please notify us at once and we will furnish you with same.

"Yours Resp.

"W. L. Spratt, Chairman."

Said H. F. Staley, by virtue of his position as master mechanic of said Carolina, Clinchfield & Ohio Railway, had authority to employ firemen and enginemen for said railway, to dismiss them and to transfer them from promotable runs to non-promotable runs, and to promote them to enginemen. Because of the false and defamatory matters contained in the above mentioned letter and of other false and defamatory statements of the same nature made to him orally by defendants, by their agent, in pursuance of the above mentioned design to injure plaintiff, and also because of the pressure brought to bear on him by defendants and the threat, express or implied, that they, defendants, would, in their organized capacity as a Brotherhood of Locomotive Firemen and Enginemen, a labor union, cause a strike of the firemen and other employees on said Carolina, Clinchfield & Ohio Railway, or otherwise injure said railway, if their demand contained in the above quoted letter was not complied with, said H. F. Staley did, on or about January 2, 1914, remove plaintiff from his promotable run to a non-promotable run, thereby plaintiff was deprived and is still deprived of the above described profits and advantages incident to the holding of said promotable run, and was otherwise injured in his trade and calling.

The above described interference by defendants with plaintiff's said contract of employment was unlawful and without just cause or excuse.

Plaintiff says that said publication was made maliciously with intent to injure plaintiff; that it was made wantonly and the defendants negligently failed to make such inquiry as they should have made to ascertain whether or not the allegations made in the above quoted letter were true. By reason of which facts plaintiff says that he is entitled to punitive damages, for which he asks.

The plaintiff, therefore, avers that he has a right of action against the defendant, for the sum above demanded and, therefore, he sues, and demands a jury to try this cause.

ISAAC COUSINS,
By J. B. Cox, Attorney.
W. W. BELEW,
Solicitor.
JAMES B. COX,
Solicitor.

No. 59.

**Declaration in Replevin for Lumber Cut on Lands Claimed
by Both Parties (1).**

[*Caption.*]

The M. Lumber Company, a corporation organized and existing under the laws of the state of — and citizen of said state, plaintiff here, by Messrs. X. & X., its attorneys, complains of A. C. and the Bay Lumber Company, a corporation organized and existing under the laws of the state of — and citizen of said state, defendants herein, who have been duly summoned to answer the said plaintiff herein, of a plea wherefore said defendants took and unlawfully detained certain goods and chattels, property of the said plaintiff described in the writ of replevin in this cause and hereinafter mentioned.

And thereupon the said plaintiff, by Messrs. X. & X., its attorneys, complains against the said defendants for that they, the said defendants, heretofore, to-wit, on the — day of —, A. D. — in the county of — and state of —, in said district, received the goods and chattels hereinbefore referred to from it, the said plaintiff, to-wit, about twenty-two hundred (2,200) pine saw logs, more or less, scaling about five hundred twenty thousand five hundred (520,500) feet, board measure, which were cut by the defendant, A. C., during the logging season of 1895 and 1896, from the southwest quarter of section twenty-five (25), in township forty-four (44) north, of range thirty-six (36) west, in said

county of Iron, which said logs were bark-marked XII and end-marked ⊗ , of great value, to wit, exceeding the value of two thousand dollars (\$2,000), exclusive of interest and costs, to be delivered to said plaintiff when they, the said defendants, should be thereunto afterwards requested.

And the said plaintiff further alleges that the said logs were cut from the lands above described by the said defendant, A. C., in violation of an order made by this court, on the equity side thereof, on the — day of —, A. D. —, in a cause therein pending between the United States of America as complainants claiming title to said land, and the Lake Railway Company, The M. Lumber Company and The W. D. Company (Limited), as defendants, claiming title as against the United States, wherein a bond was given by the said defendants in said suit to the United States for its benefit, and the benefit of all parties in interest, as required by said court in making said order, which said order permitted the cutting of said logs by the said M. Lumber Company, plaintiff herein, and which is one of the defendants in said equity suit, and the said defendants deny the validity of said order as binding on them, or as conferring any rights on the plaintiff herein, which is one of the questions in controversy in this suit.

The said M. Lumber Company also claims the right to cut said timber, and to said timber when cut, under and by virtue of a certain license and purchase from the Lake Railway Company, which company, as the plaintiff alleges, and as was claimed by said company, was the owner of said land under an act of Congress approved July 3, 1866, granting said lands to the state of — to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said state, and under a confirmation of the selection thereof under said grant, by Act of Congress approved March 2, 1889, entitled: "An Act to forfeit lands granted to the state of — to aid in the construction of a

railroad from — to — in said state," and that said Lake Railway Company, after the making of said license and sale to said M. Lumber Company, plaintiff herein, sold and conveyed said lands, subject to said license and sale of the timber on said lands, to the K. Association (Limited), a corporation organized and existing under the laws of the state of —, and a citizen of the — Division of the — District thereof. Said A. C. claims that he had a *bona fide* pre-emption claim on said land, arising or asserting by actual occupation of the land under color of the laws of the United States, on the first day of May, 1888, and that the selection thereof under said canal grant was therefore not confirmed. Said A. C. also claims that his said alleged pre-emption claim was confirmed by said Act of March 2, 1889, and such confirmation operated to vest in him the title to said land, and the right to cut and remove the timber therefrom, and the ownership of such timber, superior to the rights of the plaintiff under the Acts of Congress herein mentioned, all of which claims are controverted by the plaintiff.

Said A. C.'s claim of actual occupation of said lands is also based on alleged actual possession of only a small part thereof, and the plaintiff insists that such actual occupation of a portion of said land can not be extended by construction so as to constitute such occupation of the whole land as is intended by said act of Congress.

And the said plaintiff claims that it is a *bona fide* purchaser of the said pine timber, for value, and that the said Lake Railway Company, and said K. Association (Limited) are *bona fide* purchasers of said land, for value, and that the title and rights of the said Lake Railway Company and of the said K. Association (Limited) to said land, as well as the title of said plaintiff to said pine timber, was confirmed by Act of Congress approved March 2, 1896: entitled "An Act to provide for the extension of the time within which

suits may be brought to vacate and annul land grants, and for other purposes."

And said Bay Lumber Company claims to have contracted with said defendant, A. C., for the sale of the said pine logs, and to be entitled to the possession thereof.

And the determination of this suit involves the construction of the several Acts of Congress aforesaid and of the order of this court, on the equity side thereof, in the suit above mentioned.

Yet the said defendants, although requested so to do, have not delivered said goods and chattels or any or either of them, to the said plaintiff, but have unlawfully detained, and still do unlawfully detain the same, to the damage of said plaintiff of five thousand dollars (\$5,000.00).

And therefore it brings suit, etc.

X. & X.,

Attorneys for Plaintiff.

(1) Taken from *Cunningham vs. Metropolitan Lumber Co.*, 110 Fed. Rep. 332.

No. 60.

Declaration in Ejectment.

[Caption.]

The plaintiff, A. B., who is a resident of —, in the state of —, and a citizen of the state of —, sues the defendant, C. D., who is a resident of — county, in the — division of the — district of —, and a citizen of the state of —.

For that the plaintiff is the owner, and entitled to the immediate possession of a tract of land of the value of \$—, situate, lying and being in — county, —, and described as follows:

Beginning at two white oaks and pointers on the bank of Caney Fork river, being the northwest corner of Wm. Hudgen's 5,000 acre survey; thence east on his line 447½ poles to a corner of land conveyed to Christian Franks; thence

north with said Franks' line 895 poles to a corner; thence west $447\frac{1}{2}$ poles to a Spanish oak, hickory and post oak pointers, a corner, thence south 895 poles to the beginning, containing 2,500 acres.

And being the lawful owner of said land as aforesaid, the plaintiff avers that on, to wit: the — day of —, he was in the peaceable possession thereof; and afterwards, to wit: on the — day of —, the defendant unlawfully entered thereon, and unlawfully withholds and detains the same from the plaintiff, together with \$— due the plaintiff as damages for the detention thereof; wherefore the plaintiff sues to recover said land, and the damages aforesaid, and demands a jury to try this cause.

R. X.,

Attorney for Plaintiff.

No. 61.

Declaration in Trespass and Ejectment.

[*Caption.*]

The plaintiffs, who are citizens of the state of —, residing at —, therein, complain of the defendants, C. D., E. F. and G. H., who are citizens of the state of —, residing in the — division of the — district thereof, in an action of trespass and ejectment.

For that heretofore, to wit, on — day of —, the plaintiffs were lawfully entitled in fee and were in possession of the following described property situated in the county of —, in the said district, to wit, — acres of land in the said county situated in the low lands of the Mississippi river above Fort Pillow and north of Cole Creek, bounded as follows, to wit: [*Here set out description of property.*]

All of the said property is of the value of exceeding \$—. And the plaintiffs being so entitled to the said property, and so in possession thereof, the said defendants, to wit, on the

said — day of —, at the said county of —, unlawfully and without right entered into and upon the said premises, and falsely and unjustly set up title thereto, as in them respectively, and cut timber therefrom and removed the same, and exercised acts of ownership thereof under such false and unjust claim of title, and denied and refused to recognize the claim of these plaintiffs to the title, or their possession thereunder, and wholly refused to admit and repudiated the same, as they still do.

Wherefore the plaintiffs have been injured and damaged to the amount of \$—, and they bring their suit for the recovery of the said lands and the said damages.

R. S.,
Attorney for Plaintiffs.

[*Verification.*]

—
No. 62.

Petition by U. S. for Timber Trespass.

To the Honorable the Judge of the District Court of the United States in and for the — District of —:

The petition of the United States respectfully represents that C. D., E. F., and G. H., in the — district of —, and within the jurisdiction of this court, are jointly and severally indebted unto the United States in the sum of \$—, with six per cent. interest on said sum from the — day of —, A. D. —, till paid, for this, to wit:

The market value at —, the place of delivery of pine trees, the property of the United States, which said trees were illegally, tortuously and in bad faith cut and removed, during the year A. D. —, by C. D. from the public lands of the United States, viz: [*here describe the lands.*] and which said pine trees were by said C. D. sold and delivered at —, to said E. F. and G. H., who purchased same in bad faith, and, after converting same into lumber, sold and disposed of said lumber for their own use and benefit, in

fraud of your petitioners' rights, and with full knowledge at the date of said sale and delivery, of the facts hereinbefore set forth, thus rendering themselves liable, jointly and severally with said C. D., the original trespassers, unto the United States for the full market value, after manufacture into lumber of said pine trees.

Petitioners avers that said pine trees, rendered into lumber, yielded — feet, board measure, and that said lumber was well worth, at a fair market value, at the place of delivery, \$—— per thousand feet, or said sum of \$——, for which said sum said C. D., E. F. and G. H. are jointly and severally liable unto the United States, with interest as claimed. Petitioners allege amicable demand without avail.

Wherefore, your petitioners pray for citation to said parties defendant, and for service of this petition, and, after legal hearing and delay, for judgment in their favor against said C. D., E. F. and G. H., the defendants, jointly and severally, for said sum of \$——, with interest as claimed. Petitioners pray for all costs and general relief.

J. H.,
U. S. Attorney, — District of —.

(1) See R. S. Sec. 2461, and Act of June 3, 1878, 20 Stat. L. 90.

The United States may sue for the conversion of the timber, even if the defendant has been acquitted of criminal charge therefor. *Stone v. U. S.*, 64 Fed. Rep. 667. See also *U. S. v. Scott*, 39 Fed. 900; *U. S. v. St. Anthony R. Co.*, 114 Fed. 722.

No. 63.

**Petition by the United States against Railway for Failing to
Unload Stock en route (1).**

[Caption.]

The United States of America, plaintiffs, by J. H., United States attorney for the — district of —, complain of the defendant, the C. D. Railroad Company, and state:

That heretofore, to-wit, on the — day of —, in the year of our Lord nineteen hundred and —, and before and ever since said date said defendant was a corporation created by and

organized and existing under the laws of the state of —, and carried on its business in the district of —, and was at said times and is now a railroad company, within the United States of America, and owned and operated a railroad which formed part of a line of road over which cattle and swine and other animals were conveyed from one state to another, to-wit: from the state of — to the state of —, and from the state of — to the state of —, and over which said line of road the cattle and swine hereinafter mentioned were conveyed from the state of — to the state of —, and from the state of — into another state, to-wit, the state of —, and which said railroad as aforesaid, owned and operated by the defendant extends from — in the said state of — to — in the said state of —, and the M. & O. Railroad Company was then and there a corporation created by and under the laws of the state of —, and then and there owned and operated another railroad, which said railroad so owned by said M. & O. Railroad Company connected with said road of said defendant at — station, in the state of —, and extended from — station in said state of —, to said — station, in said state of —.

And on the said — day of —, 19—, at half past eight o'clock in the morning, said M. & O. Railroad Company received from one M. D., at — station aforesaid, a great many, to-wit, one hundred and ninety-nine cattle and two hundred and forty swine, which said cattle and swine were loaded into six cars, and six separate bills of lading were made and delivered by defendant to said M. D., and said defendant undertook and agreed to convey said cattle and swine to —, in the state of —, and then and there confined said cattle and swine in cars, forming a part of a train of cars and conveyed said cattle and swine over the railroad of said M. & O. Railroad Company to — station aforesaid, without unloading said cattle or swine, and then and there delivered said cattle and swine to defendant, which the defendant then and there undertook and agreed to convey said cattle and swine to — aforesaid, and did convey said cattle and swine without unloading the same to — city, in the state of —, and said cattle and swine did not arrive at said — city until — o'clock in the afternoon of the — day of —, of 19—.

•And said defendant, within the jurisdiction of this court, did knowingly and willingly confine said cattle and swine in railroad cars for a period of more than twenty-eight consecutive hours, to-wit, for more than thirty-one consecutive hours, without unloading said cattle and swine for any period of rest, water and feeding, said period of thirty-one hours including the period said cattle and swine were confined on the road of said M. & O. Railroad Company, without unloading the same.

And said defendant was not prevented from so unloading said cattle and swine by storm or other accidental causes.

And said cattle and swine were not carried in cars in which they could or did have proper food, water, space, or opportunity to rest, contrary to the form of the statute in such cases made and provided.

The plaintiff further states that the allegation contained in the petition herein, that the said cattle and swine so received by the said M. & O. Railroad Company at said time were received at — station, was made by mistake—that the fact is, said cattle and swine were received by said railroad company at — station on said railroad.

Whereby and by virtue of sections numbered 4386 (2) and 4388 of the Revised Statutes of the United States, a right of action hath accrued to the plaintiffs, and the said defendant hath forfeited and become liable to pay to plaintiffs a penalty of not less than \$100.00 and not more than \$500.00 for each and every of said six car loads of cattle and swine.

Wherefore the plaintiff prays judgment for \$—, and for its costs herein expended, and for all proper relief.

J. H.,
United States Attorney.

(1) Taken from the record in the case of Newport News & Miss. Valley R. Co. v. United States, 61 Fed. 488, 9 C. C. A. 579.

(2) These sections were repealed by 34 Stat. L. 608, Sec. 5 and new sections enacted including essentially the substance of the old with considerable additions in detail.

A suit under these sections, although to recover a penalty, is a civil proceeding so far as concerns pleadings and proofs, U. S. v. Atlantic Coast Line R. Co., 173 Fed. 767, where stock on a train has been loaded in lots at different times, the time limit expires and the right of action accrues on each lot separately, regardless of the

number of owners, of number of cars, and the causes of action on the various lots may be consolidated, *B. and O. S. W. R. Co. v. U. S.*, 220 U. S. 94, 55 L. Ed 384; consent of owner to longer confinement is no defense to action by the United States to enforce the penalty. *Ibidem*.

No. 64.

Petition of Receiver against Stockholder.

[Caption.]

The plaintiff above named, by Wilson & Wallis, his attorneys, complains of the above-named defendant, and alleges:

1. That on or about the 26th day of November, A. D. 1884, the Minnesota Thresher Manufacturing Company was a corporation duly incorporated under and by virtue of the constitution and laws of the state of Minnesota; that ever since said date said corporation has continued to be and now is a body corporate, organized, created and existing under and by virtue of said constitution and laws of said state; and that said corporation is and at all times has been a citizen and resident of said state of Minnesota. That on the 16th day of August, A. D. 1901, the plaintiff was and still is a citizen and resident of the state of Minnesota. That the defendant is a citizen of the state of New York and a resident of the city of New York within the southern district of New York. And that the matter in controversy in this action exceeds, exclusive of interest and costs, the sum of two thousand dollars.

2. That the articles of incorporation of said Minnesota Thresher Manufacturing Company (hereinafter called the Thresher Company) provided that the objects for which said corporation was formed was the purchase of the capital stock, evidences of indebtedness issued by and the assets of the Northwestern Manufacturing and Car Company, a corporation existing under the laws of the state of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines, and all kinds of farm implements, machinery of all kinds, and the manufacture and sale of all articles, implements and machinery, of which wood and iron, or either of them, form the principal component parts and

the manufacture of materials therein used, with a principal place of business at the city of St. Paul, in the county of Ramsay, in said state of Minnesota, which afterwards, by amendment to said articles of incorporation, duly made, was changed to the city of Stillwater, in the county of Washington, in said state of Minnesota; that after its incorporation as aforesaid said Thresher Company engaged in and carried on at said St. Paul and at said Stillwater all the classes of business authorized by said articles of incorporation; that said articles of incorporation have never been in any way altered, amended or modified, except as aforesaid.

3. That on the 6th day of May, A. D. 1901, said Minnesota Thresher Manufacturing Company was indebted to the Merchants National Bank of St. Paul, Minnesota, a banking corporation organized and existing under the laws of the United States of America, having its place of business at the city of St. Paul, in the state of Minnesota, in the sum of two thousand nine hundred and thirty-six dollars and seven cents (\$2,936.07); that prior thereto an action had been duly commenced in the district court for Ramsay county, Minnesota, in which the said bank was the plaintiff, and said Thresher Company was the defendant, of which said cause said court, which was a court of general jurisdiction and of record, had acquired jurisdiction of both of the parties and of the subject-matter thereof, and on the 6th day of May, 1901, judgment was duly entered and docketed in said court in favor of said Merchants National Bank of St. Paul, Minnesota, said plaintiff, and against said Thresher Company, for two thousand nine hundred and thirty-six dollars and seven cents (\$2,936.07). That thereafter executions directed to the sheriffs of said Ramsay county and said Washington county, were duly issued to said sheriffs, and by them duly returned wholly unsatisfied.

4. That at the time said judgment was entered and said executions were issued and returned as aforesaid, and for a long time prior thereto, and at all times thereafter, said Thresher Company was, and it now is, wholly insolvent and without any assets or property whatsoever, other than the liability of its stockholders as hereinafter set forth.

5. That after the return of said executions as aforesaid, and on or about the 16th day of August, 1901, said Merchants National Bank, as a judgment creditor of said Thresher Company, duly instituted and commenced in the district court for the said county of Washington and state of Minnesota, which said court was then and there a court of record and of general jurisdiction, an action against said Thresher Company under and pursuant to the provisions of Chapter 76 of the General Statutes of the state of Minnesota, and the acts amendatory thereof and supplementary thereto, for the sequestration of the stock, property, things in action and effects of the said Thresher Company, and for the appointment of a receiver for the same; that said Thresher Company was duly and personally served with summons and process in said action, and on or about the 16th day of August, 1901, duly appeared in said action by its duly authorized attorney.

6. That on the said 16th day of August, 1901, judgment was duly given, rendered and entered in and by said court in said action, adjudging that the stock, property, things in action and effects of said Thresher Company be sequestered, and that a receiver therefor be appointed; that such judgment has never been appealed from nor in any manner modified, reversed or set aside.

7. That on the 16th day of August, 1901, such proceedings were duly had that this plaintiff, Theodore R. Converse, was by said district court for Washington county, Minnesota, in said cause, duly appointed receiver of all the property, assets, rights and interests of said Thresher Company of every sort or nature, either in law or in equity, and with full authority and direction to sue for, collect, recover, compromise or settle any and all stockholders' liability that might exist under the constitution and laws of the state of Minnesota, or otherwise, and to prosecute and sue for the amount of such liability, or any assessment that might be made by said court on account thereof for the satisfaction of the claims of the creditors of said Thresher Company, and all expenses of administration of said trust, including fees, allowances, expenses of said receiver and his counsel, and with full power and authority to sue for and enforce the collection of any assessment or stockholders' liability, either in the courts of the state of Minnesota or the courts of any other state or

territory, or the courts of the United States, sitting in any state or territory of the United States, and with full power and authority to prosecute appeals or sue out writs of error in any such suits or cases that might be so instituted by said receiver for the collection of such assessments or stockholders' liability, and in general to do and perform all acts that in the opinion of said receiver, or that he might be advised, were needful or proper for the enforcement and collection of such assessments and stockholders' liability in any of the courts of the United States, or the various states and territories of the United States; and said receiver was further directed to seize and take into his possession, sue for and recover any and all property of every sort and nature possessed by said corporation.

8. That the plaintiff duly qualified as such receiver and entered upon the performance of his duties as such receiver, and ever since has acted, and now is acting, as such.

9. That thereafter, according to and in pursuance of the laws of the state of Minnesota, such proceedings were had in said last-mentioned action, that an order of said district court of said Washington county was made and entered therein on the 3d day of September, 1901, authorizing and requiring the creditors of said Thresher Company to become parties to said action, and to appear and exhibit therein their claims against said Thresher Company in the manner prescribed, and within the time specified in said order, to-wit, on or before six months from and after the first publication thereof. That immediately after the entry of said order, the said order was duly published as required therein, and that within the time therein limited, and in the manner therein prescribed, certain creditors of said Thresher Company duly became parties to said action as intervenors therein, and duly exhibited therein their claims and demands against said Thresher Company, and proved the same, and after hearing duly had in said action, said claims of such creditors were duly allowed to the amount of four hundred and forty-three thousand seven hundred and fifty-two dollars and seventeen cents (\$443,752.17), which is the entire amount of the indebtedness of said corporation, so far as this plaintiff has been informed and as he verily believes.

10. That at the time of the organization and incorporation of said Thresher Company, and at all times hereafter, during its

corporate existence, and at the time when, and at all times since, the said defendant became the sole beneficial owner of stock in said Thresher Company, as hereinafter alleged, it was provided in and by the constitution and general laws of the state of Minnesota pursuant to which said corporation was organized and incorporated, that each and every stockholder and beneficial owner of stock of said corporation severally agreed to assume and did assume liability for the indebtedness of said corporation in case of deficiency or insufficiency of corporate assets to liquidate such indebtedness, to the amount of the par value of his stock; and further agreed, in case of such deficiency, to pay and contribute for the equal benefit of the creditors of such corporation such amount, not exceeding the par value of the stock held by such stockholder, or held for the benefit of or in trust for such beneficial owner, as might be required to make up such deficiency, and to realize such fund as might be requisite for the payment of said creditors in full. That under said constitution and general laws, and the decisions of the supreme court of the state of Minnesota, and of the supreme court of the United States, construing and interpreting the same, said agreement and undertaking on the part of the stockholders, and on the part or in behalf of such beneficial owners, is contractual and transitory, and runs to and is enforceable for the corporate creditors by the receiver of the corporation, and that the same is enforceable by such receiver in any jurisdiction whereof jurisdiction of stockholders or beneficial owners may be obtained; and that said contract and agreement, on the part of the stockholders or beneficial owners grows out of and follows the subscription to or acquisition of the corporate stock wherein and whereby each stockholder and beneficial owner guarantees the payment of all corporation indebtedness contracted, created or existing while such stock is held by or for him, and to the amount of his stock as aforesaid. And the said defendant, when he authorized the acceptance in his behalf of the stock of said corporation now owned and held for him as hereinafter set forth, accepted the said provisions of the laws of Minnesota in relation thereto, and agreed to assume and pay the indebtedness of said corporation to the extent of the par value of the stock so owned and held for him therein, or so much thereof as might be necessary for the payment of such indebtedness, and to subject

himself to any assessments that might lawfully be imposed by the courts of Minnesota for that purpose. And under the laws of Minnesota, the liability of said defendant upon his agreement aforesaid was and is an asset of said corporation.

11. That on or about the 10th day of December, 1886, said defendant was the owner and holder of four hundred (400) shares of the preferred capital stock of the Northwestern Manufacturing and Car Company, a corporation organized under the laws of the state of Minnesota, and duly assigned the same by instrument in writing bearing date of that day, made and executed by him, and duly delivered unto D. B. Dewey, R. F. Hersey and D. N. Morgan, as trustees, in trust for the uses and purposes and upon the terms and conditions, and with the authority, therein stated and set forth; and, thereby, among other things, authorized the said trustees or their successors to exchange the said shares of the preferred capital stock of the Northwestern Manufacturing and Car Company for an equal number of shares of the common stock of the aforesaid Minnesota Thresher Manufacturing Company, and to hold the shares of the common stock of the said Thresher Company received by them through such exchange in behalf of, and in trust for the benefit of said defendant; a true copy of which said instrument in writing is hereto annexed, marked "Exhibit C," and hereby referred to and made part hereof as fully as if set up at length herein. That under and in pursuance of the provisions of the said instrument the said Dewey, Morgan and Hersey, did exchange said preferred stock of the defendant in the Northwestern Manufacturing and Car Company so assigned to them by the defendant for an equal number of the shares of the common stock of said Thresher Company, for which, on or about May 24, 1887, a certificate bearing date of that day was issued to them as trustees. That ever since said last-mentioned day the said trustees, their successors and survivors have held four hundred (400) shares of the common stock of said Thresher Company in trust for the benefit of said defendant. That on the 16th day of August, 1901, and while the provisions of the constitution and laws of the state of Minnesota, as aforesaid, remained in full force and effect, the above-named defendant was the sole beneficial owner of the said four hundred (400) shares of the capital stock of the said Thresher Company, and entitled to have the

same transferred to himself upon demand. That one E. D. Buffington, duly appointed one of the trustees, is the successor of the original trustees hereinbefore named. That after the expiration of the period of five years mentioned in said assignment of December 10, 1886, said trustees, their survivors or successors, duly notified said defendant that they held said four hundred (400) shares for his sole benefit and stood ready to transfer the same to him. And that under said constitution and laws of said state of Minnesota the stockholder's liability for the debts of the corporation and to the payment of the assessment hereinafter mentioned, is the personal liability of the beneficial owner of such stock and not of the trustee in whose name the stock stands upon the books of the company when such stock is held in trust, as it is in the case of this defendant.

12. That at the time the said defendant became the beneficial owner of said shares of the capital stock of said Thresher Company, the provisions of the constitution and laws of the state of Minnesota hereinbefore set forth were in full force and effect, and became a part of defendant's contract in the purchase and acquisition, through said trustees, of the beneficial ownership of said shares of stock; and said defendant in and by the authorizing and directing of such purchase and acquisition, through said trustees, of the said shares of stock and the holding of the same by the said trustees in his behalf and for his benefit, duly contracted and agreed for a valuable consideration that he would be and remain responsible with the other stockholders and beneficial owners of the stock of said company for all contracts, debts and engagements of said company while he remained such beneficial owner, to the amount of such stock at the par value thereof, to-wit, to the amount of twenty thousand dollars (\$20,000).

13. That it is provided by the laws of the state of Minnesota, as follows: * * *

14. That this plaintiff, by virtue of the laws of the state of Minnesota, and his appointment as such receiver, became and was and is the representative of all the creditors of said insolvent corporation, is invested with the title to all the rights of action possessed by said corporation, including the aforesaid liability of its stockholders, and is authorized to maintain such actions as are necessary to recover the assets thereof, included among which is the liability of said defendant hereinbefore set forth.

15. That on the 16th day of April, 1902, the plaintiff, as such receiver, duly made and caused to be filed with and presented to said district court of said Washington county, according to law, a petition by the plaintiff as such receiver, praying, among other things, that said court might, by order or judgment in said action, direct and levy a ratable assessment upon the parties liable as stockholders of said Thresher Company, for such amount, proportion, or percentage of the liability upon or on account of each share of said stock, as said court should deem proper after hearing, as by law provided, pursuant to the provisions of Chapter 272 of the general laws of Minnesota for the year 1899 (an act entitled "An act to provide for the better enforcement of the liability of stockholders of corporations"), as hereinbefore set forth, and praying that said court by order appoint a time for hearing such petition and application, and direct such notice thereof to be given as said court should deem proper.

16. That on said 16th day of April, 1902, said court duly made and entered its order in said last-mentioned action in pursuance of the provisions of said chapter 272 of the laws of 1899; that notice of said order was duly given in the manner prescribed by said order, notice of said order being duly published and served or mailed as therein directed; and that a copy of said order was duly mailed to the defendant herein more than twenty days prior to the date of hearing specified therein. That said matter, having been duly adjourned from time to time, and having duly come on for final hearing on the 10th day of December, 1902, at which time evidence was introduced by the receiver and by certain objecting stockholders in said Thresher Company, and the said matter having been orally argued to said court by counsel on behalf of said stockholders and by counsel on behalf of this plaintiff, thereafter, and on the 22nd day of December, 1902, said court duly made and entered its order or decree in said action, a true copy of which said order or decree is hereto annexed, marked "Exhibit A," and hereby referred to and made a part hereof as fully as if set up at length herein, and said last-mentioned order or decree has never been in any manner reversed, modified or set aside.

17. That said court, in and by said order or decree, adjudged that an assessment of thirty-six (36) per cent. of the par value of

each share of the capital stock of said Thresher Company—to-wit, the sum of eighteen dollars (\$18) on each share thereof—be, and the same was thereby, assessed upon and against each and every share of said capital stock, and upon and against the person, corporation or party liable as a stockholder of said Thresher Company for, upon or on account of said shares of stock, and that each and every person, corporation or party liable as such stockholder of said Thresher Company pay, and was thereby directed to pay to this plaintiff, as receiver of said Thresher Company, at his office in the city of Stillwater, county of Washington and said state of Minnesota, within thirty days after the date of said order, the said sum of eighteen dollars (\$18) for and on account of each and every share of said stock for or upon which said person, corporation or party was liable as a stockholder of said Thresher Company, as aforesaid, and that in and by said order or decree this plaintiff, as such receiver, was ordered to give due notice of such order or decree by mailing a copy of the same within ten days from the date thereof to each stockholder of said Thresher Company whose name and address was known to said receiver. That the amount so aforesaid adjudged and assessed against the stockholders of said corporation, was a just and proper amount for the payment of its indebtedness and the other charges which, by the laws of Minnesota, this plaintiff was required to pay, and was and is necessary for that purpose.

18. That notice of said last-mentioned order of said district court of said Washington county was duly given by the plaintiff as such receiver, as prescribed by said order, and in the manner directed thereby.

19. That certain stockholders of said Thresher Company who duly intervened in said last-mentioned action, and objected to the issuance of said last-mentioned order or decree and the levy of any assessment, duly prosecuted an appeal from said last-mentioned order or decree to the supreme court of said state of Minnesota; that said appeal was duly heard and considered by said supreme court; and that at the April term, A. D. 1903, of said court judgment was rendered and entered in said matter in and by said supreme court, determining and adjudging that the said order or decree so appealed from be in all things affirmed.

20. That the plaintiff gave notice of the decision and judgment of said supreme court in the matter of said order or decree by mailing a copy of said order and of the opinion of said supreme court to each stockholder of said Thresher Company whose name and address were known to the plaintiff.

21. That thereafter, and on the 1st day of May, 1907, the plaintiff, as such receiver, duly made and caused to be filed with and presented to said district court of said Washington county, according to law, a further petition by the plaintiff as such receiver, praying, among other things, that said court might, by order or judgment in said action, direct and levy a second ratable assessment upon the parties liable as stockholders of said Thresher Company, for such further and additional amount, proportion or percentage of the liability upon or on account of each share of the said stock, as said court should deem proper after hearing thereon, as by law provided, pursuant to the provisions of said chapter 272 of the general laws of Minnesota for the year 1899, as hereinbefore set forth, and praying that said court by order appoint a time for hearing such petition and application, and direct such notice thereof to be given as said court should deem proper.

22. That on the said 1st day of May, 1907, said court duly made and entered its order in said last-mentioned action in pursuance of the provisions of said chapter 272 of the laws of 1899; that notice of said last-mentioned order was duly given in the manner prescribed by said order, such notice being duly published and served or mailed as therein directed; and that a copy of said order was duly mailed to the defendant herein on or before the 15th day of May, 1907. And that said matter having duly come on for hearing on the 11th day of June, 1907, at which time evidence was introduced by the receiver and the said matter was submitted to the court by counsel for the receiver, and no opposition was made thereto on behalf of any of the stockholders of said Thresher Company, and it thereupon being made to appear to the satisfaction of the court by said last-mentioned petition and the evidence introduced at said hearing that, by reason of the insufficiency of said first assessment to that end, and the inability of the receiver to enforce the same against a large number of stockholders, and for other causes, it was necessary and desirable and for the interest of creditors that another and further and additional assessment upon

or against said stock be levied, the said court then and thereupon directed and levied a further and additional assessment for such amount, proportion and percentage of the liability upon or on account of each share of said stock, as said court in its discretion deemed proper, and then and thereupon duly made and entered its further order or decree in said action therefor, and to that end, a true copy of which said order or decree is hereto annexed, marked "Exhibit B," and hereby referred to and made a part hereof as fully as if set up at length herein, and said last-mentioned order has never been in any manner reversed, modified or set aside.

23. That said court, in and by said last-mentioned order or decree, adjudged that a further assessment of sixty-four (64) per cent. of the par value of each share of the capital stock of said Thresher Company—to-wit, the sum of thirty-two dollars (\$32), on each share thereof—be, and the same was thereby, assessed upon and against each and every share of said capital stock, and upon and against the person, corporation or party liable as a stockholder of said Thresher Company for, upon or on account of said shares of stock, and that each and every person, corporation or party liable as such stockholder of said Thresher Company pay, and was thereby directed to pay to this plaintiff as receiver of said Thresher Company, at his office in the city of Stillwater, county of Washington and said state of Minnesota, within thirty days after the date of said order, the said sum of thirty-two dollars (\$32) for and on account of each and every share of said stock for or upon which said person, corporation or party was liable as a stockholder of said Thresher Company as aforesaid, and that in and by said last-mentioned order or decree this plaintiff, as such receiver, was ordered to give due notice of such order or decree by mailing a copy of the same within ten days from the date thereof to each stockholder of said Thresher Company whose name and address were known to said receiver. That the amount so aforesaid adjudged and assessed against the stockholders of said corporation, was a just and proper additional amount, in addition to the amount of said prior assessment, for the payment of its indebtedness and the other charges which, by the laws of Minnesota, this plaintiff was required to pay, and was and is necessary for that purpose.

24. That notice of said last-mentioned order of said district court of said Washington county was duly given by the plaintiff as such receiver, as prescribed by said order and in the manner directed thereby.

25. That in and by the authority of said last-mentioned order or decree, and of the constitution and laws of the state of Minnesota and of the United States, there is due and owing from the defendant to the plaintiff, as such receiver, the sum of twelve thousand eight hundred dollars (\$12,800) and interest thereon at the rate of six per cent. per annum from the 12th day of July, 1907; that more than thirty days have elapsed since the date of said last-mentioned order, and that the plaintiff, as such receiver, has duly demanded of the defendant payment of the amount due from him as such stockholder of said Thresher Company, under and pursuant to said order; that the defendant has failed and refused to pay the same or any part thereof, and that no part thereof has been paid.

Wherefore the plaintiff, as such receiver, demands judgment against the defendant for the sum of twelve thousand eight hundred dollars (\$12,800) and interest thereon at the rate of six per cent. per annum from the 11th day of July, 1907, and for the costs and disbursements of this action.

WILSON & WALLIS,
Plaintiff's Attorneys.

[*Verification.*]

No. 65.

Declaration against Assignee of Shares for Assessment Thereon.

[*Caption.*]

First Count. In a plea of the case for that the said defendant heretofore, to-wit, on the 1st day of September, A. D. 1894, at said London, to-wit, at Nashua, in the state of New Hampshire, in the United States of America, was indebted to the said plaintiff in a large sum of money, to-wit, seven thousand dollars, for a certain call and assessment made by said company in pursuance of its charter and by-laws, at said London, to-wit, on the 10th day of July, A. D. 1894, and to be paid on the 1st day of September, 1894, upon the defendant's subscription to a large number, to-wit,

one thousand shares at ten pounds sterling each, to-wit, fifty dollars each of the capital stock of said company, which subscription had heretofore been made and subscribed in due form by said defendant, to-wit, at said Nashua, and of the said assessment and call the said defendant had notice at Nashua, in the state of New Hampshire, heretofore, to-wit, on the 11th day of July, A. D. 1894, and thereafter, to-wit, on the 1st day of September, A. D. 1894, at said Nashua, in consideration thereof the defendant then and there promised the plaintiff to pay the said sums on demand with interest at the rate of seven per cent. per annum from the time the same became due and payable as aforesaid.

Yet, though often requested, the defendant has never paid the said several sums of money, or any of them, but has neglected and refused so to do.

Second Count. And, also, in a further plea of the case for that the plaintiff avers that it is a corporation duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, and having its principal office and situs at the city of London, in said kingdom, and is a citizen of said London; that by the provisions of the articles of association and incorporation of said company and the rules and regulations of said corporation that were in force at and before the time the said defendant became the subscriber to and owner of the shares of the capital stock of said corporation as hereinafter set forth, the said corporation was authorized and empowered to make calls upon its shareholders from time to time in respect to all moneys unpaid on their respective shares, and each shareholder would be liable to pay the amount of calls so made as to the persons and at the times and places appointed by the said corporation, and that shareholders should be liable to pay interest at seven per centum per annum from the day appointed for payment of such call to the time of the actual payment of the calls in arrears.

And the plaintiff further avers that James Lewis Lombard, heretofore, to-wit, on the 30th day of August, A. D. 1883, was the owner of one thousand shares of ten pounds each, English or sterling money, par value of the capital stock of the said corporation, which shares had theretofore been subscribed for and purchased by him, the said Lombard, and the same had been legally transferred to him and his heirs and assigns, and accepted and

held by him, the said Lombard, for himself, his heirs and assigns, subject to the articles of association and the rules and regulations of said corporation as aforesaid; that upon said one thousand shares two pounds each of English money had been paid and eight pounds each remained unpaid.

That on said 30th day of August, A. D. 1883, by an assignment in writing in due form of law, the said James Lewis Lombard sold, assigned, transferred and delivered to the defendant his said one thousand shares of the capital stock of the plaintiff corporation, and the said shares were then and there accepted by it, the said defendant, subject to the articles of association and rules and regulations of the plaintiff corporation, and said assignment was afterwards, to-wit, on the day last aforesaid, at the request of the said defendant, accepted by said plaintiff and duly registered on the books of said corporation, of which the defendant then and there had knowledge, and the said defendant, ever since said assignment and registration last aforesaid, has been the registered and legal holder of said one thousand shares; and in consideration thereof, then and there, to-wit, at said Bristol, promised to pay said plaintiff all such calls upon said shares as the said plaintiff might make from time to time, if not exceeding one pound English or sterling money upon each share at any one time, to the person and at the times appointed by the said corporation, with interest at the rate of seven per cent. per annum from the day appointed for the payment of such call to the time of the actual payment of the calls in arrears.

And the plaintiff further avers that on the 10th day of July, A. D. 1894, the said corporation agreeably to its articles of association and rule and regulations aforesaid, made a call upon its shareholders, including the defendant, which was then and there the legal owner and holder of all the aforesaid one thousand shares, of one pound sterling or English money per share, payable on the first day of September, A. D. 1894, at the said company's office in said London, of which said call the said defendant had notice at said Nashua afterwards, to-wit, on the same 10th day of July, A. D. 1894.

Yet the said defendant, though often requested, has not paid the amount of the said call upon its said shares as aforesaid or any part thereof.

Third Count. And also in a further plea of the case for that the said defendant heretofore, to-wit, on the 2nd day of December, A. D. 1895, at said London, to-wit, at Nashua, in the state of New Hampshire, in the United States of America, was further indebted to the said plaintiff in a large sum of money, to-wit, eight thousand dollars, for a certain call and assessment made by said company in pursuance of its charter and by-laws, at said London, to-wit, on the 10th day of July, A. D. 1895, and to be paid on the 2nd day of December, A. D. 1895, upon the defendant's subscription to a large number, to-wit, one thousand shares at ten pounds sterling each, to-wit, fifty dollars each of the capital stock of said company, which subscription had theretofore been made and subscribed in due form by said defendant, to-wit, at Nashua, and of the said assessment and call the said defendant had notice at Nashua, in the state of New Hampshire, heretofore, to-wit, on the 2nd day of December, A. D. 1895, and thereafter, to-wit, at said Nashua, on the 2nd day of December, A. D. 1895, in consideration thereof, the defendant then and there promised the plaintiff to pay said sums on demand with interest at the rate of seven per cent. per annum from the time the same became due and payable as aforesaid. Yet though often requested, the defendant has never paid said several sums of money, or any of them, but has neglected and refused so to do, to the damage of the said plaintiff (as it says) the sum of fourteen thousand dollars.

A. B.,
Attorney.

No. 66.

Action in Trespass by Minor by Next Friend and by Next Friend in His Own Right—Plaintiffs' Statement.

[*Caption.*]

Alvin Chesko, by his father and next friend, Thomas Chesko, and Thomas Chesko in his own right, citizens, residents and inhabitants of the state of Pennsylvania, by their counsel, O'Brien & Kelley, complain in this action of trespass against the Delaware and Hudson Company, a corporation organized and existing under the laws of the state of New York, and a citizen, resident and inhabitant thereof, and say:

On the days and dates hereinafter mentioned the defendant, the Delaware and Hudson Company, was a corporation of the state of New York and a citizen, resident and inhabitant thereof, and was in possession and operated a certain machine shop situate on a street known and called East Market street, which was then and there a much-traveled thoroughfare in the city of Scranton, county of Lackawanna and middle district of Pennsylvania, and said machine shop was then and there equipped with certain dangerous machinery, which said machinery was located on the first floor thereof at and near a certain doorway which opened at and near the sidewalk of said East Market street aforesaid.

Thereupon it became the duty of the defendant to maintain said machinery so that it might not attract to the same children who might be lawfully passing along said street; to refrain from inviting, permitting, allowing or suffering children as aforesaid to come at or near said machinery; to maintain said machinery in such condition that it might not injure any person who might be lawfully near the same; and to properly guard said machinery; and to guard the gates, doorways and entrances to said machine shop where said dangerous machinery was in order that children of tender years like said plaintiff, Alvin Chesko, could not get near, about, upon and around said machinery.

Yet the said defendant neglected its aforesaid duties and every of them and by reason thereof, to-wit, on the 26th day of October, A. D. 1911, Alvin Chesko, a minor of the age of six years, while passing along the sidewalk of the aforesaid street, was then and there attracted to said machinery by the condition of the same, and was then and there invited by the servants of the defendant in charge of the same to pass at and near said machinery; and was then and there by the servants of the defendant in charge of the same suffered, permitted and allowed to be and remain near said machinery; and said defendant then and there neglected to maintain said machinery in safe and proper condition for persons who might be at and near the same; and said defendant then and there neglected to properly guard said machinery; and said defendant then and there neglected to have the doors, gates and entrances closed leading into said machine shop, and then and there neglected to have said dangerous machinery enclosed and guarded so

that the said plaintiff, Alvin Chesko, could not get upon, near and close to the same; so that said Alvin Chesko, while passing along the aforesaid street, then and there passed through the said doorway into said machine shop and came in contact with said machinery and was caught therein with great violence and suffered the loss of part of his hand.

By reason of the negligence of the defendant as aforesaid, Alvin Chesko, one of the plaintiffs, became injured in his head, neck, chest, abdomen, back, spine, hips, legs, arms, feet, hands, muscles and nerves, and vital organs, and was confined to his bed by reason of said illness for a long space of time, and in the manner aforesaid became then and there seriously and permanently injured, and by reason of said injuries suffered, does suffer and always will suffer great bodily and mental pain and anguish, and by means of the premises was thereby hindered, and is and always will be hindered and prevented from transacting his lawful affairs and business.

The other plaintiff, Thomas Chesko, father of the aforesaid plaintiff, by reason of the premises was, is and always will be deprived of the earnings, gains, profits and advantages which he should and otherwise would have acquired and derived from the said son until he should arrive at the age of twenty-one (21) years and afterwards had it not been for his injury as aforesaid, due to the negligence of the defendant as aforesaid; and was further damaged in that he was compelled and always will be compelled to expend large sums of money in nursing, medicines and medical attendance.

Wherefore, the plaintiffs bring this suit to recover their damages thus sustained, to-wit, damages in the sum of twenty thousand (\$20,000) dollars.

O'BRIEN & KELLY,
Counsel for Plaintiffs.

No. 67.**Petition to Recover on Reparation Order of the Interstate Commerce Commission, and Praecipe.****[Caption.]**

The petition of the above-named plaintiff respectfully shows:

I. That the petitioner is and was at the times herein alleged a corporation duly organized and existing under the laws of the state of Ohio, residing in the southern district of Ohio, Western Division, and chiefly engaged in the business of buying and selling, and dealing in old rails and other scrap iron.

II. That the defendant, Morgan's Louisiana & Texas Railroad & Steamship Company, is a corporation duly organized and existing under the laws of the state of Louisiana; that the Louisiana Western Railroad Company is a corporation duly organized and existing under the laws of the state of Louisiana; that the Texas & New Orleans Railroad Company is a corporation duly organized and existing under the laws of the state of Texas; that the defendant, the Illinois Central Railroad Company, is a corporation organized and existing under the laws of the state of Illinois.

That the defendants are and were at the times herein alleged common carriers engaged in the business of transporting passengers and property by railroad by continuous carriage or shipment between points in the state of Texas and points in the state of Illinois, and are and were particularly engaged in the transportation of scrap iron, in carloads, from Houston, Texas, to Chicago, Illinois, and as such common carriers were and are subject to the provisions of the act to regulate commerce, approved February 4, 1887, and all acts amendatory thereof and supplementary thereto.

III. That the defendants, during the months of October and November, in the year nineteen hundred and twelve, in and by their tariff known and designated as "Leland, I. C. C. No. 947," charged and exacted a joint through rate of thirty cents per hundred pounds on scrap iron, in carloads, from Houston, Texas, to Chicago, Illinois; that while so charging said joint through rate of thirty cents per hundred pounds the defendants, by their individual tariffs hereinafter specified, maintained a lower combination of rates than thirty cents per one hundred pounds on scrap

iron from Houston, Texas, to Chicago, Illinois; that the said lower combination of rates was published in "Southwestern Lines Tariff, I. C. C. No. 945," and "Emerson Tariff, I. C. C. No. 10," the former naming a rate of nine and one-half cents per one hundred pounds on scrap iron from Houston, Texas, to New Orleans, Louisiana, when destined beyond, and the latter naming a rate of three dollars and thirty-one cents per net ton on scrap iron from New Orleans, Louisiana, to Chicago, Illinois; that by reason of the defendants charging such higher joint rate than the lower combination on New Orleans in effect between the same points and over the same lines of railroad, the defendants violated the provisions of sections 1, 3 and 4 of the act to regulate commerce.

IV. That during the months of October and November, 1912, the plaintiff shipped from Houston, Texas, to Chicago, Illinois, a number of carloads of scrap iron upon which it paid the joint through rate of thirty cents per one hundred pounds, that the charging by the defendants of such higher joint through rate than the lower combination on New Orleans contemporaneously in effect subjected the plaintiff to the payment of rates which were unjust and unreasonable, unjustly discriminatory, and in violation of section 4, and resulted in its direct damage and injury.

V. That the plaintiff did file a petition before the interstate commerce commission, in the case known and designated on the dockets of said tribunal as "The Isaac Joseph Iron Company v. Morgan's Louisiana & Texas Railroad & Steamship Company; Louisiana Western Railroad Company; Texas & New Orleans Railroad Company, and Illinois Central Railroad Company, Docket No. 6924," complaining of the aforesaid alleged violations of the act to regulate commerce and praying that the defendants above named might be severally required to answer the charges therein contained; that after due hearing and investigation an order be made commanding the said defendants and each of them to cease and desist from the aforesaid alleged violations of the act to regulate commerce, and to establish and put in force, and apply as maximum in the future to the transportation of scrap iron, in carloads, from Houston, Texas, to Chicago, Illinois, a rate no higher than is contemporaneously maintained by their individual tariffs applying to the transportation of scrap iron between the same points; and also to pay to this petitioner by way of

reparation for the unlawful charges hereinbefore described such sum as, in view of the evidence to be adduced therein, the commission might consider the petitioner entitled to, and that such order or further order or orders might be made as the commission might consider proper in the premises and the petitioner's cause might appear to require.

VI. Whereupon the aforesaid being at issue upon complaint and answers on file with the interstate commerce commission, and having been duly heard and submitted by the parties thereto, and full investigation of the matters and things involved therein having been had, the commission did, on the 2nd day of November, A. D. 1915, make an order authorizing and directing the above-named defendants to pay unto the petitioner, The Isaac Joseph Iron Company, on or before December 31, 1915, the sum of \$682.34 with interest thereon at the rate of 6 per cent. per annum from December 6, 1912, as reparation on account of the aforesaid alleged excessive rate. That the aforesaid order and opinion of the interstate commerce commission is attached hereto and made a part hereof.

VII. That the above-named defendant railroads did not comply with the aforesaid order of the interstate commerce commission within the time limit in such order and continue to refuse to pay to this petitioner the sum specified therein. (1)

VIII. Wherefore, your petitioner prays that it may recover from the defendants the sum of \$682.34 with interest thereon at the rate of 6 per cent. per annum, as specified in the order of the interstate commerce commission, and that an order be issued commanding the said defendants to pay such sum on or before a day certain; and that your petitioner be allowed a reasonable attorney's fee, to-wit: the sum of five hundred dollars, to be taxed and collected as a part of the costs of the suit as is authorized by the statute in such case made and provided.

A. B.,
Attorney for the Plaintiff.

Præcipe.

To the Clerk of the Court:

Issue summons to all of the within-named defendants returnable according to law. Indorse action for the recovery of money

only and for judgment against all the defendants for the costs taxed in this suit, including \$500 as attorney's fee, and for such other and further relief to which plaintiff may be entitled.

Note: In issuing summons to the defendants, it will be necessary to issue separate summons to the United States marshals in the districts in which the defendants have their principal operating offices, as follows, to-wit:

To the United States Marshal in the district of Illinois, wherein Chicago, Illinois, is located, as to the defendant the Illinois Central Railroad Company; to the United States marshal in the district of Louisiana, wherein New Orleans is located as to the defendant the Louisiana Western Railroad Company; to the United States marshal in the district of Louisiana, wherein New Orleans is located, as to the defendant Morgan's Louisiana & Texas Railroad & Steamship Company; to the United States marshal in the district of Texas, wherein Houston is located, as to the defendant Texas & New Orleans Railroad Company.

(1) Upon failure of the carrier to comply with an order of the interstate commerce commission to make reparation in damages, the complainant or any person in whose favor the order was made may bring suit upon said order in a United States district court in the district of his residence, and he shall file a petition setting forth briefly the causes for which he claims damages and the order of the commission in the premises. 34 Stat. L. 584, 36 Stat. L. 539, 38 Stat. L. 219.

Such suit must be filed in the district court within one year from the date of the order, "and not after." 34 Stat. L. 584.

"In such suit all parties in whose favor the commission may have made an award of damages by a single order may be joined as plaintiffs, and all the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants." Act to Regulate Commerce as amended, Sec. 16. Process in such suits may run, be served and be returnable anywhere in the United States, 38 Stat. L. 219.

Such suit may be brought in a state court. *Darnell v. Illinois Central R. Co.*, 225 U. S. 243, 56 L. Ed. 1072.

Such suit is not on the award as such, to recover the amount of damages awarded, but is a plenary suit for damages actually incurred by the plaintiff by reason of the violation by the carrier of the statute. *Lehigh Valley R. Co. v. Clark*, 207 Fed. 717, 125 C. C. A. 235.

The petition in such suit must set forth the "causes for which the complainant claims damages, and the order of the commission," and it is not sufficient to set forth the proceedings of the commission alleging these causes. *Baer Bros. v. Mercantile Co.*, 200 Fed. 614, and further in this case it is said that "the pleadings must tender an issue as to whether the rates are unreasonable, discriminatory, or otherwise violative of law." The petition need not allege in specific terms that the plaintiff was damaged; it is sufficient to set forth at large all the facts of the case together with the findings of the commission, the plaintiff's right to reparation for the alleged wrongs, and a prayer for such reparation. *Southern Pacific Co. v. Goldfield, etc., Co.*, 220 Fed. 14, 135 C. C. A. 590.

It is insufficient to allege that "said commission, agreeable to the provisions of the law in that regard, duly caused a properly authenticated copy of its said report together with the order aforesaid, to be delivered to the said defendant." There must be a direct averment that the service was made and the manner thereof in terms so clear that an issue of fact may be raised. *Baer Bros. Mercantile Co. v. D. & R. G. R. R.*, 200 Fed. 614.

"If the order is not complied with, the plaintiff may have recourse to the courts (federal or state) setting forth his injury, the fact of his complaint to the commission, the order made thereon and that it has not been complied with. In the words of the statute, the cause then proceeds as an action for damages, except that the findings of the commission are made evidence, and the defendant must pay costs and counsel fees." *Minds v. Penn. R. Co.*, 237 Fed. 267, 270. Also as to the nature of the action on the order of the commission, see *Hillsdale Coal and Coke Co. v. Penn. R. Co.*, 237 Fed. 272.

No. 68.

(Another more elaborate petition.)

Complaint against Carriers on Award of Reparation by Interstate Commerce Commission.

[Caption.]

Comes now petitioner, Ballou and Wright, a corporation duly organized and existing under and by virtue of the laws of the state of Oregon, with its principal office and place of business at the city of Portland, in Multnomah county, state of Oregon, and a citizen of, and domiciled in, the said state of Oregon, and for its cause of action against said respondents, The New York, New Haven and Hartford Railroad Company, a corporation, Boston and Albany Railroad Company, a corporation, The New

York Central and Hudson River Railroad Company, a corporation, The Michigan Central Railroad Company, a corporation, Chicago and Northwestern Railroad Company, a corporation, Union Pacific Railroad Company, a corporation, Oregon Short Line Railroad Company, a corporation, Oregon-Washington Railroad and Navigation Company, a corporation, alleges:

I. That the said Ballou and Wright is now and was at all of the times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the state of Oregon, with its principal office and place of business at the city of Portland, in Multnomah county, state of Oregon, and as such corporation is now and was at all times herein mentioned a citizen of and domiciled in the said state of Oregon.

II. That the respondent, Union Pacific Railroad Company, is now and was at all the times herein mentioned a corporation, duly organized and existing under and by virtue of the laws of the state of Utah, with its principal office and place of business at Salt Lake in the said state of Utah, and as such corporation is now and was at all the times mentioned herein a citizen of and domiciled in the said state of Utah.

[And so for all the defendants as far as known, then say as follows:]

VI. That each of the other respondents above named is now and at all the times mentioned herein was a corporation duly organized and existing under and by virtue of the laws of one of the states of the United States, with its principal office and place of business therein, but the petitioner does not know and is unable to state the particular state of the United States wherein either of said corporations was organized, or wherein it was at any time or is now existing, or the particular state of which either of the said other respondents was at any time or is now a citizen, or in which it was at any time or is now domiciled, but petitioner alleges: That each of the said other corporations at all of the times herein stated did business as a corporation and in its corporate name, with the said petitioner, and each of the said other respondents should and of right ought to be required either to set out fully and particularly in its answer to this petition, the particular states wherein it was incorporated and organized and wherein it is now existing, and the place of its

principal office and business and its citizenship and domicile, or each of the said other respondents should and of right ought to be estopped from denying its corporate existence, or from requiring petitioner to allege either the place where either of said corporations was incorporated, or was at any of the times herein stated, or is now, existing, or the place of its principal office or business or domicile or citizenship; or in lieu thereof the said petitioner should be permitted upon leave of the court first obtained, when all of the said facts are discovered, to make all necessary allegations touching said matters. That J. M. Dickinson is now and was at all the times herein stated the duly qualified and acting receiver of the said Chicago, Rock Island and Pacific Railroad Company.

VII. That said petitioner is now, and was at all of the times herein stated, as such corporation, engaged in the business of a wholesale and retail dealer in, and in the sale of, motorcycles and other vehicles and merchandise, with its principal office and place of business at the city of Portland in Multnomah county in the state of Oregon; and at all times herein stated it had a large and extensive trade in said business in said state of Oregon and in other states on the Pacific coast.

VIII. That each of the respondents above named was at all of the times herein stated, and it is now, a common carrier, engaged in interstate commerce by railroad, and in the transportation of passengers and property by railroad, for hire over its lines of railways, and between Armory and other points in the state of Massachusetts and the city of Portland in Multnomah county and other points in the state of Oregon, and other states and territories of the United States, and in the Dominion of Canada; and as such common carrier, each of the said respondents was at all of the times herein stated, and it is now, subject to the provisions of the act of congress of the United States, entitled an act to regulate commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto.

IX. That the said petitioner on the several dates hereinafter shown and set forth, caused to be delivered to the said respondent, The New York, New Haven and Hartford Railroad Company, at Armory, Massachusetts, and the said respondent on the said several dates received the certain carload shipments of

motorcycles herein shown, for transportation and delivery to the said petitioner at Portland, Oregon; and thereafter the said respondent, operating with said other respondents, caused each of the said shipments to be delivered to the said complainant and petitioner at Portland, Oregon, between April 1, 1911, and January 24, 1913.

X. That at the time of the shipments hereinafter shown and set forth, dated respectively March 24, 1911, and March 9, 1912, Transcontinental Freight Bureau Westbound Tariff 41, I. C. C. 942, issued by R. H. Countiss, was in effect, and carried a first class rate of \$3.00 per 100 pounds, and the said first-class rate from Armory, Massachusetts, to Portland, Oregon, then established and in force and effect was \$3.00 per 100 pounds; and at the time of the shipments hereinafter shown and set forth dated respectively July 3, 1912, August 22, 1912, and January 3, 1913, The Transcontinental Freight Bureau Westbound Tariff 4-I, I. C. C. 942, issued by R. H. Countiss, was in effect and carried a first-class rate of \$3.70 per 100 pounds, and the first-class rate from Armory, Massachusetts, to Portland, Oregon, then established and in effect was \$3.70 per 100 pounds.

That at the time of said shipments the said first-class rates as shown by said tariff were and are just and reasonable and should have been applied to motorcycles in car loads.

XI. That the said respondents charged and collected and the said petitioner paid to said respondents, under protest, on each of the said shipments hereinafter shown, a commodity carload rate of \$4.00 per one hundred pounds, which said charge was and is excessive, unjust and unreasonable, and in violation of said act to regulate commerce and the acts amendatory thereof, and supplementary thereto, and particularly section one thereof.

XII. That the following is a detailed statement, as to each shipment upon which reparation is herein claimed by the said petitioner against said respondents, showing:

1. Point of origin of shipment and date thereof.
2. Waybill number and date thereof.
3. Car number and initial.
4. Carriers interested and route and point of destination.
5. The weight and commodity rate charged and collected.
6. The weight and first-class rate in effect and applicable to

motorcycles in car loads, at the time of each of said shipments, and the amount which should have been charged and collected.

7. The amount of reparation due, based upon the first-class rate in effect at the time of each shipment.

8. Amount of overcharge.

[Here follows itemization, and then follows:]

XIII. That the foregoing shipments consisted of five carloads of motorcycles which were moved over the lines of the said respondents as hereinbefore shown and mentioned. That the aggregate weight of the said shipments was 79,000 pounds; and the said respondents charged and collected, and the said petitioner paid, as freight for said service a commodity rate of \$4.00 per 100 pounds, or the total sum of \$3,160.00. That said petitioner paid to said respondents under protest, all of the said excessive, unjust and unreasonable freight charges for said service at the city of Portland, Oregon, between April 4, 1911, and February 1, 1913. That the aggregate weight of the shipments made on March 25, 1911, and March 9, 1912, respectively, was 32,300 pounds, and when these shipments were made the first-class, which should have been applied to motorcycles in carloads from Armory, Massachusetts, to Portland, Oregon, was \$3.00 per 100 pounds, which would amount to the total sum of \$969.00.

That the aggregate weight of the shipments made July 3, 1912, August 22, 1912, and January 3, 1913, respectively, was 46,700 pounds, and when these last named shipments were made the first-class rate which should have been applied to motorcycles in carloads from Armory, Massachusetts, to Portland, Oregon, was \$3.70 per 100 pounds, which would amount to the total sum of \$1,727.90.

That based upon the first-class rate which should have been applied to motorcycles in carloads at the time of these several shipments the amount which petitioner should have paid on all of the said shipments was the total sum of \$2,696.00 and no more.

That the said rate charged and collected by the said respondents from the petitioner was excessive, unjust and unreasonable to the extent that it exceeded the said first-class rate which should have been applied to motorcycles in carloads and in effect at the time the said shipments were made. That the difference between the amount so unjustly and unreasonably charged and

collected by the said respondents and the amount the said petitioner would have paid at the said first-class rate which should have been applied to motorcycles in carloads and then in effect was and is the sum of \$463.10.

XIV. That by reason of the said excessive, unjust and unreasonable charges made and collected by said respondents for the said service, the said petitioner has been damaged in the sum of \$463.10, being the difference between the amount actually charged and collected by the said respondents and paid by the said petitioner, and the reasonable amount which the said petitioner would have paid based upon the said first-class rate at the time of said shipments which should have been applied to motorcycles in carloads.

XV. That on the 10th day of March, 1913, the said petitioner filed its petition with the interstate commerce commission of the United States, against the said respondents and the other respondents mentioned in the title of this cause, which said petition is number 5616 in the files of the said commission, and is in writing in words and figures as follows, to-wit:

[Omit the petition and proceed:]

XVI. That thereafter such proceedings were had and taken by the said interstate commerce commission in said cause that on the 14th day of August, 1914, the said commission made and entered its decision and order of reparation in writing in words and figures as follows, to-wit:

[Omit the same and proceed:]

That no application has ever been made by the said respondents or either thereof to set aside said report, decision and order, or either thereof, of the said commission, or for a rehearing of said cause, or of any matter determined therein, nor has the said commission ever granted a rehearing of said cause, or reversed, changed, or modified the said report, decision and order, or either thereof, but the same is now in full force and effect.

XVII. That in and by the terms of the said order of reparation the said respondents mentioned in this cause of action were required to pay unto the said petitioner on or before the 1st day of October, 1914, the sum of \$463.10 with interest thereon at the rate of 6% per annum from January 1, 1913, as reparation

on account of the said unreasonable rate charged for the transportation of motorcycles in carloads from Armory, Massachusetts, to Portland, Oregon.

That the said report and order of reparation were, immediately after the dates thereof, served upon the said respondents and an immediate demand was made upon them that they comply with the said order of reparation of the said interstate commerce commission and pay unto the said petitioner the said sum of \$463.10 with interest thereon at the rate of 6% per annum from the 1st day of January, 1913, as reparation on account of the said unjust, excessive and unreasonable rate charged and collected by the said respondents as aforesaid, but petitioner alleges: That the said respondents have, and each of them has, failed, neglected and refused, and each of them still fails, neglects and refuses to comply with the said order of the said interstate commerce commission, or to obey the provisions thereof, or to pay the said petitioner the said sum of \$463.10 with said interest or any part thereof.

XVIII. That the sum of \$300.00 is a reasonable attorney's fee in this action, to be taxed and collected as a part of the costs thereof.

XIX. That there is now due and owing the said petitioner from the said respondents the said sum of \$463.10, together with interest thereon at the rate of 6% per annum from January 1, 1913, and the further sum of three hundred dollars, a reasonable attorney's fee herein.

Wherefore petitioner demands judgment against the said respondents [*naming them*] for the said sum of \$463.10 with interest thereon at the rate of 6% per annum from the 1st day of January, 1913, and the further sum of \$300.00 as attorney's fee herein and for its costs and disbursements in this action.

[*Verification.*]

A. B. and C. D.,
Attorneys for Petitioner.

No. 69.**Declaration in Assumpsit for Goods Sold and Delivered.**

[Caption.]

The Toledo and Ohio Central Railway Company, which is a corporation duly created, organized and existing under the laws of the state of Ohio, and a citizen of the state of Ohio, complains of The Chesapeake and Ohio Coal and Coke Company, which is a corporation duly created, organized and existing under the laws of the state of West Virginia, and a citizen and resident of the state of West Virginia, and the southern district thereof, which has been summoned, etc., of a plea of trespass on the case in assumpsit: For that the said defendant heretofore, to-wit, on the first day of October, 1912, was indebted to said plaintiff in the sum of \$20,000.00 for the work and labor, care and diligence of the said plaintiff by the said plaintiff before that time done, performed and bestowed in and about the business of said defendant, and at its the said defendant's special instance and request; and also, in the further sum of \$20,000.00, for divers goods, wares and merchandise, by the said plaintiff before that time sold and delivered to the said defendant at its the said defendant's like special instance and request; and also, in the further sum of \$20,000.00 for money by the said plaintiff before that time lent and advanced to, and paid, laid out, and expended for the said defendant and at its the said defendant's like special instance and request; and also, in the further sum of \$20,000.00 for other money by the said defendant before that time had and received to and for the use of the said plaintiff: And being so indebted, it, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, undertook, and then and there faithfully promised the said plaintiff, to pay it the said several sums of money in this account mentioned, when it, the said defendant, should be thereunto afterwards requested.

And for that, also, the said defendant afterwards, to-wit, on the day and year last aforesaid, accounted with the said plaintiff of and concerning divers other large sums of money, from the said defendant to the said plaintiff before that time due and owing, and then in arrear and unpaid; and upon such accounting, the said defendant was then and there found to be in arrear and

indebted to the said plaintiff in the further sum of \$20,000.00, and being so found in arrear and indebted to the said plaintiff, the said defendant in consideration thereof, afterwards, to-wit, on the day and year last aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay it said last mentioned sum of money when it should be thereunto afterwards requested.

Nevertheless, the said defendant, not regarding its several promises and undertakings, or any or either of them, but contriving and intending to deceive and defraud the said plaintiff, has not yet paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiff (although often requested so to do), but the same to pay the said defendant has wholly neglected and refused, and still does neglect and refuse, to the damage of the plaintiff of \$20,000.00 and therefore it brings suit, etc.

FRANK S. LEWIS and
BROWN, JACKSON & KNIGHT, *p. q.*

No. 70.

Suit against Company on Fidelity Bond.

[Caption.]

Plaintiff, as superintendent as aforesaid, claims of the defendant the sum, to-wit, seventy-five hundred dollars damages for the breach by it of a bond or agreement entered into by it on, to-wit, the 15th of April, 1914, whereby the defendant agreed, for a consideration or reward paid to it by the Clanton Bank, Clanton, Alabama, that it would, within, to-wit, three months next after satisfactory proof of loss, make good and reimburse the said Clanton Bank, Clanton, Alabama, such pecuniary loss as said bank may sustain by reason of the fraud or dishonesty of E. A. Matthews, then employed by the said Bank in the capacity of cashier, the said fraud or dishonesty to be in connection with the duties of the office or position held by said Matthews, amounting to embezzlement or larceny, and committed during the continuance of the term of said bond, or any renewal thereof, or within six months thereafter, or within six months from the death, or the time of dismissal of said Matthews from

the service of said bank, and plaintiff avers that on, to-wit, the 15th day of January, 1915, the said bond was continued in force by the defendant from the 20th day of April, 1915, to the 20th day of April, 1916. And plaintiff avers that during the period covered by said bond, and the renewal thereof as averred, the said E. A. Matthews fraudulently or dishonestly in a manner amounting to embezzlement or larceny appropriated to his own use funds of money of the said Clanton Bank in a sum in excess of the amount claimed, to-wit, \$7,500.00, and by reason thereof the plaintiff, as the representative of the said Clanton Bank, of Clanton, Alabama, has suffered loss in said sum, and notice thereof has been given to said defendant by this plaintiff, as required by said bond, and the defendant has failed or refused to pay the same. And plaintiff avers that heretofore, to-wit, during the month of April, 1916, the plaintiff, as superintendent of banks in the state of Alabama, by virtue of the statute in such cases provided, and by proceedings duly had, in such official capacity went into possession of said The Clanton Bank for the purpose of liquidating its affairs, and has since been and now is in possession thereof for such purpose. And plaintiff further avers that by virtue of his position as superintendent of banks as aforesaid, he brings this suit.

WM. M. ADAMS,
Attorney for Plaintiff.

No. 71.

Complaint for Personal Injury against Partnership and Corporation.

[Caption.]

Plaintiff, for his complaint, alleges:

1. Upon information and belief that heretofore and at the times hereinafter mentioned, the defendants were and now are domestic corporations.
2. Upon information and belief that heretofore and at the times hereinafter mentioned, the defendant, Chiarello Dick Bros., Inc., was engaged in the stevedoring business.
3. Upon information and belief that heretofore and at the times hereinafter mentioned, the defendant, Chiarello Bros. Co.

was engaged in the lightering business and owned, controlled and operated a certain lighter known as the "Only Sister."

4. Upon information and belief that the defendant, The Long Leaf Pine Co., Inc., at the times hereinafter mentioned, was and now is a domestic corporation.

5. That at all times hereinafter mentioned, plaintiff was and now is a subject of the king of Norway.

6. Upon information and belief, that at the times hereinafter mentioned, the defendant, The Long Leaf Pine Co., Inc., had chartered the said lighter known as the "Only Sister" and at the times hereinafter mentioned, upon information and belief the said defendant, The Long Leaf Pine Co., Inc., were in charge and control of said lighter and the loading of the same jointly with the defendants, Chiarello Bros. Co. and Chiarello Dick Bros., Inc.

7. Upon information and belief, the defendants herein, at the time and place aforesaid, were engaged in unloading lumber from a steamship known as the "Steamship O'Brien" and in the carrying on of said work, the said defendants were engaged in unloading said lumber and placing it on the said lighter "Only Sister," which said lighter was under the care and control of defendants, their agents and servants.

8. Upon information and belief that the defendants herein were in sole charge and control of the work of unloading said lumber from said steamship, shifting it and placing it upon the said lighter.

9. Upon information and belief that the directions relative to the moving of said lumber and the unloading and shifting of the same from said steamer to said lighter was under the control and direction of the defendant.

10. That at the time and place aforesaid, plaintiff herein was in the employ of the Merritt and Chapman Derrick & Wrecking Company, a domestic corporation, and as such employe plaintiff was lawfully upon said lighter.

11. Upon information and belief, that at the time and place aforesaid, the defendants herein, and each of them, their agents and servants, negligently and carelessly directed, allowed and permitted said lumber to be placed upon said lighter in a negligent and careless fashion and negligently and carelessly failed

to secure the same and negligently and carelessly allowed, permitted and directed the said lighter to become overloaded, all of which the defendants well knew and were warned of the fact that said lighter was negligently and carelessly overloaded.

12. That at the time and place aforesaid, and by reason of the negligence and carelessness of the defendants, and through no fault or negligence on the part of this plaintiff, the said lighter, negligently overloaded as aforesaid, suddenly and without warning listed to the side, shifting and causing large quantities of said lumber to slide and fall overboard, catching plaintiff, without warning, in said suddenly shifting lumber, throwing him down, crushing him, inflicting upon him a compound fracture of the right leg above the knee and a compound fracture of the right leg above the ankle, permanently injuring his right knee and knee-joint and the muscles, sinews and nerves of said leg and ankle-joint of the right foot, as he is informed and believes, and upon information and belief, permanently injuring his back and the muscles, his spine and right hip joint, internally and permanently injuring him, causing him nervous shock and disability and upon information and belief, preventing him from attending to his work and earning his wages, putting him to expense for medical aid and medicines, forever crippling, disabling and debilitating plaintiff; to his damages \$50,000.

Wherefore, plaintiff demands judgment against the defendant in the sum of \$50,000, together with the costs and disbursements of this action.

[*Verification.*]

A. B.,
Attorney for Plaintiff.

No. 72.

Complaint for Breach of Contract of Sale.

[*Caption.*]

Plaintiff, by A. B. and C. D., its attorneys, for its complaint against the defendant, respectfully shows to this honorable court and alleges upon information and belief as follows:

First. The plaintiff was at all the times hereinafter mentioned, now is and for many years last past has been a corporation duly organized and existing under the laws of the state of California, with its principal place of business in San Francisco, in the said state, and is a resident and a citizen of the state of California.

Second. The defendant was at all the times hereinafter mentioned and now is a citizen and resident of the state of New York, residing at No. 940 East 173d street, in the borough of the Bronx, and is a resident and inhabitant of the southern district of New York, and is engaged in the manufacture of yarns and threads at 147 Spring street, borough of Manhattan, city of New York, doing business under the name and style of "The Globe Thread Co."

Third. The matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars (\$3,000).

Fourth. In or about the month of February, 1916, the plaintiff and the defendant entered into an agreement in writing, whereby it was mutually agreed that the defendant should sell and deliver to the plaintiff in ten monthly shipments, beginning on or about March 1, 1916, and that the plaintiff would accept and pay for, ten thousand tubes of thread made of combed Egyptian yarn, half silk finish and half soft finish, at sundry prices, amounting in the aggregate to the sum of about \$11,315, all of the said thread to be of the same color, strength, quality and finish as certain thread constituting a sample previously delivered by the defendant to the plaintiff; and the defendant further represented and declared that he had on hand dye of a quality equal to that used in the said sample, and the plaintiff entered into the said agreement relying on the said representation; and the defendant warranted and agreed to and with the plaintiff that all of the said thread should be of the color, strength, quality and finish as the sample on the faith of which the agreement was entered into, and further warranted and agreed that the said thread should be free from all defects and of good and merchantable quality.

Fifth. The defendant wholly failed to perform the said contract with the plaintiff, and did not have on hand dye of a qual-

ity equal to that used in the said sample, failed to tender deliveries of any thread at the time stipulated in the said agreement, and has wholly failed and refused to deliver any thread of the color, strength, quality or finish called for by said contract, but at divers times the defendant tendered to the plaintiff various shipments of tubes of thread that were not in accordance with the said contract, and not of the same color, strength, quality or finish as the said sample thread, but of a different color and finish, and all of inferior strength and quality, and not free from defects and not of a good and merchantable quality. The plaintiff rejected all of the said shipments and duly notified the defendant of the rejection of each and all of the said shipments and demanded of the defendant that he make deliveries in accordance with his agreement, which the defendant wholly failed and refused to do; although the plaintiff was at all times ready and willing at the times and place appointed in the said agreement, to receive the said thread and to pay for the same, and has otherwise duly performed all the conditions on its part to be performed, the defendant has wholly failed to perform the said agreement, has failed and neglected to deliver or to tender delivery of the said thread, or any part thereof, in accordance with the said agreement, but has broken and terminated the said contract.

Sixth. The plaintiff has incurred expenses in and about the transport of the said shipments from the city of New York, where the same were delivered, to the city of San Francisco, where the same were inspected, and in and about the return thereof to the city of New York, in the sum of \$265.74.

Seventh. By reason of the premises the plaintiff has been damaged in the sum of \$10,265.74.

Wherefore, plaintiff demands judgment against the defendant in the sum of \$10,265.74, together with the costs and disbursements of this action.

A. B. and C. D.,
Attorneys for Plaintiff.

No. 73.**Declaration against Carrier for Violation of Safety Appliance Act (1).**

[Caption.]

Now comes the United States of America, by Richard Evelyn Byrd, United States attorney for the western district of Virginia, and brings this action on behalf of the United States against the Chesapeake & Ohio Railway Company, a corporation organized and doing business under the laws of the states of Virginia and West Virginia, and having an office and place of business at Clifton Forge, in the state of Virginia; this action being brought upon the suggestion of the attorney general of the United States at the request of the interstate commerce commission, and upon information furnished by said commission.

For its cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Virginia.

Plaintiff further alleges that in violation of the act of congress, known as the safety appliance act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an act approved April 1, 1896 (29 Statutes at Large, 85), as amended by an act approved March 2, 1903 (32 Statutes at Large, 943), and as modified by an order of the interstate commerce commission of June 6, 1910, which order was made pursuant to the provisions and requirements of the aforesaid amendment of March 2, 1903, and is in the words and figures following, to-wit:

It is ordered: That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent. of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which

are associated together with the 85 per cent. shall have their brakes so used and operated, defendant on September 13, 1915, operated on its line of railroad, over a part of a through highway of interstate commerce, one train, to-wit, its own No. 1/98, consisting of sixty-two cars, drawn by its own locomotive engine No. 539, all of said cars being equipped with power or train brakes, not less than 85 per cent. of said cars, to-wit, sixty-one cars, being associated together in said train and having their brakes used and operated by the engineer of the locomotive engine drawing said train.

Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad from Clifton Forge, in the state of Virginia, in an easterly direction, within the jurisdiction of this court, when one of the power-braked cars associated with said sixty-one cars in said train, to-wit, Southern Box No. 133173, did not have its power or train brakes used and operated by the engineer of said locomotive engine drawing said train, said power or train brakes on said car being cut out at the cut out cock in the cross-over pipe, and when all the power-braked cars in said train which were associated with the 85 per cent. of the power-braked cars in said train did not have their brakes so used and operated.

Plaintiff further alleges that by reason of the violation of the said act of congress defendant is liable to the plaintiff in the sum of one hundred dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of one hundred dollars and its costs herein expended.

R. E. BYRD,

United States Attorney.

(1) The federal safety appliance act was passed in 1893, and is found in 27 Stat. L. 531, and amendments thereto are found in 29 Stat. L. 85, 32 Stat. L. 943, and 36 Stat. L. 298. In section 6 of the act a penalty of \$100 for each violation thereof is provided, and the United States district attorney is required to bring suits to recover the penalty in the United States district court having jurisdiction in the locality where the violation occurred; such suit is to be brought upon duly verified information, and the interstate commerce com-

mission is required to lodge such information with the district attorney.

The suit prescribed is a civil action. *Chicago, etc., R. Co. v. U. S.*, 220 U. S. 559, 55 L. Ed. 582. Really an action for debt. *Atlantic Coast Line R. Co. v. U. S.*, 168 Fed. 175. Each defective equipped car in a train is a violation of the act. *St. L. Sou. R. Co. v. U. S.*, 183 Fed. 770, 106 C. C. A. 136.

An averment that the violation occurred "on or about" a mentioned date is sufficient. *Atl. C. L. R. Co. v. U. S.*, 168 Fed. 175, 94 C. C. A. 35. And in the same case at page 178 it is held that an averment stating the number of the car, nature of the goods contained therein, point of shipment and of destination is sufficiently definite.

Complaint need not aver that defendant acted "knowingly and negligent." *U. S. v. Oregon Short Line R. Co.*, 180 Fed. 483. Nor is a complaint under this act demurrable (1) for failing to negative the matter of the exception created by the proviso to section 6 of the act, or (2) because it shows that only one of the couplers was out of repair and inoperative, and that it was so because the uncoupling chain was "kinked," or (3) because it fails to negative the exercise of reasonable care on the part of the railroad company in maintaining the coupler in operative condition, or (4) because, although showing an actual and substantial hauling of the car in moving interstate commerce, it fails to specify how far the hauling was continued, or is silent in respect of any actual use of the defective coupler. *U. S. v. D. and R. G. R. Company*, 163 Fed. 519, 90 C. C. A. 329.

The amendment in 32 Stat. L. 943, made in 1903, extended the act to cover cars, etc., used on any railroad which is a highway of interstate commerce. *Sou. Ry. v. U. S.*, 222 U. S. 20, 56 L. Ed. 72.

No. 73a.

Another Petition for Violation of Federal Safety Appliance Act.

[Caption.]

Now comes the United States of America, by Stuart R. Bolin, United States attorney for the southern district of Ohio, and brings this action on behalf of the United States against the Baltimore & Ohio Southwestern Railroad Company, a corporation organized and doing business under the laws of the states of Ohio and Indiana, and having an office and place of business at Cincinnati, in the state of Ohio; this action being brought upon suggestion of the attorney general of the United

States at the request of the interstate commerce commission, and upon information furnished by said commission.

For a first cause of action, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Ohio.

Plaintiff further alleges that in violation of the act of congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on November 11, 1915, hauled on its standard gauge line of railroad one freight car, to-wit, Erie Box No. 111772, over a part of a through highway of interstate commerce, and as a part of a train engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad in and about Cincinnati, in the state of Ohio, within the jurisdiction of this court, when the height of the drawbar on the "B" end of said car, measured perpendicularly from the level of the tops of the rails to the center line of said drawbar, was twenty-nine and one-half ($29\frac{1}{2}$) inches, and when the height of said drawbar should not have been less than thirty-one and one-half ($31\frac{1}{2}$) inches, as prescribed by an order of the interstate commerce commission of October 10, 1910, which order was made in pursuance of the provisions and requirements of section 3 of the aforesaid act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of said act of congress, said defendant is liable to plaintiff in the sum of one hundred dollars.

For a second cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Ohio.

Plaintiff further alleges that in violation of the act of congress known as the safety appliance act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29

Statutes at Large, page 85), and as amended by an act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), defendant, on November 30, 1915, hauled on its line of railroad one car, to-wit, L. & N. Flat No. 23992, over a part of a through highway of interstate commerce, and as a part of a train engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad, in and about Cincinnati, in the state of Ohio, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the lock block of the coupler on said end of said car being broken, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by section 2 of the safety appliance act, as amended by section 1 of the act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said act of congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

For a third cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Ohio.

Plaintiff further alleges that in violation of the act of congress, known as the safety appliance act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), defendant, on November 30, 1915, hauled on its line of railroad one car, to-wit, Southern Box No. 26774, over a part of a through highway of interstate commerce, and as a part of a train engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad, in and about Cincinnati, in the state of Ohio, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "B" end of said car was out of repair and inoperative, the uncoupling chain on said end of said car being broken and disconnected, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by section 2 of the safety appliance act, as amended by section 1 of the act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of three hundred dollars and its costs herein expended.

STUART R. BOLIN,

United States Attorney,

By EDWARD K. BRUCE,

Assistant United States Attorney.

[*Duly verified.*]

No. 73b.

Answer in Suit for Violation of Federal Safety Appliance Act.

[*Caption.*]

For answer to the first cause of action in the petition contained, defendant says that on November 11, 1915, it received, on its line of railroad, one freight car, to-wit, Erie Box No. 111772, from a connecting line of railroad; that immediately upon receipt of said car and before the same was moved or hauled on its line of railroad, the same was discovered by it through its inspectors, to be defective in the respect mentioned in the first cause of action; that at the place where the same

was discovered to be defective it had no facilities for repairing the same, and that it was impossible to repair the same at the place where it was discovered to be defective, and that thereupon it hauled the said car to its shops at the Cincinnati Union Stockyards, which shop was the nearest place at which the said car could be repaired, and that the same was the same hauling of said car mentioned in the first cause of action in the petition contained.

[*Verification.*]

A. B. and C. D.,
Attorneys for Defendant.

No. 74.

Complaint against Railroad for Fire Along Right of Way.

[*Caption.*]

Comes now the plaintiff, the United States of America, by Harry B. Tedrow, United States attorney for the district of Colorado, by the special authority and discretion of the attorney general, and complaining of defendant, The Denver and Rio Grande Railroad Company, a corporation, alleges, for a first cause of action:

1. The defendant, The Denver and Rio Grande Railroad Company, at all times herein mentioned was and is a railroad company and a railroad corporation, organized and existing under the laws of the state of Colorado, and operating a line of road in said state and in Huerfano county in said state.

2. On, to-wit, June 1, 1908, and prior thereto, the plaintiff was the owner of and in possession of the following lands constituting a part of its public domain, to-wit:

The west half of section twenty-nine; the west half of the southeast quarter, and the southeast quarter of the southeast quarter of section thirty; and the northeast quarter and southwest quarter of section thirty-one; all in township twenty-nine south, range sixty-nine west of the sixth principal meridian, in Huerfano county in the state of Colorado, which lands then contained valuable timber, then and there the property of the plaintiff.

3. On, to-wit, June 1, 1908, the said defendant was operating its line of road in said county and state, near said lands of plaintiff, and then and there, while so operating its said line of road, unlawfully set out a fire near said lands of plaintiff, which fire was caused by defendant's operation of its said line of road, and thereby unlawfully set on fire, burned, destroyed and injured plaintiff's said timber on said lands, to-wit, 243,750 linear feet of mining timbers, of the reasonable value of \$1,218.75; 25,000 feet, board measure, of the reasonable value of \$87.50; and the plaintiff was compelled to expend the sum of \$106.33 for actual and necessary expenses for putting out said fire to prevent further damage to plaintiff:— to plaintiff's total damage in the sum of \$1,412.58.

4. Defendant has not paid plaintiff any part of the value of said timber so injured and destroyed, nor any part of said damages, although requested by plaintiff so to do.

Wherefore, plaintiff prays judgment against defendant in the sum of \$1,412.58, together with legal interest thereon from June 1, 1908, and costs.

HARRY B. TEDROW,
United States Attorney.

No. 75.

**Complaint against the Collector of Internal Revenue for
Illegal Exaction of Excise Taxes.**

[Caption.]

Comes now The Snake River Valley Railroad Company, the plaintiff above named, and for cause of action against the above named defendants alleges:

I. That the plaintiff on and prior and subsequent to June 27, 1911, was a corporation duly organized and existing under the laws of the state of Oregon, and the owner of a line of railroad extending from Wallula, Washington, in a general northeasterly direction to the town of Grange City in said state.

II. That the defendant, M. A. Miller, was on and subsequent to August 16, 1913, and is now, the duly appointed and act-

ing collector of internal revenue of the United States for the district of Oregon; and that defendant, David M. Dunne, was prior to August 16, 1913, the duly appointed and acting collector of internal revenue of the United States for the district of Oregon.

III. That plaintiff herein, on the 29th day of June, 1907, leased to The Oregon Railroad and Navigation Company its entire railroad and all property connected therewith, and same was turned over to The Oregon Railroad and Navigation Company and since the said date has been operated by The Oregon Railroad and Navigation Company and its successor in interest, The Oregon-Washington Railroad and Navigation Company; and the plaintiff has not since said date carried on any business in connection with the operation of said railroad and has not been engaged in doing or carrying on any business whatsoever, except the business of owning the property, maintaining the investment, collecting the income and dividing it among its stockholders.

IV. That notwithstanding the fact that the plaintiff has not, since June 29, 1907, been engaged in or doing business in any manner whatsoever, except as above set forth, the defendant, David M. Dunne, as collector of internal revenue of the United States for the district of Oregon, wrongfully and illegally exacted and collected from the plaintiff, under color of the provisions of section 38 of an act of congress of the United States, approved August 5, 1909, entitled, "An act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes," and demanded and required the plaintiff to involuntarily and under duress and compulsion pay to him on the 27th day of June, 1911, as collector of internal revenue of the United States for the district of Oregon, the sum of \$870.70, as special excise taxes for the year ending June 30, 1911. That at said time and place plaintiff served written notices upon defendant, David M. Dunne, that said payment was made under duress and compulsion and under

protest, solely for the purpose of avoiding the imposition of the penalties in said act provided, and the restraint of its goods, chattels and effects, reserving all its rights to recover said amount so illegally and erroneously assessed and collected, and that the assessment of said tax was illegal and void as against the plaintiff.

V. That thereafter and on the 2d day of May, 1913, the plaintiff herein presented and delivered to David M. Dunne, as collector of internal revenue of the United States for the district of Oregon, for transmission to the commissioner of internal revenue of the United States at Washington, D. C., its appeal to said commissioner in the form and manner required by law, and the regulations of the secretary of the treasury of the United States, established in pursuance thereof. That thereafter and on or about the 26th day of June, 1913, said commissioner of internal revenue and defendant, David M. Dunne, as collector, notified this plaintiff that it would be necessary for the claimant to furnish additional information in connection with said application for refund; that thereafter the plaintiff complied with said request and furnished said additional information to David M. Dunne, as collector, and to the commissioner of internal revenue; and thereafter and on or about the 21st day of November, 1913, said commissioner of internal revenue rejected and disallowed said appeal. And said defendant, M. A. Miller, as collector of internal revenue, and defendant, David M. Dunne, as former collector of internal revenue, to whom said money was paid, by reason of the disallowance and rejection of said appeal and application for refund by the commissioner of internal revenue, refuse and still refuse to refund to this plaintiff the whole or any part of said taxes so wrongfully and illegally exacted and collected from this plaintiff.

Wherefore, plaintiff demands judgment against the defendants for the sum of eight hundred seventy and 70/100 dollars, together with interest thereon from June 27, 1911, and for its costs and disbursements herein.

[*Verification.*]

A. B. and C. D.,
Attorneys for Plaintiff.

No. 76.**Allegation of Guardianship ad Litem.**

That the plaintiffs, Orene Wright and Ora Wright, are minors, each of whom is under the age of fourteen years; that the said Orene Wright is of the age of thirteen years, and that the said Ora Wright is of the age of eleven years; that the plaintiff, Gertrude Wright, is the mother of said minors, and that at the beginning of this action said Gertrude Wright has made application to be appointed the guardian ad litem of said minors for the purpose of prosecuting and conducting this action, and that said application has been granted, and by an order of this court duly given, made and entered herein, the said Gertrude Wright has been appointed and now is the duly qualified and acting guardian ad litem of the said Orene Wright and the said Ora Wright, minors, plaintiffs in this action.

No. 77.**Complaint for Refusal to Honor Check against an Open Account.****[Caption.]**

Plaintiff, by William Klein, its attorney, for its amended complaint herein, respectfully shows to the court and alleges:

1. Plaintiff is, and at all times hereinafter mentioned was, a foreign corporation, organized and existing under the laws of the state of New Jersey.

2. Defendant is and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the United States, and located in this state, and engaged in the business of banking in the city and county of New York.

3. On or about the ——— day of November, 1911, a deposit account was opened by plaintiff by its agent duly authorized in defendant bank. At the opening of said account, it was agreed that said account should be drawn against by plaintiff over the signature of Lee Shubert or Jacob J. Shubert. Both

Lee Shubert and Jacob J. Shubert were and are officers of plaintiff. Checks drawn by plaintiff and signed as aforesaid were, it was agreed, to be denominated "Blue Bird Special" on the face thereof.

4. At divers times between the — day of November, 1911, and the 19th day of July, 1915, plaintiff delivered various sums of money to defendant which defendant received on deposit in plaintiff's account mentioned in paragraph 3 hereinabove, and which defendant agreed to repay to this plaintiff or to its order on demand.

5. On the said 19th day of July, 1915, there remained in the hands of the defendant of the said moneys so deposited as aforesaid, a balance undrawn by the plaintiff of \$11,938.30.

6. On or about that day and before the beginning of this action, plaintiff duly demanded of defendant the repayment to this plaintiff of said balance. On or about said day, and in connection with said demand, and as a part thereof, and before the beginning of this action, plaintiff drew against its account with defendant by a check for \$11,938.30, signed "Lee Shubert" and denominated "Blue Bird Special" on the face thereof. Defendant, however, refused and still refuses to pay the sum of \$11,938.30 or any part thereof.

Wherefore, plaintiff demands judgment against defendant in the sum of \$11,938.30 with interest thereon from the 19th day of July, 1915, and the costs and disbursements of this action.

A. B.,

Attorney for Plaintiff.

No. 78.

Declaration by State on Indemnifying Bond given in Suit to Enjoin.

[Caption.]

State of Maryland, to the use of A. B. Baxter, a citizen and resident of the state of Pennsylvania, by James A. McHenry and Gans & Haman, its attorneys, sues George E. Deneen,

William M. Mertens and Harrison Swartswelder, defendants, each and all of whom are citizens of the state of Maryland, and none of whom are citizens of the state of Pennsylvania:

For that, on or about the 18th day of October, 1902, there was on deposit in the Third National Bank of Cumberland, to the credit of A. B. Baxter, and subject to check signed by him, the sum of eighteen thousand, two hundred and fifty-three dollars and six cents (\$18,253.06), and on said day the said George E. Deneen filed his bill of complaint in the circuit court of Allegany county, Maryland, in equity, against the said A. B. Baxter, the Third National Bank, and certain other defendants, by which said bill the said Deneen prayed for an injunction to prohibit and restrain the said Baxter from withdrawing any of the said money from the said Third National Bank, and prohibiting the said bank from paying out any of said money to Baxter, or to any one else on his check or order; whereupon the said circuit court of Allegany county, ordered that a preliminary writ of injunction be issued as prayed for in said bill upon the filing of a bond by the said Deneen to the state of Maryland in the penalty of twenty thousand dollars, with securities to be approved by the clerk of the court; with leave, however, to the defendant to move for a dissolution of the injunction. And thereafter, to-wit, on October 23, 1902, the said Deneen, as principal, and the said W. M. Mertens and H. Swartswelder, as sureties, executed and filed in said case in said court an injunction bond as follows:

"Know all men by these presents, that we, George E. Deneen, William M. Mertens and H. Swartswelder, of Allegany county, Maryland, are held and firmly bound unto the state of Maryland in the full and just sum of twenty thousand dollars current money to be paid to the state of Maryland, or its certain attorney, to which payment, well and truly to be made and done, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents: sealed with our seals and dated this 18th day of October in the year nineteen hundred and two.

"Whereas, by an order of the circuit court for Allegany county, passed in a cause wherein the said George E. Deneen is plaintiff, and A. B. Baxter, the Third National Bank and others, are defendants, an injunction is about to issue to restrain the said defendants as prayed in the bill in the said cause exhibited, upon the plaintiff filing a bond with security in the above penalty—

"Now the condition of the above obligation is such, that if the said plaintiff shall and do prosecute the said writ of injunction with effect, and indemnify and save harmless the said defendants, if the same be not prosecuted with effect, and in such case pay all costs and damages that may be occasioned by the issuing thereof, unless the said court shall decree to the contrary, and shall in all things obey, abide by, perform and fulfill such decree and order as shall be made in the premises, then the above obligation to be void; otherwise to remain in full force and virtue.

"GEORGE E. DENEEN, [Seal]

"H. SWARTZWELDER, [Seal]

"W. M. MERTENS, [Seal]"

And the said bond was thereupon approved by John W. Young, clerk of said court, and thereafter, on said day, said preliminary writ of injunction was issued as prayed for in said bill; and thereafter, to-wit, on November 24, 1902, the said A. B. Baxter filed a motion for the dissolution of the said injunction.

And the plaintiff further says that the said George E. Deneen did not prosecute the said writ of injunction with effect and did not indemnify and save harmless the said A. B. Baxter, and did not pay all the costs or damages that were occasioned by the issuance of said writ of injunction, and did not in all things obey, abide by, perform and fulfill the decree and order finally made and rendered in said case.

But, on the contrary, the plaintiff shows that such further proceedings were had in said case, that on or about the 23d day of March, 1904, the court of appeals of Maryland, to

which an appeal had been taken in said case, ordered that the bill of complaint in said case be dismissed, with costs to the said Baxter, and said injunction was thereupon dissolved.

Wherefore, the plaintiff shows that the defendants herein, to-wit, George E. Deneen, and the sureties on said bond, Harrison Swartzwelder and William M. Mertens, did not fulfill the condition of said injunction bond, and, therefore, are liable to the equitable plaintiff for and on account of the same.

And the plaintiff further shows that by reason of the issuance of said injunction and the continuance of the same until dissolved as aforesaid by the court of appeals of Maryland, the said Baxter was deprived of the use of said money on deposit in the Third National Bank, from October 23, 1902, until March 23, 1904, and further, he was compelled to pay the amount of eight hundred dollars (\$800) as costs in said injunction case, none of which said costs have been refunded to him by the said Deneen, and he has suffered other great damages.

And the said equitable plaintiff has made demand upon the defendants for satisfaction and payment thereof, which has been refused.

And the plaintiff further shows that none of the defendants in said suit other than said Baxter were in any wise interested or entitled to any benefit in said money on deposit in the Third National Bank, nor were they in any way damaged by the issuance and continuance of said injunction as aforesaid.

And the plaintiff further shows that the sum of more than two thousand dollars (\$2,000), exclusive of interest and costs, is in controversy in this suit.

And the plaintiff, therefore, claims twenty thousand dollars (\$20,000) damages.

A. B. and C. D.,
Attorneys for Plaintiff.

[Caption.]

No. 79.**Writ and Declaration—Violation of Federal Employer's Liability Act (1).**

[*Caption.*]

United States of America,

New Hampshire District, ss.

The President of the United States of America, to the Marshal
of our District of New Hampshire, or his Deputy,

[SEAL] Greeting:

We command you to attach the goods or estate of the Boston & Maine Railroad, a corporation duly organized under the laws of the state of New Hampshire, a citizen and inhabitant of said state and of Concord in said district, to the value of forty thousand dollars, and summon it (if it may be found in your district) to appear before our judges of our circuit court, next to be holden at Concord within and for our said district of New Hampshire, on the second Tuesday of December next, then and there in our said court to answer unto Mary J. Benson of Lebanon in the county of Grafton and state of New Hampshire and a citizen and inhabitant of said last mentioned state duly appointed and now acting as administratrix of the estate of Henry D. Sumner late of Bellows Falls in the county of Windham and district of Vermont under authority of the judge of probate of the county of Grafton in the state of New Hampshire:

IN A PLEA OF THE CASE, for that the defendant was on the 2d day of October, 1909, and ever since has been, a corporation operating a railroad between Windsor in the district of Vermont and Claremont Junction in the district of New Hampshire, and a common carrier by railroad engaged in interstate commerce between said state of Vermont and the state of New Hampshire; that said plaintiff's intestate, said Henry D. Sumner deceased, was then and there in the employ of said defendant corporation as a car inspector at said Windsor, and was employed by said defendant in said capacity in such interstate commerce; that said defendant was then and there oper-

ating between said Windsor and said Claremont Junction a certain freight train, and said train was then and there engaged in carrying interstate commerce; that said defendant was then and there employing as a car inspector at said Windsor a certain man named Charles Coleman, whose duty it was to instruct said deceased how properly to do his work, and to warn said deceased of the dangers incident to such work; that said defendant was then and there employing a certain train crew on said train at said Windsor, whose duty it was to handle said train in a reasonable and careful manner, and with due regard to the safety of said car inspectors; that said deceased was then and there employed as a car inspector as aforesaid on the defendant's said railroad at said Windsor, and while so employed and in the exercise of due care, he was bruised and injured by reason of a fall from the top of one of the cars of said train, said fall being caused (1) by the failure of said Coleman to properly instruct said deceased how properly to do his work; (2) by the failure of said Coleman to warn said deceased of the dangers of such work; and (3) by the failure of said train crew to handle said train in a reasonable and careful manner, and with due regard to the safety of said car inspectors; by reason of which negligence on the part of said defendant, its officers, agents and employes, said deceased received injuries as aforesaid from which he died on the 20th day of May, 1910; whereby under an act of congress entitled, "An act relating to the liability of common carriers by railroad to their employes in certain cases," approved April 22, 1908, an action has accrued to the plaintiff, who is the administratrix of the estate of said deceased, to recover in her said capacity as administratrix for the benefit of said estate, for the benefit of the widow of said deceased, Annella J. Sumner, and for the benefit of Edwin H. Sumner, Ione C. Sumner, and Mabel A. Mack, all of Bellows Falls, and Evelyn J. Mack of Brattleboro, in the county of Windham and said district of Vermont, children of said deceased, the damages caused to them, to said deceased, and to his estate by the aforesaid negligence; to the

damage of the plaintiff, as she says, the sum of forty thousand dollars (\$40,000.00).

To the damage of the said Mary J. Benson (as she says) the sum of forty thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness Honorable Edward D. White, Chief Justice of the United States, at Concord, the 29th day of September, Anno Domini 1911.

BURNS P. HODGMAN, Clerk.

(1) This act went into effect April 22, 1908, 35 Stat. L. 65, and was amended by 36 Stat. L. 291, which added section 9 providing for the survival of the action to the representative of the decedent.

The statute need not be specifically referred to in the complaint. *Grand Trunk Western R. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838.

The act of 1908 created a new and independent cause of action, *Mich. Cent. R. R. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, and the amendment of 1910 saves this cause of action to the representative, hence since the amendment the recovery includes also the loss and suffering to the decedent, *St. L. and I. M. Ry. v. Craft*, 237 U. S. 648, 59 L. Ed. 1160, but not where the period between the injury and the death is very brief, or the injured person lived for a time in a condition of unconsciousness. *G. N. Ry. Co. v. Cap. Trust Co.*, 242 U. S. 144, 61 L. Ed. 208.

The representative is limited to one recovery for both causes of action recognized by the statute, for the avoidance of needless litigation in separate actions. *St. L. & I. M. Ry. v. Craft*, *supra*, and *K. C. Sou. Ry. v. Leslie*, 238 U. S. 599, 59 L. Ed. 1478.

An amendment to the petition which sets out a new or different cause of action is equivalent to a new suit and hence subject to the test of the two year statute of limitations. *Seaboard Air Line Ry. v. Renn*, 241 U. S. 290, 60 L. Ed. 1006. A new cause of action is not stated by an amendment which adds to the original averment that the injuries caused the deceased to suffer "intense pain" an allegation of "conscious pain and suffering." *Washington Ry. & El. Co. v. Scala*, 244 U. S. 630, 61 L. Ed. 1360. Also on the effect of the statute of limitations on amendments, see notes to cases in 3 L. R. A. (N.S.) 259, 33 L. R. A. (N.S.) 196, 47 L. R. A. (N.S.) 932.

The widow can not recover for loss of society and companionship of the deceased, being limited to pecuniary damage only. *Mich. Cent. R. R. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417; *Gulf, etc., Ry. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785.

The act is involved, although not directly mentioned, where complaint alleges and the proof establishes that the employe was engaged in, and the injury occurred in the course of, interstate commerce. *G. T. W. Ry. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838; *I. C. R. R. Co. v. Bchrens*, 233 U. S. 473, 58 L. Ed. 1051.

Where the petition did not distinctly aver that the cause of action arose under the act, and did not aver that it arose under the state law, but further, averred that defendant was engaged in operating its railroad in that and other states, an amendment that plaintiff's employment and defendant's engagement were both in interstate commerce at the time of the injury, is admissible. *Seaboard Air Line v. Renn*, 241 U. S. 290, 60 L. Ed. 1006.

Where the petition states facts sufficient to constitute a cause of action either under the act or under the state statute, or at the common law, a case arising under the act is stated. *Flas v. I. C. R. Co.*, 229 Fed. 319.

Failure to allege a duty from the conductor to the injured brakeman in a suit under the act is not fatal, since the act imposes a duty on the carrier in case of injury of one employe through the negligence of another. *I. C. R. R. v. Norris*, 245 Fed. 926.

Generally, on the constitutionality, application and effect of the act and the pleading thereunder, see *Lamphere v. O. R. & N. Co.*, 47 L. R. A. (N.S.) 1, and note at page 38.

No. 80.

Complaint where Attorneys Sue for Fees.

[Caption.]

The plaintiffs complaining of the defendant, allege:

1. That on or about the 15th day of April, A. D. 1909, the plaintiffs were employed by the defendant to represent him in two suits then just instituted by J. G. Merrimon, Esq., in the superior court of McDowell county, North Carolina, which suits were in behalf of D. J. McDonald, and against MacArthur Brothers Company, the Carolina, Clinchfield & Ohio Railway, and others, one suit, however, being only against MacArthur Brothers Company, and was for the recovery of more than twenty thousand dollars (\$20,000.00) for railroad construction work in the state of Virginia, and the other was against said MacArthur Brothers Company, said railway company, and others, and was for the recovery of an alleged claim in the

total amount of thirty-four thousand seven hundred thirty-nine and 85/100 dollars (\$34,739.85), claimed as due for railroad construction work in McDowell county, North Carolina.

2. That the plaintiffs made unusual preparation in said causes, assisted in the preparation of all pleadings, motions and other papers filed for the plaintiff in said causes, made many trips to distant points in the United States and participated in the trial of the causes for which a special term of court was called and held, occupying nearly two entire weeks, in which suits the plaintiff recovered \$6,916.15, in the suit involving the work in Virginia, which amount was accepted by the plaintiff in compromise after allowing proper credit to said company, and in the second suit the plaintiff recovered \$27,528.47, with interest from January 10, 1909, with all costs, the total amount when collected being, as plaintiffs are informed, about \$31,000.00.

3. That for many months prior to the trial of said causes the plaintiffs were the only counsel representing the said McDonald residing in the state of North Carolina, and during the trial the plaintiffs were the only attorneys appearing for the plaintiff residing in this state, and the plaintiffs actively participated in the trial and rendered all the services of which they were capable.

4. That both parties to the said suits appealed to the supreme court from the judgment of the superior court and in the preparation of the records, arranging the transcripts, preparing briefs and arguments both of the plaintiffs in this cause devoted great time and labor, and the said J. W. Pless devoted almost his exclusive time and labor to said work and participated in the argument in the supreme court, which said court confirmed the judgment in the lower court, and the said D. J. McDonald has collected, as plaintiffs are informed, the whole amount of his said judgments.

5. That by reason of said employment, and on account of the labor of the plaintiffs for the said defendant in this cause, in the preparation and trial of the said causes, the defendant,

D. J. McDonald, is indebted to the plaintiffs over and above all payments, off-sets and counterclaims, and the plaintiffs are entitled to recover of him the sum of four thousand dollars (\$4,000.00), with interest from the date of the institution of this suit.

Wherefore, the plaintiffs pray judgment against the defendant, D. J. McDonald, in the sum of four thousand dollars (\$4,000.00), with interest from the date of institution of this cause, the costs of this action to be taxed by the clerk, and for such other and further relief as to the court may seem just, right and proper.

A. B. and C. D.,
Attorneys for Plaintiffs.

[*Verification.*]

No. 81.

Information against a Carrier for Violation of Hours of Service Act (1).

[*Caption.*]

Now comes the United States of America, by James H. Wilkerson, United States attorney for the northern district of Illinois, and brings this action on behalf of the United States against the Chicago, Rock Island and Pacific Railway Company, a corporation, organized and doing business under the laws of the states of Illinois and Indiana, and having an office and place of business at Blue Island in the state of Illinois; this action being brought upon suggestion of the attorney general of the United States at the request of the interstate commerce commission, and upon information furnished by said commission.

For a first cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Illinois.

Plaintiff further alleges that in violation of the act of congress, known as "An act to promote the safety of employes

and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 6:00 o'clock a. m. on November 22, 1913, at its office and station at Blue Island, in the state of Illinois, and within the jurisdiction of this court, required and permitted its certain employe, to-wit, Edward T. Kelly, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit, from said hour of 6:00 o'clock a. m. on said date, to the hour of 6:00 o'clock p. m. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employe, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said act of congress, defendant is liable to plaintiff in the sum of five hundred dollars.

For a second cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Illinois.

Plaintiff further alleges that in violation of the act of congress, known as, "An act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 6:00 o'clock a. m. on November 23, 1913, at its office and station at Blue Island, in the state of Illinois, and within the jurisdiction of this court, required and permitted its certain employe, to-wit, Edward T. Kelly, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit, from

said hour of 6:00 o'clock a. m. on said date, to the hour of 6:00 o'clock p. m. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employe, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said act of congress, defendant is liable to plaintiff in the sum of five hundred dollars.

For a third cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Illinois.

Plaintiff further alleges that in violation of the act of congress, known as, "An act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 6:00 o'clock a. m. on November 24, 1913, at its office and station at Blue Island, in the state of Illinois, and within the jurisdiction of this court, required and permitted its certain employe, to-wit, Edward T. Kelly, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit, from said hour of 6:00 o'clock a. m. on said date, to the hour of 6:00 o'clock p. m. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employe, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said act of congress, defendant is liable to plaintiff in the sum of five hundred dollars.

For a fourth cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Illinois.

Plaintiff further alleges that in violation of the act of congress, known as, "An act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 6:00 o'clock p. m. on November 22, 1913, at its office and station at Blue Island, in the state of Illinois, and within the jurisdiction of this court, required and permitted its certain employe, to-wit, John Meehan, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit, from said hour of 6:00 o'clock p. m. on said date, to the hour of 6:00 o'clock a. m. on November 23, 1913.

Plaintiff further alleges that during all the time mentioned herein said office and station was one continuously operated night and day, and that said employe, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said act of congress, defendant is liable to plaintiff in the sum of five hundred dollars.

For a fifth cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Illinois.

Plaintiff further alleges that in violation of the act of congress, known as, "An act to promote the safety of employes

and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 6:00 o'clock p. m. on November 23, 1913, at its office and station at Blue Island, in the state of Illinois, and within the jurisdiction of this court, required and permitted its certain employe, to-wit, John Meehan, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit, from said hour of 6:00 o'clock p. m. on said date, to the hour of 6:00 o'clock a. m. on November 24, 1913.

Plaintiff further alleges that during all the time mentioned herein said office and station was one continuously operated night and day, and that said employe, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said act of congress, defendant is liable to plaintiff in the sum of five hundred dollars.

For a sixth cause of action, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Illinois.

Plaintiff further alleges that in violation of the act of congress, known as, "An act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 6:00 o'clock p. m. on November 24, 1913, at its office and station at Blue Island, in the state of Illinois, and within the jurisdiction of this court, required and permitted its certain employe, to-wit, John Meehan, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit, from said

hour of 6:00 o'clock p. m. on said date, to the hour of 6:00 o'clock a. m. on November 25, 1913.

Plaintiff further alleges that during all the time mentioned herein said office and station was one continuously operated night and day, and that said employe, while required and permitted to be and remain on duty as aforesaid by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said act of congress, defendant is liable to plaintiff in the sum of five hundred dollars.

Wherefore, plaintiff prays judgment against defendant in the sum of three thousand dollars and its costs herein expended.

A. B.,

United States Attorney.

(1) The statute relating to the number of consecutive hours during which an employe of a railroad engaged in interstate commerce might be kept at work is usually called the Hours of Service Act, and is found in 34 Stat. L. 1415, and as amended, in 39 Stat. L. 61, the amendment prescribing principally a minimum penalty for violation.

The action provided by this act is civil, and the rules of civil procedure therefore govern. *U. S. v. K. C. Sou. Ry.*, 202 Fed. 828; *Delano v. U. S.*, 220 Fed. 635. The pleader is not required to state his cause of action with the exactness and particularity that would be necessary in a criminal indictment. *U. S. v. Houston Belt & Terminal Co.*, 205 Fed. 344, 125 C. C. A. 481. Nor need the petition allege that the case presented does not fall within the exceptions of the act, such matter being appropriate for defense. *U. S. v. G. N. Ry. Co.*, 220 Fed. 630.

A separate offense is committed and a separate penalty is incurred for each employe on the same train kept on duty contrary to the statute by reason of the same delay. *M. K. & T. Ry. Co. v. U. S.*, 231 U. S. 112, 58 L. Ed. 144.

Keeping an operator at work an excessive number of hours in intrastate traffic where a part of his time is taken in interstate traffic, is a violation of the act. *Denver & I. R. Co. v. U. S.*, 236 Fed. 685.

Numerous groups of facts set up in an answer which will not constitute a defense are set out in *U. S. v. Missouri Pacific R. Co.*, 235 Fed. 944.

See the notes dealing with this act in L. R. A. 1915D, page 408, and supplementary note in L. R. A. 1917A, page 1202.

No. 82.

(Another violation.)

Complaint in Suit for Violation of Hours of Service Act of the United States.*[Caption.]*

Plaintiff alleges that in violation of the act of congress, known as, "An act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 10:40 o'clock p. m. on October 2, 1912, upon its line of railroad at and between the stations of Parker in the state of Arizona, and Los Angeles in the state of California within the jurisdiction of this court, required and permitted its certain brakeman and employe, to-wit, W. F. Rossow, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of 10:40 o'clock p. m. on said date, to the hour of 8:25 o'clock p. m. on October 3, 1912.

Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 17 drawn by its own locomotive engine No. 1276, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said act of congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of five hundred dollars, and its costs herein expended.

A. B.,

United States Attorney.

No. 83.**Answer in Suit for Violation of Federal Hours of Service Act.**

[*Caption.*]

Now comes the Atchison, Topeka & Santa Fe Railway Company, defendant in the above entitled cause, and in answer to the complaint of the plaintiff in said action respectfully shows:

I. That it is and was at the times mentioned in said complaint a common carrier engaged in interstate commerce substantially as alleged in said complaint; that on or about the times mentioned in said complaint it retained in service the certain employes named in said complaint in excess of 16 hours, substantially as stated in said complaint.

II. And for further answer and defence to said complaint this defendant shows:

That said station of Parker is a terminal of this defendant and the terminal from which said employes were engaged by this defendant to operate and accompany said train to the city of Los Angeles, in the state of California, which is the terminal to which said employes were destined at the time stated in the complaint; that the schedule and usual time of said train in going from said Parker to said Los Angeles is and was at the times mentioned in said complaint much less than 16 hours, to-wit, 11 hours and 5 minutes, and that said train would, at the time mentioned in said complaint, have made said run in about 11 hours and 5 minutes, and in much less than 16 hours, but for certain casualties and unavoidable accidents, and for certain causes which could not have been foreseen by and were not known to said defendant, or any of its officers or agents at the time when said crew left said terminal at Parker; that is to say, said train was delayed at certain stations between Cadiz and Barstow by reason of congestion of trains due to certain washouts caused by storm waters shortly before the passage of said train, which washouts had delayed a number of passenger trains on the main line of this defendant, congesting all traffic on said line and causing necessary delay to all trains; but that said delays, aggregating 2 hours and 30 minutes before reach-

ing the station of Barstow would not have caused said crew to exceed the time of 16 hours in reaching said station of Los Angeles.

Said train left Barstow at 7:45 a. m. October 3, and shortly thereafter, at 8:30 a. m., an axle broke under the tank of the engine of said train, whereby said train was delayed 6 hours and 10 minutes, although every effort was made to remedy the accident and proceed at the earliest possible moment; that the breaking of the axle was a casualty and unavoidable accident, and was the result of causes which were not known to this defendant, or to any of its officers or agents, when said engine left its terminal, to-wit, said station of Barstow, and that said casualty could not have been foreseen when said engine left said Barstow.

Wherefore, defendant prays that said action may be dismissed, and that it may have judgment for its costs.

Dated March 29, 1913.

[*Verification.*]

E. W. CAMP,
U. T. CLOTFELTER,
Attorneys for Defendant.

No. 84.

Action on Judgment against Assignee of Debtor's Assets.

[*Caption.*]

The plaintiff complains of the defendant and alleges:

First: Upon information and belief that the defendant, The Baker Motor Vehicle Company, now is, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the state of Ohio.

Second: Upon information and belief, that defendant, American Bonding Company, of Baltimore, prior to November, 1908, and since then was and now is a foreign corporation organized and existing under the laws of the state of Maryland.

Third: That plaintiff, Louis R. Hunter, on February 4, 1909, in the supreme court of the state of New York, county of

Oswego, duly recovered judgment against Clarence B. Rice and The C. B. Rice Company, a New York corporation, in the sum of \$8,329.75, upon which said judgment execution was duly issued and has been duly returned unsatisfied and said judgment is wholly unsatisfied and unpaid.

Fourth: That on or about October 1, 1907, said The C. B. Rice Company, the New York corporation aforesaid, transferred, assigned and set over unto The Baker Motor Vehicle Company of New York, a New York corporation, all the assets of said The C. B. Rice Company, and the said Baker Motor Vehicle Company of New York (a corporation organized and caused to be incorporated by the defendant, The Baker Motor Vehicle Company, and its officers and agents for the very purpose with a capital of only \$10,000 and only \$500 of that paid in) in consideration of the transfer and assignment of said assets to it by said The C. B. Rice Company, agreed to pay all the debts of said The C. B. Rice Company.

Fifth: Upon information and belief, that at the time when said transfer by said The C. B. Rice Company to The Baker Motor Vehicle Company, of New York, the assets of said The C. B. Rice Company amounted to over \$100,000 and were more than sufficient to meet its liabilities, and that prior to, and at the time of said transfer by said The C. B. Rice Company to The Baker Motor Vehicle Company, of New York, all the creditors of the said The C. B. Rice Company, except the plaintiff, consented to said assignment and agreed to accept the obligations of said The Baker Motor Vehicle Company of New York in full satisfaction of their claims against said The C. B. Rice Company, and their said claims were thereafter so satisfied and paid.

Sixth: Upon information and belief that said The C. B. Rice Company was organized by said defendant, The Baker Motor Vehicle Company, for the purpose of selling in New York City and its vicinity electric vehicles and parts manufactured by the defendant, The Baker Motor Vehicle Company, and that a majority of the stock of said The C. B. Rice Company was

controlled and owned by the defendant, The Baker Motor Vehicle Company, and it managed, controlled and directed all its business and corporate affairs, and the minutes of said The C. B. Rice Company were submitted to and approved by the officers and agents of the defendant, The Baker Motor Vehicle Company, before such minutes became the corporate action of said The C. B. Rice Company.

Seventh: Upon information and belief that a majority of the stock of the corporation The Baker Motor Vehicle Company of New York was owned and controlled by defendant, The Baker Motor Vehicle Company, and one R. C. Norton, the treasurer of the defendant, The Baker Motor Vehicle Company, and George H. Kelly, the attorney for the defendant, The Baker Motor Vehicle Company, owned stock in The Baker Motor Vehicle Company of New York, and were officers of said company.

Eighth: That a petition in involuntary bankruptcy, which petition was verified October 13, 1908, was filed against The Baker Motor Vehicle Company of New York in the district court of the United States for the Southern District of New York, and thereafter and on October 14, 1908, a receiver was appointed in said United States district court aforesaid for the Baker Motor Vehicle Company of New York, and there came into the hands of said receiver assets of The Baker Motor Vehicle Company of New York amounting in value to upwards of \$40,000; that thereafter and on or about October 17, 1908, in a petition for an injunction to restrain this plaintiff from proceeding with the action against The C. B. Rice Company, and which resulted in the judgment in favor of the plaintiff as set forth in paragraph third hereof, it was stated that the alleged bankrupt (Baker Motor Vehicle Company of New York) is or may be ultimately liable, in case a judgment is obtained against The C. B. Rice Company.

Ninth. That thereafter and by order of the United States district court dated December 1, 1908, the receiver appointed by the United States district court, sold, assigned, transferred

and set over unto the defendant, The Baker Motor Vehicle Company, all the assets of The Baker Motor Vehicle Company of New York upon the agreement and stipulation by the defendant, The Baker Motor Vehicle Company, that said The Baker Motor Vehicle Company would execute and deliver to the plaintiff herein an undertaking or bond which said bond should be conditioned that the defendant, The Baker Motor Vehicle Company, would pay to the plaintiff such sum or sums as he might be entitled to receive in law out of the amount received by said receiver for the distribution to creditors, on the plaintiff's claim as set up in a certain action then pending in the supreme court of the state of New York, county of Oswego, which said action resulted in said judgment in favor of the plaintiff as set forth in paragraph "Third" of this complaint.

Tenth: That in pursuance of said agreement and stipulation the defendants executed and delivered to the plaintiff an agreement in writing, dated November 25, 1908, wherein and whereby said defendants agreed to pay to the plaintiff such sum or sums as the plaintiff would be entitled in law to receive out of the amount received by the receiver in bankruptcy of The Baker Motor Vehicle Company of New York for distribution to creditors of said Baker Motor Vehicle Company of New York, upon plaintiff's claim in the then pending action referred to in paragraph ninth hereof, and which said action resulted in a judgment as set forth in paragraph "Third" of this complaint, a copy of which bond and undertaking is annexed hereto, marked "Exhibit A" and made a part hereof.

Eleventh: That there came into the hands of the receiver of The Baker Motor Vehicle Company of New York for distribution to the creditors of The Baker Motor Vehicle Company of New York the sum of \$18,000.

Twelfth: Upon information and belief, that the plaintiff now is and was the sole creditor of The C. B. Rice Company when its assets were sold, assigned, transferred and set over as aforesaid to The Baker Motor Vehicle Company of New York; that

The Baker Motor Vehicle Company of New York received the assets of The C. B. Rice Company subject to a first lien for the payment of the creditors of The C. B. Rice Company; that plaintiff's claim against The C. B. Rice Company must be paid before The Baker Motor Vehicle Company of New York could or did acquire any title to any part of the property or assets of The C. B. Rice Company; that as to the creditors of The Baker Motor Vehicle Company of New York, the plaintiff has a prior and preferred claim and lien against the assets of The Baker Motor Vehicle Company of New York; that the plaintiff was entitled to receive from the receiver in bankruptcy of The Baker Motor Vehicle Company of New York the just and full sum of \$8,329.75, the amount of plaintiff's judgment against The C. B. Rice Company aforesaid, with interest from the 4th day of February, 1909.

Thirteenth: That thereafter the plaintiff duly demanded from the defendants and each of them payment of plaintiff's claim amounting to \$8,329.75, with interest from February 4, 1909, which payment has been refused and there is now due and owing to the plaintiff from the defendants the sum of \$8,329.75, with interest from February 4, 1909, no part of which has been paid.

Wherefore, plaintiff demands judgment against the defendants in the sum of \$8,329.75, with interest from the 4th day of February, 1909, together with costs and disbursements of this action.

A. B.,

Attorney for Plaintiff.

[*Verification.*]

No. 85.

**Complaint by Husband and Wife for Recovery of Money for
Wife's Separate Estate.**

[*Caption.*]

To the Hon. Edward R. Meek, Judge of said Court:

Rada Pigg, joined herein *pro forma* by her husband, John Hutchings Pigg, both citizens of the county of Pittsylvania, in

the state of Virginia, plaintiffs in this suit, complain of defendant, The Citizens' National Bank of Stamford, Texas, of which J. S. Morrow is president, and being a corporation duly incorporated under the laws of the United States of America, with its office and place of business in the city of Stamford, Jones county, Texas, and a citizen of said state of Texas, and an inhabitant of the northern district of Texas, in the Abilene division thereof, and say:

First: That heretofore, to-wit, on April 1, 1914, Avoca State Bank, a private corporation, duly incorporated under the laws of the state of Texas, and having its domicile and place of business at Avoca, in Jones county, Texas, issued to plaintiff, Rada Pigg, its certificate of deposit on a pass-book of said Avoca State Bank in words and figures as follows:

"Avoca State Bank Debtor, April 1, Amount \$10,000, described on following page, Amount at interest at the rate of 8 per cent. per annum, interest payable monthly to credit of Mrs. J. H. Pigg in the Avoca State Bank, Avoca, Texas. Interest paid to April 1, 1914, H. H. Hall," in and by which said certificate of deposit said Avoca State Bank agreed, promised and bound itself to pay to the said Mrs. J. H. Pigg, who is the same person as Rada Pigg, plaintiff herein, said sum of ten thousand (\$10,000) dollars, with interest at 8 per cent. per annum from April 1, 1914, said interest payable monthly as therein provided.

Second: That on July 24, 1914, the plaintiff, Rada Pigg, had on deposit in said Avoca State Bank the sum of five hundred and fifty-six and 60-100 (\$556.60) dollars, which amount was deposited by plaintiff subject to payment of checks drawn by plaintiff, Rada Pigg, on said Avoca State Bank and against which said deposit said Rada Pigg has drawn checks aggregating approximately three hundred (\$300) dollars, and the balance of said deposit is still unpaid.

Third: That all of said sums hereinabove mentioned were and are the separate property of the plaintiff, Rada Pigg.

Fourth: That on the 14th day of November, 1914, said sums of money and all accrued interest thereon were due and payable by said Avoca State Bank to the plaintiff, Rada Pigg, and were liabilities of said Avoca State Bank in favor of plaintiff, Rada Pigg.

Fifth: That on or about November 14, 1914, the defendant, The Citizens' National Bank of Stamford, Texas, purchased, acquired and took charge and possession of all of the assets of said Avoca State Bank, and on or about said date the assets of said Avoca State Bank were conveyed, assigned and delivered to said defendant, and for and in consideration of the conveyance, assignment and delivery of all of the assets of said Avoca State Bank to defendant, defendant then and there agreed in writing to assume and did assume the payment of all of the liabilities of the said Avoca State Bank, and by reason thereof the defendant became bound and liable and promised to pay to the plaintiff, Rada Pigg, the amount so due and owing by said Avoca State Bank the full amount of principal and interest so due and owing by said Avoca State Bank to the said Rada Pigg, together with interest on said sum of ten thousand (\$10,000) dollars, from April 1, 1914, at 8 per cent. per annum, and on said balance of said deposit in said Avoca State Bank from November 14, 1914, at the rate of 6 per cent. per annum, which amount exceeds \$3,000 exclusive of interest.

Sixth: That though often demanded, the defendant has refused to pay the plaintiff, Rada Pigg, said sum of money or any part thereof, to the damage of the plaintiff, Rada Pigg, in the sum of twelve thousand (\$12,000) dollars.

Wherefore, premises considered, plaintiff prays that defendant be cited to appear and answer herein, and that on final hearing plaintiffs have judgment for the use and benefit of the plaintiff, Rada Pigg, as her separate estate, for the amount of the debts aforesaid, together with interest, costs of suit and for general relief.

A. B. and C. D.,
Attorneys for Plaintiffs.

No. 85a.

Declaration for Infringement of a Patent.

See under title "Patents."

No. 85b.

Declaration for Infringement of a Copyright or Trade-Mark.

See under title "Copyrights and Trade-Marks."

PLEADINGS BY THE DEFENDANT AND REPLY BY THE PLAINTIFF.

No. 86.

Demurrer to Declaration for want of Jurisdiction (1).

[Caption.]

The defendant, C. D., comes by his attorney and demurs to the petition (or declaration, as the case may be), for the reason that the said petition does not state a cause of action against this defendant within the jurisdiction of this court.

R. Y.,

Attorney for Defendant.

(1) Where the petition or declaration does not set forth a ground of federal jurisdiction, the parties may raise the question by demurrer or the court may dismiss the case sua sponte. Act of March 3, 1875, 18 Stat. L. 470, Sec. 5; *Nashua R. R. Co. v. Lowell R. R. Co.*, 136 U. S. 373, 34 L. Ed. 363; *R. R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462.

No. 87.

Plea to the Jurisdiction (1).

[Caption.]

C. D., the above-named defendant, specially appearing under protest for the purpose of this plea and for no other, says that

this court has no jurisdiction of this case for the reason that the said C. D. is not a citizen or an inhabitant of the state of ———, as set forth in the petition, but that he is a citizen and resident of the state of ———, of which state the plaintiff is also a citizen.

Wherefore, he prays that this case be dismissed and that he go hence without day.

C. D.

(1) Where the declaration sets forth a case within the federal jurisdiction and the defendant wishes to contest the facts he must interpose a plea to the jurisdiction. *Hartog v. Memory*, 116 U. S. 588.

Where the state practice permits such pleading under R. S. Sec. 914 the federal courts will permit issue of jurisdiction to be raised in an answer. *Roberts v. Lewis*, 144 U. S. 653.

The general rule is that by pleading to the merits, the defendant admits averments, which state facts sufficient to establish jurisdiction. *Sheppard v. Graves*, 14 How. 505; *Butchers and Drovers Stockyards Co. v. L. & N. R. Co.*, 67 Fed. Rep. 40.

Lack of jurisdiction can not be supplied by anything set up by way of defense. *Baker v. Eastman*, 206 Fed. 865, 124 C. C. A. 525. Where the suit is against a state dairy and food commissioner, objection that the suit is against a state and therefore the court is without jurisdiction, should be raised by demurrer and not by the court suo motu. *Scully v. Bird*, 209 U. S. 481, 52 L. Ed. 899. Where jurisdiction is invoked on the ground of diversity of citizenship, the court will entertain a motion to dismiss for lack of jurisdiction based on the proofs taken by a master to whom the case has been referred. *Steigleder v. McQuestion*, 198 U. S. 141, 49 L. Ed. 986. But in *Gaddie v. Mann*, 147 Fed. 955, it is said that where jurisdiction is predicated on diversity of citizenship, attack thereon should preferably be made by plea, which admits of examination and cross-examination, instead of by motion, with ex parte affidavits.

"A question of jurisdiction is fundamental and underlies all other questions arising in the course of litigation, and it may be raised at any time, in any mode, and at any stage, as every step taken in the progress of a cause is an assertion of jurisdiction, and the court may of its own motion make the objection or institute such investigation as may be necessary to establish or defeat it. This is especially true of federal courts, as being courts of statutory or limited jurisdiction." *Kreider v. Cole*, 149 Fed. 647, 79 C. C. A. 339.

An objection to jurisdiction may be taken by answer where dependent on a question of fact, and the issue submitted to the jury independently. *Kirven v. Virginia and Carolina Chemical Co.*, 145 Fed. 288, 76 C. C. A. 172.

Where a complaint averred that plaintiff "is a bona fide resident of the city and county of San Francisco, state of California," the defendant filed a motion to set aside service and to dismiss the action for lack of jurisdiction, and the plaintiff insisted that the objection must be made by answer, but the court said that however the question is raised it must be regarded. *Koike v. A. T. & S. F. R. Co.*, 157 Fed. 623.

To the same effect, see *Briggs v. Traders' Co.*, 145 Fed. 254.

In *Stockwell v. Boston & Maine R. Co.*, 131 Fed. 153, a demurrer was held to be the proper pleading to raise the question of jurisdiction where the averment of citizenship was insufficient.

Motions are generally appropriate only in the absence of remedies by regular pleadings, and can not be made available to settle important questions of law, or to dispose of the merits of the case. *I. C. Ry. Co. v. Adams*, 180 U. S. 28, 45 L. Ed. 410. This language was used in a case where the objection was made by motion that the suit was really one against a state.

Under the conformity act, the district courts of the United States "follow the practice of the courts of the states in regard to the form and the order of pleading, including the manner in which objections may be taken to the jurisdiction and the question whether objections to the jurisdiction and defenses on the merits shall be pleaded successively or together." *Southern Pacific Co. v. Denton*, 146 U. S. 202, 209, 36 L. Ed. 942. And where want of citizenship is apparent on the face of the petition, a special appearance for the sole purpose of filing a demurrer to raise the question of jurisdiction, which is overruled, does not waive the jurisdictional question if an exception is saved, and answer is later filed. *Ibidem*. Nor in such case is the question of jurisdiction *res judicata*. *Tate v. Brinser*, 226 Fed. 878.

A plea in abatement to jurisdiction is necessary only when the citizenship averred is such as to support jurisdiction and defendant desires to controvert the averment. *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179.

There is no lack of authority that the court may, *suo motu*, inquire into jurisdiction, including such late cases as *Continental National Bank v. Buford*, 191 U. S. 119, 48 L. Ed. 119, and *L. & N. R. R. v. Mottley*, 211 U. S. 149, 53 L. Ed. 126, where many authorities are cited; also *Sclarenco v. Chicago Bonding Co.*, 236 Fed. 592. And this true even if the parties forbear to make the question of jurisdiction, or consent that the case be considered upon its merits. *Metcalf v. Watertown*, 128 U. S. 586, 32 L. Ed. 543.

An attack on the jurisdiction of the court will be entertained whether made by objection to complaint, plea in abatement, or during trial. *Amer. Sheet, etc., Co. v. Wenzler*, 227 Fed. 321.

The question, of course, may be raised by a motion to quash a marshal's return of service, on the ground that the corporation defendant was not suable in the district, or that service was attempted

to be made upon one without authority to acknowledge it. *Frey v. Cudahy Co.*, 228 Fed. 209, in which case the court withheld decision upon the motion to permit the service upon the corporation in the district of its residence, as permitted by the Clayton act.

A motion to dismiss on the ground that the plaintiff in an equity action has an adequate remedy at law will not lie under equity rule 22 and the Judicial Code, Sec. 274a, which have swept away all technical objections whatever. While the constitution preserves the right to trial by jury, the practice as to raising the objection is changed; defendant's motion to dismiss on the ground mentioned may be taken as a motion to transfer the case to the law side, if the remedy at law is adequate. *Collins v. Bradley Co.*, 227 Fed. 199.

No. 88.

General Demurrer.

[Caption.]

The defendant, the C. D. Co., comes by its attorneys and demurs to the petition [*or, declaration, or as may be*], for the reason that the said petition does not state a cause of action against this defendant upon which this plaintiff can recover.

R. Y.,

Attorney for Defendant.

I, R. Y., do hereby certify that I am counsel for the defendants in the above-entitled action, and that, in my opinion, the foregoing demurrer is well founded.

R. Y.

No. 89.

Demurrer to Declaration for Damages for Personal Injury.

[Caption.]

The defendant, C. D. Railway Company, comes by attorney and demurs to the original declaration and the amended declaration of the plaintiff in this case and for causes of demurrer shows:

First: That said original declaration as a whole sets out no cause of action against this defendant upon which said plaintiff as administrator can recover.

Second: That said amended declaration as a whole sets out no cause of action against this defendant upon which said plaintiff as administrator can recover.

Third: Defendant demurs to each count in said original declaration on the ground that plaintiff has not alleged facts which entitle him to recover against this defendant.

Fourth: Said defendant likewise demurs to said amended declaration because therein the plaintiff has set out no facts which entitle him to recover against this demurrant.

Fifth: This defendant demurs to the first count of said original declaration because therein plaintiff shows that the plaintiff's intestate was an employe of the Northern Railway Company, and that duty was owed to him alone by said railway company and that if negligence of any person caused the injuries to him resulting in his death it was the negligence of his co-employes and fellow-servants for which negligence his administrator has no right to recover.

Sixth: This defendant further demurs to the first count of said original declaration because the allegations and charge in said count are not particular as it is by law required that they should be, but are so general, vague, indefinite and uncertain that this defendant can not safely and intelligently plead to them.

Seventh: This defendant demurs to the second count of said original declaration on the ground that plaintiff's intestate was alone an employe of the Northern Railway Company and that duty was owed alone to him by that company and that he has so charged, and that if the negligence of any one caused the injuries to him resulting in his death it was, as he has alleged, the negligence of said Northern Railway Company, and of its servants, his co-employes, and because he has alleged no specific act of negligence against this demurrant for which he could recover.

Eighth: This defendant further demurs to said second count because the allegations thereof are so vague, indefinite and uncertain that this defendant can not safely and intelligently plead

thereto, and because they are too general and are not particular as is by law required.

Ninth: This defendant demurs to the amended count of the plaintiff's declaration because the suit is against three defendants and in the other counts of the declaration a joint recovery is sought while in the said amended count the allegations as to the defects in the engine and of the negligence applied exclusively to defendant, Northern Railway Company, and in no wise to this defendant, and there is no allegation of negligence as to this defendant as regards the alleged defects in said engine or otherwise, and if recovery were to be had by reason of said defect it must necessarily be against the Northern Railway Company alone while the proceeding is against all the defendants jointly.

Tenth: This defendant demurs to the fourth count in said original declaration on the ground that the allegations of negligence are so vague, indefinite and uncertain that this defendant can not join issue thereon and can not safely or intelligently plead thereto, notwithstanding and contrary to the requirements of law that said allegations should be definite and certain; and because in and by said count no duty is shown to have been owing by this demurrant to plaintiff's intestate and because the negligence resulting in the death of plaintiff's intestate, if any existed, was that of said intestate's co-employees.

Wherefore, this defendant demurs and prays judgment of the court on each and all of the grounds of demurrer herein taken.

R. Y.,

Attorney for C. & D. Ry. Co.

No. 90.

Demurrer Based on Case being One under Maritime Law.

Now comes The Zenith Steamship Company, defendant herein, and files this its demurrer to the amended petition of the plaintiff herein on the ground that the said amended petition does not state facts sufficient to constitute a cause of action against this defendant, because:

(a) It appears that the plaintiff was a seaman on board the defendant's steamer, and the duty of the defendant to the said plaintiff was therefore governed by the maritime law of the United States.

(b) The negligence which caused the injuries sustained by the plaintiff was solely that of the first mate on board the defendant's said steamer; and

(c) Under the maritime law the said first mate was a fellow-servant of the said plaintiff and for his negligence this defendant is not liable to the plaintiff.

A. B. and C. D.,
Attorneys for Defendant.

No. 91.

Demurrer to Complaint—General and Special.

[*Caption.*]

Comes now the above-named defendant, ———, and demurs to the complaint on file herein, and for grounds of demurrer specifies:

I. That several causes of action have not been separately stated, to-wit, an action upon an account stated to recover the sum of forty-five hundred dollars (\$4,500), an action to recover the reasonable value of the work and labor performed and services rendered, in connection with, and relating to, said water rights and said power company, in the sum of twenty-five hundred dollars (\$2,500), and an action to recover money expended by plaintiff for defendant's use in the sum of four hundred eleven dollars (\$411).

II. That said complaint does not state facts sufficient to constitute a cause of action.

III. Defendant specially demurs to said complaint in that it does not appear that said Charles A. Nones, as president, agent and general superintendent, has the right and power for and in behalf of said defendant corporation, to engage or employ plaintiff to perform the services or make the expenditures claimed as set forth in said complaint.

Wherefore said defendant prays that said plaintiff take nothing by his said action, and that it be hence dismissed with its costs herein expended.

A. B.,

Attorney for Defendant.

The undersigned, counsel for the defendant in the above-entitled cause, does hereby certify that the foregoing demurrer is not filed for delay, and that in the opinion of said counsel the same is well taken in point of law.

A. B.,

Attorney for Defendant.

No. 92.

Demurrer to Pleas.

[*Caption.*]

And the plaintiff, by its attorneys, A. and B., comes and defends, etc., and, as to the fourth, fifth and sixth pleas of the defendant above pleaded, says that the matters and things in said fourth, fifth and sixth pleas contained, in manner and form as the same are herein set forth and alleged, are not sufficient in law to bar the plaintiff from maintaining its aforesaid action, and that it, the plaintiff, is not bound by law to answer the same; and this the plaintiff is ready to verify.

Wherefore, for want of sufficient fourth, fifth and sixth pleas in this behalf, the plaintiff prays its damages, etc., to be adjudged to it, etc.

A. and B.,

Attorneys.

No. 93.

Demurrer to Answer.

[*Caption.*]

Now comes the plaintiff, and demurs to the amended answer of defendant filed herein, for the reason that the same does not state facts sufficient to constitute a defense to the cause of action alleged in the petition.

Wherefore, plaintiff prays judgment as in its original petition.

R. Y.,

Attorney for Plaintiff.

No. 94.**General Demurrer to an Amended Answer.**

[Caption.]

Now comes the plaintiff and demurs to the first ground of defense contained in the second amended answer of the defendant filed herein, for the reason that the facts and statements therein contained are not sufficient in law to constitute a defense to plaintiff's petition or the several causes of action therein contained

Plaintiff also demurs to that portion of the second amended answer denominated the second ground of defense, for the reason that the facts therein stated do not in law constitute a defense in favor of the defendant and against the plaintiff's petition or the several causes of action therein contained.

R. X.,

Attorney for Plaintiff.

No. 95.**Plea Not Guilty in Trespass by Cutting Timber.**

[Caption.]

And the defendants, for plea, say they are not guilty of cutting and removing the timber from lands of plaintiffs, as in the declaration alleged.

R. Y.,

Attorney for Defendants.

No. 96.**Plea Not Guilty in Ejectment.**

[Caption.]

The defendants, C. D. and E. F., come, and for plea say they are not guilty of wrongfully withholding the premises from the plaintiffs claimed in the declaration.

R. Y.,

Attorney for Defendants.

No. 97.**Plea, General Issue and Contributory Negligence.**

[Caption.]

The defendant for plea to the several counts of the declaration says it is not guilty of the wrongs and injuries complained of in plaintiff's several counts of his declaration, and avers that plaintiff is not entitled to a recovery.

And for further plea to the several counts of the declaration says the injury complained of was the result of A. B.'s own negligence, whereby his negligence being the contributory cause of the injury, defendant is not liable.

R. Y.,
Attorney for Defendant.

No. 98.

(Another form.)

Answer in Action for Tort, Alleging Negligence of Plaintiff.

[Caption.]

And now comes the defendant in the above-entitled action and for answer denies each and every material allegation in the plaintiff's writ and declaration contained, and further answering the defendant says the plaintiff is not entitled to maintain this action for the reason that at the time or times mentioned in said declaration the plaintiff was not in the exercise of due care.

By its Attorney,
X. Y.

No. 99.**Plea, Raising General Issue.**

[Caption.]

Now comes the defendant, The Chicago, Rock Island & Pacific Railway Company, by M. L. Bell and A. B. Enoch, its

attorneys, and defends the wrong and injury when, etc., and as to said declaration says that it is not guilty of the said supposed grievances above laid to its charge nor any nor either of them, and further says that it does not owe the said sum of money demanded or any part thereof, in manner and form as the plaintiff has above thereof complained against it. And of this the defendant puts itself upon the country.

M. L. B. and
A. B. E.,
Attorneys for Defendant.

No. 100.

Defendant's Plea and Brief Statement in Action for Assessment on Shares.

[Caption.]

And now the defendant comes, etc., when, etc., and says it never promised the plaintiff in the manner and form it has declared against it, and for this puts itself upon the country.

By its Attorneys,
J. S. H. FRINK.
C. J. HAMBLETT.

The plaintiff will take notice that the defendant makes the following brief statement of its defence:

(1) It denies the said plaintiff corporation was ever duly organized, or that all the shares necessary to enable said corporation to duly and legally organize have ever been subscribed for or taken.

(2) It denies that James Lewis Lombard was ever the *bona fide* owner and holder of the stock it is alleged in plaintiff's declaration was sold, assigned, transferred and delivered to said defendant, or that defendant ever accepted the assignment of the same.

(3) It says that said James Lewis Lombard conspired with the plaintiff company to make sale to said defendant of said

shares, through false and fraudulent representations, and that the sale and acceptance to said defendant in plaintiff's declaration alleged was procured by the fraudulent and false representations of said James Lewis Lombard, acting for and in behalf of the plaintiff company.

(4) It says that said James Lewis Lombard, conspiring with the plaintiff company, and with full knowledge on the part of the plaintiff, sold said stock to the said defendant upon the false and fraudulent representation and promise, that there never should be a call for more than two pounds sterling per share on the subscription to said stock, and the call and assessment in the suit is in excess of said sum.

(5) It says that said James Lewis Lombard, with the full knowledge and authority on the part of the plaintiff to make the representations hereinafter recited, in order to induce said defendant to purchase said shares, represented to it that the capital stock of said company was placed at ten pounds sterling per share, because it was the English method of doing business, and that it was necessary to do so to comply with the English law or custom in such cases, in order to absorb the surplus, which he represented would accumulate from the profits of the business of said corporation, and to enable the company to increase its capital stock if desirable, by making dividends from its surplus, and that said representations were false and fraudulent, and the said defendant in making said purchase relied upon the same.

(6) It says that defendant was induced to purchase said stock, relying upon the promise of said James Lewis Lombard, with the full knowledge and assent of the plaintiff company, that the American stockholders should be represented in the board of officers of said company and have a voice in the management of its affairs, but the plaintiff corporation has refused and neglected to choose any such officers, and did not so intend at the time of such representations, with a view of making the fraudulent call and assessment in plaintiff's declaration alleged.

(7) It says that the plaintiff corporation has purposely and with a view to making unlawful assessments and calls, intentionally debarred the American stockholders from attending any meeting of said company, by neglecting to give the American subscribers to stock in said company, including the defendant, seasonable notice of the meetings of said company, at which said alleged assessments were voted, so that it would be possible for them to attend said meetings, and they did not attend said meetings for want of such seasonable notice, and the defendant will claim that the assessments are invalid, for this and other causes.

(8) It says the assessment declared upon was not a legal assessment against the stockholders in said company, because no notice to the stockholders was ever given of a meeting to consider the subject of making an assessment upon said stock, so as to render it possible for the stockholders to be present or to be represented at such meeting.

(9) It says the assessments attempted to be collected in this suit are invalid, unlawful and unauthorized.

(10) It says that no assessment whatever was made, or is alleged to have been made, upon the stock alleged to have been sold, assigned, transferred and delivered to the defendant by said James Lewis Lombard, since said alleged sale, assignment, transference and delivery.

(11) It says that defendant never subscribed for any of the stock of said plaintiff corporation, nor was it at the time of said alleged assessment nor has it ever been the owner of any such stock.

No. 101.

Plea of Defendant in Action for Violation of Federal Employer's Liability Act.

[Caption.]

The defendant says that it is not guilty in manner and form as the plaintiff has alleged and makes the following brief statement of defence under the foregoing issue:

1. The injury of which the plaintiff complains was not caused by the negligence of the defendant or of any of its officers, agents or servants.

2. The situation and all the conditions in any way related to the accident were open and obvious and whatever risks the plaintiff's intestate was subjected to were assumed by him.

The defendant further says that the plaintiff was guilty of contributory negligence.

By its Attorneys,
A. B. and C. D.

No. 102.

Plea of General Issue to Additional Counts.

[Caption.]

Now comes the defendant, Chicago, Milwaukee & St. Paul Railway Company, by O. W. Dynes and C. S. Jefferson, its attorneys, and defends the wrong and injury, when, etc., and says that it is not guilty of the said several supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the plaintiff has above thereof in his said additional counts complained against it. And of this the defendant puts itself upon the country, etc.

A. B. and C. D.,
Attorneys for Defendant.

No. 103.

Allegation of Negligence and Assumed Risk.

6. Further answering the complaint alleges upon information and belief that any injuries sustained by the plaintiff at the time and place mentioned and described in the complaint were caused by his own carelessness and negligence and in no

wise by negligence on the part of this defendant. That all the risks and dangers connected with the situation at the time and place mentioned in the complaint were open, obvious and apparent and were known to and assumed by the plaintiff herein.

No. 104.

Defense of Another Action Pending.

The defendant realleges the allegations contained in paragraphs tenth, eleventh, twelfth and thirteenth of this answer, and in addition thereto alleges at the time of the commencement of this action there was and is now pending in the supreme court of the state of New York an action brought by this plaintiff against this defendant in the month of July, 1907, upon the same cause of action alleged in the complaint herein, which action at the time of the commencement of this action was and is now at issue between the parties hereto.

No. 105.

Defense to Counterclaim, of Another Action Pending.

For a separate and distinct defense to the said counterclaim, this plaintiff alleges:

That there is another action pending between the same parties and for the same cause.

Wherefore, this plaintiff demands judgment as prayed for in the complaint herein.

No. 106.

Counterclaim in Suit for Breach of Contract of Sale.

Further answering the complaint, and for a defense to the whole thereof, and as a counterclaim to the causes of action

therein alleged, the defendant alleges upon information and belief as follows:

VIII. The defendant was at all the times hereinafter mentioned, now is and for many years last past has been, a corporation duly organized and existing under the laws of the state of California, with its principal place of business in San Francisco, in the said state, and is a resident and a citizen of the state of California.

IX. The plaintiff was at all the times hereinafter mentioned and now is a citizen and resident of the state of New York, residing at No. 940 East 173d street, in the borough of the Bronx, and is a resident and inhabitant of the Southern District of New York, and is engaged in the manufacture of yarns and threads at 147 Spring street, borough of Manhattan, city of New York, doing business under the name and style of "The Globe Thread Co."

X. In or about the month of February, 1916, the defendant and the plaintiff entered into an agreement in writing, whereby it was mutually agreed that the plaintiff should sell and deliver to the defendant in ten monthly shipments, beginning on or about March 1, 1916, and that the defendant would accept and pay for, ten thousand tubes of thread made of combed Egyptian yarn, half silk finish and half soft finish, at sundry prices, amounting in the aggregate to the sum of about \$11,315, all of the said thread to be of the same color, strength, quality and finish as certain thread constituting a sample previously delivered by the plaintiff to the defendant; and the plaintiff further represented and declared that he had on hand dye of a quality equal to that used in the said sample, and the defendant entered into the said agreement relying on the said representation; and the plaintiff warranted and agreed to and with the defendant that all of the said thread should be of the color, strength, quality and finish as the sample on the faith of which the agreement was entered into, and further warranted and agreed that the said thread should be free from all defects and of good and merchantable quality.

XI. The plaintiff wholly failed to perform the said contract with the defendant, did not have on hand dye of a quality equal to that used in the said sample, failed to tender deliveries of any thread at the time stipulated in the said agreement, and has wholly failed and refused to deliver any thread of the color, strength, quality or finish called for by said contract, but at divers times the plaintiff tendered to the defendant various shipments of tubes of thread that were not in accordance with the said contract, and not of the same color, strength, quality or finish as the said sample thread, but of a different color and finish, and all of inferior strength and quality, and not free from defects and not of a good merchantable quality. The defendant rejected all of the said shipments and duly notified the plaintiff of the rejection of each and all of the said shipments and demanded of the plaintiff that he make deliveries in accordance with his agreement, which the plaintiff wholly failed and refused to do; although the defendant was at all times ready and willing at the times and place appointed in the said agreement, to receive the said thread and to pay for the same, and has otherwise duly performed all the conditions on its part to be performed, the plaintiff has wholly failed to perform the said agreement, has failed and neglected to deliver or to tender delivery of the said thread, or any part thereof, in accordance with the said agreement, but has broken and terminated the said contract.

XII. The defendant has incurred expenses in and about the transport of the said shipments from the city of New York, where the same were delivered, to the city of San Francisco, where the same were inspected, and in and about the return thereof to the city of New York, in the sum of \$265.74.

XIII. By reason of the premises, the defendant has been damaged in the sum of \$10,265.74.

Wherefore, the defendant demands judgment that the relief demanded by the plaintiff be denied, and that the defendant

have judgment against the plaintiff in the sum of \$10,265.74, together with the costs and disbursements of this action.

A. B. and C. D.,
Attorneys for Defendant.

No. 107.

Defense of Breach of Contract.

For a further and separate and as a partial defense to the alleged cause of action set forth in the complaint, this defendant alleges upon information and belief:

First: That in and by the policy issued by it to the plaintiff on or about the 6th day of February, 1914, bearing No. 178,716, which policy is referred to and described in the complaint and in the alleged cause of action therein set forth, and on which policy the said alleged cause of action is based, it was provided that it shall be optional with this defendant to repair, rebuild or replace the property lost, or damaged, with other of like kind and quality within a reasonable time on giving notice within thirty days after the receipt of a proof of loss of its intention so to do.

Second: Upon information and belief that within thirty days after the receipt by this defendant from the plaintiff of papers purporting to be a proof of loss, and prior to the commencement of this action, this defendant notified the plaintiff that it desired and was ready to promptly replace the property alleged in the cause of action in the complaint to have been lost, destroyed or damaged with other property of like kind, and quality, and this defendant offered so to do both orally and in writing.

Third: That plaintiff refused to permit this defendant to replace such property with other of like kind and quality.

Fourth: That the plaintiff has wholly failed, with regard to the fire alleged in the cause of action, set forth in the complaint, to comply with the terms and conditions of the policy

described in said alleged cause of action on its part to be performed.

Wherefore the defendant demands judgment that the complaint of the plaintiff be dismissed with costs.

A. B.,

Attorney for Defendant.

[*Verification.*]

No. 108.

Defense of Tender.

For a separate and distinct defense to the alleged cause of action set forth in the complaint, this defendant alleges as follows, upon information and belief:

Ninth: That before the commencement of this action and on the 11th day of June, 1909, at the city of New York, this defendant tendered to the plaintiff the sum of one thousand two hundred ninety-nine and 44/100 dollars (\$1,299.44), with interest from February 4, 1909, to June 11, 1909, in payment and full settlement of the obligation of the defendants to the plaintiff under the agreement annexed to the complaint herein marked Exhibit "A," but the plaintiff refused to receive the ~~same~~

Tenth: That this defendant has ever since remained and still is ready and willing to pay to the plaintiff said sum and said interest in full payment and settlement of the obligation of the defendants to the plaintiff on the account of the afore-said agreement, but the plaintiff has hitherto refused to receive the same.

Wherefore, this defendant demands judgment dismissing the complaint of the plaintiff and for the costs and disbursements of this action.

A. B.,

Attorney for Defendant.

No. 109.**Defense of Res Adjudicata.**

That on or about March 10, 1904, this plaintiff commenced an action in the supreme court of the state of New York, for the county of New York, against this defendant to recover from him the sum of \$7,200, the amount of his alleged liability under the constitution and general laws of Minnesota as a stockholder or beneficial owner of stock of the Minnesota Thresher Manufacturing Company for the same indebtedness of said company which is alleged in the complaint in this action, and that the liability of the defendant asserted in the said action is the same liability asserted by the plaintiff in this action, except only that the said action was brought to recover from the defendant the assessment of \$18 per share assessed by an order of the district court for the county of Washington, state of Minnesota, dated December 22, 1902, and referred to and more fully described in paragraphs "16" and "17" of the complaint herein, against every person liable as a stockholder of said Thresher Company, while the present action while based upon the same alleged liability of the defendant as a stockholder or beneficial owner of stock of the said Thresher Company, and upon the same proceedings of the courts of Minnesota referred to in the first twenty paragraphs of the complaint herein, is brought to recover an assessment of \$32 per share assessed against every person liable as a stockholder of the said Thresher Company by an order of the said court dated June 11, 1907, and referred to and more fully described in paragraphs "22" and "23" of the complaint herein. That the said action was thereafter duly tried upon the merits and that a judgment was on January 7, 1905, duly entered therein in favor of this plaintiff and against this defendant. That this defendant duly appealed from the said judgment to the appellate division of the supreme court of the state of New York, which court reversed the said judgment and ordered a new trial of the said

action, and a judgment of the supreme court of the state of New York was thereupon duly entered reversing the said judgment and ordering a new trial of the said action. That such new trial was thereupon duly had upon the merits and proposed findings of fact and conclusions of law were duly submitted thereon on behalf of both the plaintiff and defendant and that a judgment was on August 29, 1906, duly entered therein upon the merits in favor of this defendant and dismissing the complaint in said action. That the plaintiff thereafter appealed to the appellate division of the supreme court of the state of New York from said judgment, which court duly affirmed the said judgment; that the plaintiff thereafter appealed to the court of appeals of the state of New York from the judgment affirmed by the appellate division of the supreme court of the state of New York in favor of this defendant and that the said court of appeals duly affirmed the said judgment; that the said plaintiff thereafter sued out a writ of error to the supreme court of the United States from the judgment entered upon the order of the said court of appeals affirming the said judgment and that the supreme court of the United States thereafter dismissed said writ of error, and a judgment of the supreme court of the state of New York was thereafter and on the 17th day of January, 1911, duly made and entered affirming the judgment appealed from. That in and by said judgments and proceedings of the supreme court and court of appeals of the state of New York, it was finally adjudged and decreed upon the merits as appears from the judgment roll in the said action that the defendant was not a stockholder of the Minnesota Thresher Manufacturing Company at the time of the entry of the judgments, orders or decrees of the district court of Washington county, Minnesota, on August 16, 1901, and December 22, 1902, respectively, described in the complaint herein, and that the defendant was not, therefore, subject to any liability for the debts of that corporation under the constitution or laws of Minnesota. That hereto attached

marked "A" and made a part hereof is a true copy of the minutes of the decision of the court of appeals in the said action.

That the said judgments and proceedings other than the judgment of January 7, 1906, are still in full force and unreversed and are *res adjudicatae* and conclusive upon the parties to this action as to liability of this defendant asserted in the complaint herein as a stockholder or as the beneficial owner or holder of stock of the Minnesota Thresher Manufacturing Company.

Upon information and belief that the cause of action alleged in the complaint in this action is the same cause of action alleged in the action referred to in paragraph twelfth of this answer and that the judgment of August 29, 1906, in the said action is *res adjudicata* as to the cause of action alleged in the complaint in this action.

That under the provisions of Article 4, Section 1, of the Constitution of the United States, full faith and credit must be given by this court to the said judgments and judicial proceedings of the supreme court of the state of New York and of the court of appeals of that state.

No. 110.

Pleading Equitable Defense in Action at Law (1).

And for a fifth, further and affirmative defense, without waiver of any of the defenses hereinbefore interposed, defendant alleges:

That the plaintiff, on or about the 5th day of March, 1915, for a good, valuable and sufficient consideration, compromised, adjusted and made a full settlement of his claim, if any, against defendant on account of the accident, if any occurred, of which plaintiff complains in said complaint, and then and there, for a good, valuable and sufficient consideration paid to

him by defendant, made, executed and delivered to defendant his written release, in full settlement and discharge of all claims, demands or causes of action whatsoever which he then had or might thereafter have against defendant on account of the accident, if any occurred described in said complaint; that plaintiff thereby then and there released and forever discharged defendant of all claims, demands and causes of action whatsoever which plaintiff then had or which he might thereafter have against defendant on account of the accident, which occurred to the plaintiff on October 28, 1914, as alleged in said complaint; that by virtue thereof plaintiff's right of action against defendant, if any he had, and defendant's liability for said accident, if any existed, were extinguished; that said written release, made, executed and delivered to defendant by plaintiff on March 5, 1915, as aforesaid, was and is in words and figures as follows, to-wit:

"Union Pacific Railroad Company. Voucher No. ———.

"Draft No. 714 EDW.

"Release of All Claims.

"Received of Union Pacific Railroad Company seven hundred fifty dollars (\$750.00) in full settlement and complete satisfaction of all claims and causes of action against it growing out of any matter whatsoever, and particularly in full settlement and complete satisfaction of all claims or causes of action, that exist or may hereafter accrue, against it or any other company, partnership or person, for damages for any and all personal injuries or loss or damage to property, sustained in or growing out of a certain accident, or for complications arising from such injuries, or treatment for such injuries. Said accident occurred on the twenty-eighth (28th) day of October, 1914, at or near Denver, Colorado, and consisted in injuries received while employed as boilermaker helper.

"In consideration thereof, I release Union Pacific Railroad Company from all claims or causes of action growing out of any matter whatsoever, and I particularly release said company and all other companies, partnerships and persons from all claims or causes of action, that exist or may hereafter accrue, for damages for any and all personal injuries or loss or damage to property, sustained in or growing out of the said accident, or for complications arising from such injuries, or treatment for such injuries.

"The above amount is the full consideration for this settlement, and no promise or contract of future employment has been made.

"I have read the foregoing receipt and release and fully understand the same.

"Dated, Denver, Colo., March 5, 1915.

"Witnesses:

"Mrs. Katie Hoffman,

"C. R. Lucas.

"(Signed) JAMES SYAS."

(1) The Judicial Code, Sec. 274b, provides for such defense. 35 Stat. L. 956.

There was no such right prior to this statute. *Whitcomb v. Shultz*, 223 Fed. 268, 138 C. C. A. 510, and see note to *Standard, etc., Co. v. Evans*, 125 C. C. A. 1.

This statute abolishes the technical distinctions between actions at law and in equity. *U. S. v. Richardson*, 223 Fed. 1010, 139 C. C. A. 386.

Answer in a suit in assumpsit for price of an adding machine may set up fraudulent representations of the plaintiff. *Burroughs, etc., Co. v. Bank*, 239 Fed. 179.

In a suit against the executors of a will to recover a legacy the executors may set up a release as a legal defense, but plaintiff may not set up an equitable defense thereto in the replication, for Judicial Code, Sec. 274b, although permitting an equitable defense in the answer or plea, permits such defense in the replication only when the answer or plea interposes an equitable defense upon which affirmative relief is prayed, as a counterclaim, but Hand, district judge, regarded that construction too narrow and dissented. *Keatley v. U. S. Tr. Co.*, 249 Fed. 296, 161 C. C. A. 304.

When equitable relief is asked in an action at law, the case for equitable relief should be tried as a case in equity and first disposed of before proceeding in the action at law; it is error to send to the same jury the question of fraud in a release pleaded as an equitable defense and the question of damages if the release is found by the jury to be fraudulent. *U. P. Ry. Co. v. Syas*, 246 Fed. 561, 158 C. C. A. 531; *Fay v. Hill*, 249 Fed. 415.

This section applies only between the original parties to the suit, and is therefore not a bar to an ancillary action in the nature of an interpleader brought by the same defendant where other parties are necessary to the determination of the interpleader. *Sherman, etc., Bank v. Shubert Theatrical Co.*, 247 Fed. 256, 159 C. C. A. 350.

This section covers also a case in which the defense calls for affirmative relief as well as for a judgment that the plaintiff "take nothing." *United Timber Corp. v. Bivens*, 248 Fed. 554, 562.

Under this section it is proper in an action on a contract to ask in the answer for reformation thereof, and the court will consider this cross-petition first as an equity proceeding, and after decree thereon, take up the trial of the action at law for breach. *Upson Nut Co. v. American Shipbuilding Co.*, 251 Fed. 707.

No. 111.

Plea of General Issue with Notice of Set-Off.

[Caption.]

The defendant comes and demands a trial of the matters set forth in the plaintiff's declaration.

R. Y.,

Attorney for Defendant.

To G. P.,

Attorney for the Plaintiff:

Please take notice that the defendant will in like manner insist upon and give in evidence under the general issue above pleaded that before and at the time of the commencement of this suit, the plaintiff was and still is indebted to the defendant in the sum of twenty-five thousand dollars, for the price and value of goods then sold and delivered by the defendant to the plaintiff at its request. And in like sum for the price and value of work then done, and materials for the same provided, by the defendant for the plaintiff, at its request. And in like sum for the price and value of work then done by the defendant for the plaintiff, at its request. And in a like

sum for money then lent by the defendant, to the plaintiff, at its request. And in a like sum for money then paid by the defendant for the use of the plaintiff, at its request. And in a like sum for money then received by the plaintiff for the use of the defendant. And in a like sum for money found to be due from the plaintiff to the defendant on an account stated between them. Which said several sums of money, or so much thereof as will be sufficient for that purpose, the defendant will set off and allow against any demand of the plaintiff to be proved on said trial, and will take judgment against the plaintiff for the amount of the balance, if any, found upon such trial, to be due from the plaintiff to the defendant.

R. Y.,

Attorney for Defendant.

Dated this — day of —, A. D. —.

No. 112.

Pleas to a Declaration by an Engineer for Damages for Personal Injury.

[Caption.]

First. The defendant for plea to the declaration and the four counts of the same says it is not and was not guilty of the wrongs and injuries as plaintiff both alleged.

R. Y.,

Attorney for Defendant.

Second. And for further plea to the first count of the declaration says, if the injury resulted from the negligence of the conductor, as plaintiff has alleged, then the defendant is not liable, as the said conductor and engineer were fellow servants.

R. Y., Attorney.

Third. And the defendant for further plea to the second count of the declaration says, if the injury resulted from the negligence of the telegraph operator at Jackson and Milan,

or either, as plaintiff has alleged, it is not responsible as it would be the act of a fellow servant of the deceased.

R. Y., Attorney.

Fourth. And for further plea to the third count of the declaration that the injury resulted from the negligence of the operator or agent or some one for him at Milan, it states it is not liable because it would be the negligence of a fellow servant of the deceased.

R. Y., Attorney.

Fifth. And further plea to said third count that the accident resulted from the negligence of some one at Milan, it is not responsible for the acts of said third party.

R. Y., Attorney.

Sixth. And for further plea to each count of the declaration it says if the accident occurred it was the fault of a fellow servant of said engineer, for which it is not responsible.

R. Y., Attorney.

Seventh. And for further plea to each count of the declaration it says if the accident occurred it was by the negligence of the deceased for which the defendant is not liable.

R. Y., Attorney.

Eighth. And defendant for further plea to each and every count of the declaration says the accident or injury was the result of the deceased's disobedience of the rules and regulations of the defendant.

R. Y., Attorney.

Ninth. And for further plea to each count of the declaration it says it is not liable; that the deceased at the time of the accident was acting in direct violation of the rules of the defendant which he knew of.

R. Y., Attorney.

Tenth. And for further plea says the accident was the result of deceased disobeying the rules of defendant.

R. Y., Attorney.

No. 113.**Plea of Statute of Limitations.**

[*Caption.*]

And for further plea in this behalf said defendant says, plaintiff's cause of action, if any he had, accrued more than twelve months next before the commencement of this suit and this defendant is ready to verify.

R. Y.,

Attorney for Defendant.

No. 114.**Pleas to a Declaration on Policy for Accident Insurance.**

[*Caption.*]

First. The defendant, the Fidelity and Casualty Company of New York, for plea says that it owes the plaintiff nothing as in his declaration he hath alleged.

Second. The defendant craves oyer of the policy of accident insurance in the declaration mentioned and it is read to it in these words: [*Here set out policy in haec verba.*]

Third. For further plea defendant says that the statement made in said application for said policy of insurance that said intestate was then in sound condition mentally and physically was false and untrue in that the said intestate had a few months theretofore received a severe blow on the head which caused his brain to become and be diseased, and in consequence thereof he was not in sound condition physically, and at the time of the making of said statement. Said intestate was not in a sound mental condition and by reason of the falsity of said statement and the breach of said warranty, the policy of accident insurance mentioned in the declaration was avoided from the beginning.

Fourth. Defendant for further plea says that plaintiff's intestate committed suicide by, on —, voluntarily, wantonly and with the intent to take his life, jumping from a train en route from — to —, moving at a high rate of speed,

he being a passenger on said train; that said intestate intentionally and of a purpose, fell, sprang or jumped from said train with the intent of inflicting injury upon himself and as a result thereof he was thrown against the ground on or near said railway track with great violence receiving injuries from which he died four days later.

Y. & Y.,
Attorneys for Defendant.

No. 115.

Plea that Suit Has Abated by Death of only Beneficiary.

[Caption.]

Now comes the defendant, the C. & D Railroad Company and for plea to the said declaration filed herein says:

That the deceased, E. F., died unmarried, without children, and leaving surviving him as his next of kin his father, G. F., who alone was entitled to recover any damages for the wrongful death of said E. F.

Since the bringing of this suit, said father, G. F., has died; thereupon defendant comes and says that this suit abated upon the death of the father, G. F., and can no longer be maintained.

And this it is ready to verify.

R. Y. and G. Y. come and make oath that they are attorneys for the C. & D. Railroad Company and do say upon oath that the matters and things stated in the foregoing plea are true in substance and in fact. This plea is not interposed for delay.

R. Y.

G. Y.

Sworn to and subscribed before me this — day of —,
H. M., Clerk.

No. 116.**Answer to Suit on Fidelity Bond.**

[Caption.]

Comes the defendant in the above styled cause, and for answer to each count of the complaint filed in said cause, separately, says:

1. It pleads in short by consent the general issue.
2. It denies every material allegation of said count.
3. It says that it is not indebted to the plaintiff.
4. Defendant alleges that the bond sued on provides that the defendant should not be liable under said bond for any act or thing done or left undone by the principal, E. A. Matthews, in obedience to, or in pursuance of any instruction or authorization received by him from the assured, the Clanton Bank, or any superior officer, and defendant alleges that the act or thing done or left undone by the said E. A. Matthews, and for which recovery is sought in this suit, was done or left undone by the said E. A. Matthews in obedience to or in pursuance of instruction or authorization received by him from the Clanton Bank or from one of the superior officers of the said E. A. Matthews.
5. Defendant says that the bond sued on provides that the defendant should not be liable for any mere error of judgment or bona fide mistake or any injudicious exercise of discretion on the part of the said E. A. Matthews in and about all or any matters wherein he shall have been vested with discretion, either by instruction or by the rules and regulations of the Clanton Bank; and defendant says that the acts of the said E. A. Matthews, for which recovery is sought in this suit, consisted of nothing more than errors of judgment or bona fide mistakes or the injudicious exercise of discretion on the part of the said E. A. Matthews in and about the matter of the bank, with which he was vested with discretion.
6. Defendant says that prior to the execution of the bond sued on, the said E. A. Matthews had been, for a number of years, in the employ of the Clanton Bank as its cashier, and

that during the time that he was so employed by the Clanton Bank, prior to the date of the execution of the bond sued on, the said E. A. Matthews was guilty of dishonest and fraudulent acts, in pursuance of his duties as cashier, which dishonest or fraudulent acts amounted to larceny or embezzlement and that the said Clanton Bank, at the time that the bond sued on was executed by the defendant, had knowledge of the commission of said acts by the said E. A. Matthews. Defendant further alleges that when said bond was executed by it, the said Clanton Bank concealed from and failed to disclose to the defendant the commission of said acts by the said E. A. Matthews, and thereby perpetrated upon the defendant a fraud in the procurement of the execution by the defendant of the bond sued on. Wherefore, the defendant says that the plaintiff should not recover on said bond.

7. Defendant says that prior to the execution of the bond sued on, the said E. A. Matthews had been, for a number of years, in the employ of the Clanton Bank as its cashier, and that during the time that he was so employed by the Clanton Bank, prior to the date of execution of the bond sued on, he had on numerous occasions done some of the same character of acts and used the funds of the Clanton Bank in the same manner as that for which recovery is sought in this suit; that the Clanton Bank had knowledge of these facts at the time that the bond was executed by the defendant, but concealed from and failed to disclose to the defendant said facts, and defendant alleges that said Clanton Bank thereby perpetrated upon it a fraud in the procurement of the execution of said bond, which precludes a recovery upon said bond.

8. Defendant alleges that the bond sued on in this case was issued upon the express condition, which condition is set out in the bond sued on, that on the discovery of any act capable of giving rise to a claim under said bond, the Clanton Bank should, at the earliest practicable moment, give notice thereof to the defendant, and defendant alleges that the Clanton Bank discovered an act or acts capable of giving

rise to a claim under said bond, and failed to give notice thereof to the defendant at the earliest practicable moment after the discovery thereof.

9. Defendant alleges that the bond sued on in this case was issued upon the express condition, which condition is set out in the bond sued on, that on the discovery of any act capable of giving rise to a claim under said bond, the Clanton Bank should, at the earliest practicable moment, give notice thereof to the defendant, and defendant alleges that the Clanton Bank discovered an act or acts capable of giving rise to a claim under said bond, and failed to give notice thereof to the defendant within a reasonable time after the discovery of said act or acts.

10. Defendant alleges that the bond sued on in this case was issued upon the express condition, which condition is set out in the bond sued on, that on the discovery of any act capable of giving rise to a claim under said bond, the Clanton Bank should, at the earliest practicable moment, give notice thereof to the defendant, and defendant alleges that the Clanton Bank discovered an act or acts capable of giving rise to a claim under said bond, and for more than five months after making such discovery failed to give notice thereof to the defendant.

11. Defendant alleges that the bond sued on in this case was issued upon the express condition, which condition is set out in the bond sued on, that on the discovery of any act capable of giving rise to a claim under said bond, the Clanton Bank should, at the earliest practicable moment, give notice thereof to the defendant, and defendant alleges that one or more of the items for which recovery is sought in this case, and of which the defendant had notice in the proof of loss furnished to it by the plaintiff, was discovered by and known to the Clanton Bank more than five months before any notice thereof was given by the Clanton Bank or by the plaintiff to the defendant.

12. Defendant alleges that the bond sued on in this case was issued upon the express condition, which condition is set out in the bond sued on, that said bond should become void as to any claim for which the defendant would otherwise be liable if the bank should fail to notify the defendant of the occurrence of the act or omission, out of which said claim might arise, immediately after it came to the knowledge of the bank; and further that the knowledge of a president, vice president, secretary, treasurer, manager, cashier or other like executive officer should be deemed, under said bond, the knowledge of the bank. And defendant alleges that an act or acts of E. A. Matthews, for which recovery is sought in this case, became known to the bank or to the president, vice president, or to some director of the same Clanton Bank, and said Clanton Bank failed to notify the defendant of the occurrence of said act or omission immediately after it so became known.

13. Defendant alleges that the bond sued on in this case was issued upon the express condition, which condition is set out in the bond sued on, that said bond should become void as to any claim for which the defendant would otherwise be liable if the bank should fail to notify the defendant of the occurrence of the act of omission, out of which said claim might arise, immediately after it came to the knowledge of the bank; and further, that the knowledge of a president, vice president, director, secretary, treasurer, manager, cashier or other like executive officer should be deemed, under said bond, the knowledge of the bank; and defendant alleges that an act or acts of E. A. Matthews, for which recovery is sought in this case, became known to the bank or to the president, vice president, or to some director of the bank, and said Clanton Bank and said plaintiff failed to notify the defendant within a reasonable time after the knowledge of the occurrence of said act or acts so became known.

14. Defendant alleges that the bond sued on in this case was issued upon the express condition, which condition is set

out in the bond sued on, that said bond should become void as to any claim for which the defendant would otherwise be liable if the bank should fail to notify the defendant of the occurrence of the act or omission, out of which said claim might arise, immediately after it came to the knowledge of the bank; and further, that the knowledge of a president, vice president, secretary, treasurer, manager, cashier or other like executive officer should be deemed, under said bond, the knowledge of the bank. And defendant alleges that an act or acts of E. A. Matthews, for which recovery is sought in this case, became known to the bank or to the president, vice president, or to some director of the said Clanton Bank, and said Clanton Bank and said plaintiff for more than five months after said act or acts so became known failed to notify the defendant of the occurrence of such act or acts.

15. Defendant says that prior to the execution of the bond sued on, the said E. A. Matthews had been for a number of years in the employ of the Clanton Bank as its cashier, and that during the time that he was so employed by the Clanton Bank, prior to the date of the execution of the bond sued on, he had on numerous occasions done some of the same character of acts and used the funds of the Clanton Bank in the same manner as that for which recovery is sought in this suit; that the Clanton Bank had knowledge of these facts at the time that the bond was executed by the defendant.

And defendant alleges that at the time said bond was executed, the said Clanton Bank, through its president, represented to the defendant that the duties required of the said E. A. Matthews had always been performed in a faithful and satisfactory manner. Wherefore, defendant alleges that the Clanton Bank perpetrated a fraud upon the defendant in the procurement of the execution of the bond by the defendant, and no recovery can be had in this suit.

WEIL, STAKELY & VARDERMAN,
Attorneys for Defendant.

No. 117.**Disclaimer in Action in Ejectment.**

[Caption.]

And the defendant, E. H., comes and disclaims all title to the property set forth and described in plaintiffs' declaration.

Y. & Y.,

Attorneys for Defendant.

No. 118.**Answer of Ry. to a Petition for Damages for Personal Injury.**

[Caption.]

The defendant, for answer to the petition of plaintiff herein, denies that on the — day of —, or other date, it or its agents in charge of its train, did with gross and wilful negligence, or in such reckless or careless manner operate one of defendant company's trains that the plaintiff was suddenly and without warning of the approach of the train, or at all, struck and knocked from the said public highway and permanently injured, etc. It denies that the plaintiff was attempting to cross a railway track at or near a public crossing at the time she was struck and injured by defendant's train.

It denies that the plaintiff was injured by any negligence of it, or its agents, in the operation of any of its trains at the time and place specified in the petition and amended petition. It states that it has not sufficient knowledge or information upon which to form a belief as to the statements of plaintiff's petition, as to whether or not all the toes on her left foot were cut off, or said left foot badly mashed, or her right arm broken, but denies that by the carelessness or recklessness of its agent, after the plaintiff was injured, in treating plaintiff's injuries, the plaintiff has sustained a stiff arm. It denies that plaintiff has been permanently injured or permanently disabled from earning a livelihood. It denies that plaintiff has been damaged in the sum of \$—, or any other sum. Wherefore, etc.

Par. 2. The defendant, further answering, states that at the time of the injury complained of, the plaintiff was guilty of negligence which contributed to her injury, and but for which negligence upon her part, the injury would not have happened; that said contributory negligence was committed as follows, to wit, the said plaintiff, after leaving the train of defendant and deposited upon defendant's platform in safety, carelessly and negligently left the way prepared by defendant for her and other passengers to cross its tracks to their destination, which way was a perfectly safe way, and pursued a shorter and more dangerous route, and one not furnished or authorized by defendant, although the regular way and route furnished by defendant was plain and visible, the plaintiff walked immediately around the rear end of the coach she had just left and started to walk diagonally across defendant's tracks, and without stopping or looking or listening stepped upon an adjoining track of defendant, when she was immediately struck by an engine of defendant passing in the opposite direction, and without fault upon defendant's part, received the injuries complained of.

Wherefore, having fully answered, defendant prays that it be hence dismissed, with costs herein expended.

R. Y.,

[*Verification.*]

Attorney for Defendant.

No. 119.

**Answer of Receivers to a Petition for Damages for Ejectment
from Railway Train.**

[*Caption.*]

Now come the defendants, E. F. and G. H., receivers of the C. & D. Railroad Company, and for answer to the petition of the plaintiff, say that they admit that the plaintiff is a resident of ——— county, ———, as averred in his petition; that the C. & D. Railroad Company is a corporation, and that these defendants have been duly appointed and qualified

and are acting as the receivers thereof, and that they were such receivers on the date named in said petition operating the road therein described, and were then and there common carriers of passengers and their baggage over such line of railway.

It is also admitted that the plaintiff purchased at the time named in his petition and was the owner of the book of mileage tickets described, but the defendants say that such mileage tickets in said book did not entitle the plaintiff to passage over the said road operated by the defendants.

The defendants also admit that the plaintiff on the date named in his petition boarded a train upon the road so operated, at —, bound for —, with said mileage book of tickets, and that he presented said book to the conductor of said train for passage, as averred in said petition, but was informed by the conductor that said book was not good over said road, and that if he desired to remain on the train, as a passenger, that he must pay his fare to his destination. This the plaintiff refused to do and he was ejected from the train by the conductor, using no more force than was necessary to accomplish the object intended. And the defendants further say that in so acting, the conductor was carrying out his instructions in that regard.

And the defendants deny each and all of the other averments contained in said petition not herein either specifically admitted or denied.

R. Y.,

Attorney for Defendants.

No. 120.

Answer of R. R. Co. to Petition for Damages for Personal Injury — General Denial with Defense of Contributory Negligence.

[Caption.]

The defendant for answer to the petition herein, admits that it is and was a corporation organized under the laws of —,

having citizenship and residence alleged, and that during the month of —, A. D. —, it was engaged in operating upon the railroad tracks described, under and by virtue of the ordinance alleged, said ordinance containing the provisions set forth in said petition.

The defendant denies each and every other allegation therein contained. The denial, in so far as it relates to the alleged appointment of the plaintiff as administrator of A. B., being made for want of knowledge.

Defendant further states that plaintiff's intestate, A. B., was himself negligent and guilty of a want of ordinary care at the time of his alleged injuries, in this, to wit, that while in a place of safety, and with full knowledge or means of knowledge of the presence or approach of said engine and cars, and the dangers involved, he voluntarily approached the same with his team of horses and placed himself in the perilous situation in which his injuries, if any, were sustained; and that said want of care on the part of said A. B. directly contributed to such injuries, if any as he may have sustained.

Wherefore defendant prays to be hence dismissed with its costs.

R. Y.,

Attorney for Defendant.

[*Verification.*]

No. 121.

Answer of Ry. Co. to Petition for Damages for Personal Injury (1).

[*Caption.*]

Defendant denies that while attempting prudently to obey the orders of its engineer, plaintiff was thrown or precipitated from defendant's engine, and received injuries complained of.

It denies that its engineer, mentioned in plaintiff's petition, was guilty of negligence or gross negligence in moving

defendant's engine at said time, or in moving on the main track from a side track where the engine had been just prior thereto, or on the time of an approaching train of cars and denies that the engine was in a defective or dangerous or grossly defective or dangerous condition, or that the steps of the engine which plaintiff was required to use in leaving said engine were improperly, dangerously or defectively constructed and denies that the hand hold necessary for him to use in leaving the engine was in a defective or dangerous condition; and has no knowledge or information sufficient to form a belief whether in using same plaintiff's hand was caught, or his safe exit from said engine interfered with.

Defendant denies that at the time, or after plaintiff was ordered to leave said engine, or while in the act of alighting from said engine, the engineer operated the engine in a dangerous or reckless manner, or suddenly so accelerated the speed of said engine as to greatly or at all add to the danger of plaintiff; and denies that plaintiff received all or any of his injuries by reason of the negligence or carelessness, or gross negligence or carelessness of this defendant, its agents or servants, superior in authority to plaintiff, or whose orders he was bound to obey, or by reason of the alleged defects or dangerous condition of the engine steps, hand holds or appliances.

Defendant denies that plaintiff did not know or could not by the exercise of ordinary care have known of the condition of the engine, hand holds and appliances. But denies that they were known to this defendant or plaintiff's superior officers or agents, or could have been known to them by the exercise of ordinary care to have been defective or dangerous, and denies that they were so.

Second. For further answer to the petition, defendant says that the engine upon which plaintiff was riding, as alleged in his petition, was moved at said time from the said side track to the main track with the knowledge, consent and

upon the suggestion of the plaintiff, and that the hand holds referred to were upon the outside of the engine cab and upon the tank attached to the engine, in full view of the plaintiff as he approached the said engine, and as obvious to the plaintiff as to the defendant or any of its agents or servants, that plaintiff had long been cognizant of the position and nature of said hand holds, and had often used them before the accident, and that plaintiff, in his contact with the said engine, and the said hand holds and in leaving said engine, did so carelessly and negligently, and without heeding his own safety, and thereby contributed directly to causing and did cause the injury complained of in his petition, and but for such negligence and carelessness of plaintiff, said injury would not have occurred.

Defendant further states that the engineer mentioned in the petition, was the engineer of the same engine upon which plaintiff was riding immediately before he was injured, and was the engineer of the train upon which plaintiff was engaged as the brakeman of defendant, in defendant's service at the time he was injured, and was then and there the fellow servant of the defendant, employed by the defendant as was the plaintiff in conducting the business of transportation of freight by railroad on said train.

Wherefore plaintiff prays to be hence dismissed with its costs herein incurred and all general relief.

R. Y.,
Attorney for Defendant.

[*Verification.*]

(1) Taken from *Butler vs. Ill. Cent. R. Co.*, 105 Fed. Rep. 1000.

No. 122.

Answer of a Transportation Company to Suit for Taxes (1).

[*Caption.*]

The defendant, The Lake Erie Transportation Company, for its answer herein says:

It admits that the plaintiff is the duly elected, qualified and acting treasurer of Lucas County, Ohio; that this defendant is a corporation, duly organized under the laws of the state of Michigan; that the plaintiff has in his hands all the duplicates of said county containing the unpaid property taxes due him as such treasurer; that on said duplicate this defendant is charged with taxes for the years named in the petition on the valuations and to the amounts therein set forth for the respective years therein named; and that a copy of a certificate containing a statement of said taxes, issued by the auditor of said county to the plaintiff, is attached to the petition marked "Exhibit A." This defendant denies all and singular the allegations and statements in the petition contained not herein expressed admitted to be true.

Further answering this defendant says:

It is now and was during each and all of the years from 1893 to 1898, inclusive, a corporation duly incorporated and organized under the laws of the state of Michigan. At all of said times the general office for the business of said company was located in the city of Monroe, county of Monroe, and state of Michigan. At all of said times it was a citizen of said state of Michigan and a resident of said city of Monroe. The business of said company, for which it was organized, at all of said times was that of maritime commerce or navigation within the state of Michigan and upon the frontier lakes and other navigable waters, natural or artificial, connected therewith.

During the year 1893 the defendant owned and operated in its said business three certain steam boats or propellers, known as the Russell Sage, the John C. Gault, and the S. C. Reynolds; and during the years from 1894 to 1898, inclusive, owned and operated in its said business the above named vessels and in addition thereto a certain other steam boat or propeller, known as the George J. Gould.

The valuations of personal property charged on the tax

duplicate aforesaid for said respective years consist entirely of valuations placed on said four vessels during the years aforesaid; and the taxes charged on said tax duplicates against this defendant are charged entirely in respect of said vessels. The valuation of each of said vessels during the years for which said taxes are charged, and the taxes charged against the same, respectively, are shown in the following table:

| | Valuations Gould. | Valuations Reynolds. | Valuations Sage. | Valuations Gault. |
|------|----------------------|-------------------------|---------------------|----------------------|
| 1893 | | 67,800 | 6,000 | 6,000 |
| 1894 | 89,100 | 61,020 | 6,000 | 6,000 |
| 1895 | 80,190 | 54,920 | 6,000 | 6,000 |
| 1896 | 72,170 | 49,430 | 6,000 | 6,000 |
| 1897 | 64,960 | 44,480 | 6,000 | 6,000 |
| 1898 | 58,460 | 40,040 | 6,000 | 6,000 |

| | Total with Penalty. | Tax Rate. | Tax. |
|------|---------------------|-----------|----------|
| 1893 | 119,700 | 2.86 | 3,423.42 |
| 1894 | 243,180 | 2.86 | 6,954.95 |
| 1895 | 220,665 | 2.90 | 6,399.29 |
| 1896 | 200,400 | 3.12 | 6,252.48 |
| 1897 | 182,160 | 2.98 | 5,428.37 |
| 1898 | 165,750 | 3.32 | 5,502.90 |

This defendant further says that in the month of March, 1899, the auditor of Lucas County, Ohio, wrongfully claiming that this defendant had willfully evaded making a return or statement of its personal property taxable within said county, and claiming to act under the authority of Sections 2781 and 2782 of the Revised Statutes of Ohio, placed upon the tax duplicate and certified for collection to the said plaintiff the taxes and penalties set forth and described in the petition and the statement thereto attached. Said sums so certified for collection included a penalty of fifty per cent. of

the original amounts claimed for each of said years, which said penalty was imposed by said auditor.

This defendant says that the action of said auditor in entering the valuations, taxes and penalties aforesaid upon his tax lists or duplicates and certifying the same to the plaintiff for collection was wholly without warrant of law, wrongful and void.

This defendant avers that it never did evade making a return or statement of its property for taxation. The vessels aforesaid were not, nor was any of them, at the time the same were listed for taxation or during the years 1893 to 1898, inclusive, situated in the county of Lucas, and state of Ohio.

Said vessels during all of said years were owned by this defendant company and were engaged in the carrying trade between various ports upon the great lakes, so-called, and the navigable streams tributary thereto. The only business carried on by said vessels during said years within the state of Ohio consisted of the transportation of freights from the city of Toledo, in Lucas county, Ohio, to ports in other states or the Dominion of Canada, and from ports in other states or of the Dominion of Canada, to said city of Toledo, and was exclusively interstate commerce.

Each of said vessels during all of said years and up to the commencement of this suit was of the burden of twenty tons and upwards, and was duly enrolled and licensed under the statutes of the United States for the navigation of the great lakes and navigable waters tributary thereto, and thereby authorized to do a coasting or foreign trade in said waters. The home port of said vessels was at all said times at said Monroe, state of Michigan, and said vessels were all duly enrolled by the collector of the collection district, including said port of Monroe, at his office in the city of Detroit, in said state of Michigan, except that said vessel, the George J. Gould, was prior to the 20th of August, 1897, temporarily enrolled at Buffalo, in the state of New York, where said ves-

sel was built. This defendant has paid all the fees and dues of every kind required to be paid by the laws of the United States for the regulation of commerce.

This defendant says that all of its personal property, including said vessels, was duly assessed for taxation by the proper authorities of the state of Michigan and the county and city of Monroe during all of said years; and this defendant paid to said authorities the taxes levied and assessed upon its said property during said period. Prior to the month of March, 1899, no tax was levied or assessed within the state of Ohio against this defendant on its said property. And this defendant has not at any time made any return of its said property for taxation within this state. Defendant was advised by counsel and understood and believed at all times that its said vessels were not taxable in Ohio and were not within the jurisdiction of said state or its officers. And this defendant alleges that said auditor and treasurer of Lucas county are and were entirely without jurisdiction or authority to assess said property of this defendant for taxation, or to levy and collect any taxes assessed against this defendant in respect thereof.

And this defendant further says that the statutes of the state of Ohio under which, as aforesaid, said auditor and the plaintiff claim the right to assess and collect the taxes herein sued for, are in contravention of the Fourteenth Amendment of the Constitution of the United States, in that if carried out to the logical result they would deprive this defendant of its property without due process of law; and because by the statutes of the state of Ohio the said auditor is entitled to receive a fee of four per cent. of the amount of omitted taxes so as aforesaid placed by him on the tax duplicates and collected and paid into the treasury of the county.

And this defendant further says that the said taxes so as aforesaid imposed upon this defendant and sued for herein, are a tax and burden upon the interstate commerce and trade

carried on by this defendant in the vessels aforesaid and are imposed upon said vessels by reason of their use in the carrying on of such trade and commerce, and are therefore void as an interference with and obstruction of the exclusive power of Congress to regulate commerce with foreign nations and between the states.

This defendant therefore prays that it may go hence without day and recover its costs herein.

By Y. & Y., its Attorneys.

State of Ohio,
Lucas County, ss.

A. W., being duly sworn, says he is the duly authorized manager of the defendant herein, a corporation non-resident of the state of Ohio.

The facts stated in the foregoing answer are true as he believes.

A. W.

Sworn to before me and subscribed in my presence this 21st day of June, 1899.

[Seal.]

C. M.,

Notary Public, Lucas County, Ohio.

(1) Taken from *Yost vs. Lake Erie Transportation Co.*, 112 Fed. Rep. 746.

No. 123.

Answer of an Incorporated Village to a Petition to Recover on Bonds and Coupons.

[Caption.]

First Defense. For its first defense, the defendant, answering the petition herein, says: It admits that it is a municipal corporation, a village of the first class, organized and existing under and by virtue of the laws of —, and located in — county, within the — division of the — district of —.

And it denies each and every other averment in the petition.

Second Defense. Answering the petition, and by way of its second defense thereto, it says that on or about the — day of —, one C. B., who was then mayor of said village of —, and L. P., who was then the clerk of said village of —, pretended to execute on behalf of said village what purported to be 80 bonds for the sum of \$— each, together with interest coupons attached thereto, which bonds and interest coupons were respectively for the sums mentioned in the petition, and purported to mature respectively in the amounts and at the times stated in the petition.

But it says that the said C. B., as such mayor, and said L. P., as such clerk, had no power or authority at the time to execute or issue such or any bonds or coupons or any of them on behalf of this defendant.

And it says that said pretended bonds and coupons were not issued for the purpose of procuring necessary means to refund and extend the time of payment of certain then outstanding general fund bonds theretofore legally issued by said village, which from its limits of taxation the said village was unable to pay at maturity; and it says that there was at the time no outstanding general fund bonds or any other bonds of said village outstanding or maturing, and that the said village was not indebted at the time in any sum whatever upon any of its bonds theretofore issued, nor were any such bonds of the defendant in any sum whatever then outstanding, nor had the defendant at said time or theretofore issued any of its bonds; and it says that any issue of bonds by the defendant at said time would be to that extent an increase of the indebtedness in that amount of the defendant. It says that the said pretended bonds did not upon their face express the purpose for which they were purported to be issued, nor any purpose for which they purported to be issued; and admitting that the defendant is a municipal corporation, and a

village of the first class as averred in the petition, it denies every averment and fact stated in the petition not herein specifically admitted; and it asks to be hence dismissed, and to recover its costs.

R. Y.,

Attorney for Defendant.

The State of ———,
County of ———, ss.

W. W., being duly sworn, says he is clerk of the defendant, the village of ———, duly authorized in the premises, and that the allegations and statements in the foregoing answer contained are true as he verily believes.

[*Seal of corporation clerk.*]

W. W., Clerk.

Sworn to before me by the said W. W., clerk, and by him subscribed in my presence, this ——— day of ———, A. D. ———.

G. McC.,

[*Seal.*]

Notary Public.

No. 124.

Reply to Answer.

[*Caption.*]

Now comes the plaintiff, and for reply to the answer herein filed denies each and every allegation therein contained which is not an expressed denial or admission of the allegations set forth in the amended petition herein filed.

R. X.,

Attorney for Plaintiff.

No. 125.

Similiter (1) and Replica'ions to Pleas.

[*Caption.*]

Now comes the plaintiff, American Colortype Company, a corporation, by Zane, Morse, McKinney & McIlvaine, its attorneys, and, as to the plea of the defendant first above pleaded,

as to which the defendant has put itself upon the country, doth the like.

And as to the plea of the defendant secondly above pleaded, the plaintiff says that it ought not to be precluded from further maintaining its aforesaid action by anything in that second plea alleged, because it says that it, the plaintiff, did not promise in manner and form as the defendant hath in said second plea complained against it; and of this the plaintiff puts itself upon the country.

And as to the plea of the defendant thirdly above pleaded, the plaintiff says that it ought not to be precluded from further maintaining its aforesaid action on account of anything in said third plea alleged, because it says that at the time of the making of the said promises in the said declaration mentioned, the plaintiff was then and there a foreign corporation duly, etc., and of this the plaintiff puts itself upon the country.

(1) Most of the states have adopted a code of civil procedure based largely on the original Field Code of New York, but with many departures which illustrate the development of the system under varied and widely separated conditions; four states have recently authorized or adopted court rules of procedure, and a half dozen states still adhere to common law pleading, while a few adhere in part, especially in New England. Shelton, in "Spirit of the Courts" at page 227, presents the situation as it existed in July, 1918, as above stated.

The opposition to the present federal system existing under the conformity act has been developing, and although bills introduced into congress from time to time to authorize the supreme court to prescribe rules governing civil procedure at law, as it has in equity, admiralty and bankruptcy, have never gotten beyond committee, yet the fight goes hopefully on, and an increasingly favorable sentiment appears. Such a bill is pending in the appropriate committee of each branch of congress at the present time (August, 1919).

No. 128.

Joinder and Replication.

[Caption.]

First. The plaintiff comes by his attorneys and joins issue on the defendant's first plea.

Second. Comes the plaintiff, by his attorneys, and for replication to the defendant's second plea, says the negligence of the deceased did not materially contribute to or cause the injury complained of in plaintiff's declaration.

Third. Comes the plaintiff, by his attorneys, and for replication to the defendant's third plea, says the plaintiff's right of action did not accrue more than a year next before the plaintiff commenced his action.

R. X.,

Attorney for Plaintiff.

No. 127.

Replication to Pleas in Suit on Policy of Insurance.

[Caption.]

Plaintiff, for replication to defendant's second plea, says:

First. It is not true that the policy of insurance involved in this cause was issued in consideration and only because of certain statements and warranties made in the application for a policy.

Second. It is not true that in said application plaintiff's intestate made false and untrue statements.

Third. If plaintiff's intestate did make false and untrue statements in said application for insurance in the defendant's company, said statements were not made with any intent to deceive, nor did they increase the risk.

Fourth. If plaintiff's intestate made false and untrue statements in said application for insurance in defendant's company in that he stated, as alleged by defendant, that he had no insurance paying weekly indemnities, said statement was immaterial to the risk insured against by defendant, in the event of death, and defendant has ratified said compact since the death of plaintiff's intestate and is thereby estopped.

Fifth. Plaintiff further avers that said contract of insurance is severable, insuring plaintiff's intestate in a certain amount in the event of death from accident, and in another

amount for injury by accident, and that the statements made by plaintiff's intestate as to matters pertaining to the insurance of weekly indemnity has no application to that part of the policy agreeing to pay a certain amount in the event that death resulted.

Plaintiff, for replication to defendant's third plea, says:

First. It is not true that plaintiff's intestate stated that he never had fits and disorders of the brain.

Second. If plaintiff's intestate said in his application that he had never had fits or disorders of the brain the same was true as stated.

Third. If plaintiff's said intestate had had fits or disorders of the brain, he had recovered therefrom prior to the taking out of this insurance, and it is untrue that his brain became disordered until the time of his death, as alleged by defendant.

Plaintiff, for replication to defendant's fourth plea, says: It is not true the plaintiff's intestate was not in sound condition, physically and mentally, at the time said insurance was issued to him.

Plaintiff, for replication to defendant's fifth plea, says: It is not true as alleged that his intestate committed suicide on the day and in the manner alleged in said plea.

X. & X.,

Attorney for Plaintiffs.

No. 128.

Reply to Answer in Suit on Municipal Bonds.

[Caption.]

The plaintiff replying to the amended answer of the defendant filed herein, says: That as to all and singular the averments thereof, excepting only such as are admissions of the allegations of this plaintiff's petition, this plaintiff has no

knowledge or information of the truth thereof, and therefore denies the same.

Further replying, this plaintiff says that it purchased said bonds, to which said coupons were attached, on the open market, for a valuable consideration, without any notice whatever of any infirmities connected with the same, and relying upon the recitals in said bonds, that said bonds, and each of them, recited among other things as follows, to wit: "It is hereby certified that all acts and things necessary to be done precedent to and in the issuing of these bonds have been done and performed in regular and due form, as required by law, and the faith and credit of the village of —— are hereby pledged for the prompt payment of the principal and the interest hereof, at maturity." "(This bond is issued for the purpose of refunding certain bonds issued by said village, ——, which are taken up and discharged.)"

That by reason of said recitals as set forth in said bonds, the said village of —— represented that said bonds were issued for the purpose of refunding a legal debt of said city. And that all acts and things required to be done or performed were properly performed and done as required by law. That plaintiff, purchasing said bonds upon the open market as aforesaid, relied upon said recitals so set forth, and relied upon the representations as set forth in said bonds and defendant is now estopped to assert that said bonds were issued for any other purpose than is therein recited, and is estopped to assert the invalidity of the same.

Further replying, says that of all and singular the averments thereof referring to the various acts of the municipal corporation in issuing said bonds, and the purpose thereof, and the direction and proceeds thereof, this plaintiff, at the time of the purchase of said bonds, had no knowledge thereof and naught to do with said acts, purpose and proceeds.

Further replying, says that when this plaintiff became the owner and holder of said bonds and coupons, that the coupons

amount for injury by accident, and that the statements made by plaintiff's intestate as to matters pertaining to the insurance of weekly indemnity has no application to that part of the policy agreeing to pay a certain amount in the event that death resulted.

Plaintiff, for replication to defendant's third plea, says:

First. It is not true that plaintiff's intestate stated that he never had fits and disorders of the brain.

Second. If plaintiff's intestate said in his application that he had never had fits or disorders of the brain the same was true as stated.

Third. If plaintiff's said intestate had had fits or disorders of the brain, he had recovered therefrom prior to the taking out of this insurance, and it is untrue that his brain became disordered until the time of his death, as alleged by defendant.

Plaintiff, for replication to defendant's fourth plea, says: It is not true the plaintiff's intestate was not in sound condition, physically and mentally, at the time said insurance was issued to him.

Plaintiff, for replication to defendant's fifth plea, says: It is not true as alleged that his intestate committed suicide on the day and in the manner alleged in said plea.

X. & X.,

Attorney for Plaintiffs.

No. 128.

Reply to Answer in Suit on Municipal Bonds.

[Caption.]

The plaintiff replying to the amended answer of the defendant filed herein, says: That as to all and singular the averments thereof, excepting only such as are admissions of the allegations of this plaintiff's petition, this plaintiff has no

knowledge or information of the truth thereof, and therefore denies the same.

Further replying, this plaintiff says that it purchased said bonds, to which said coupons were attached, on the open market, for a valuable consideration, without any notice whatever of any infirmities connected with the same, and relying upon the recitals in said bonds, that said bonds, and each of them, recited among other things as follows, to wit: "It is hereby certified that all acts and things necessary to be done precedent to and in the issuing of these bonds have been done and performed in regular and due form, as required by law, and the faith and credit of the village of —— are hereby pledged for the prompt payment of the principal and the interest hereof, at maturity." "(This bond is issued for the purpose of refunding certain bonds issued by said village, ——, which are taken up and discharged.)"

That by reason of said recitals as set forth in said bonds, the said village of —— represented that said bonds were issued for the purpose of refunding a legal debt of said city. And that all acts and things required to be done or performed were properly performed and done as required by law. That plaintiff, purchasing said bonds upon the open market as aforesaid, relied upon said recitals so set forth, and relied upon the representations as set forth in said bonds and defendant is now estopped to assert that said bonds were issued for any other purpose than is therein recited, and is estopped to assert the invalidity of the same.

Further replying, says that of all and singular the averments thereof referring to the various acts of the municipal corporation in issuing said bonds, and the purpose thereof, and the direction and proceeds thereof, this plaintiff, at the time of the purchase of said bonds, had no knowledge thereof and naught to do with said acts, purpose and proceeds.

Further replying, says that when this plaintiff became the owner and holder of said bonds and coupons, that the coupons

representing and evidencing the first installment of interest due on said bonds, had been detached therefrom. For anything this plaintiff knew to the contrary, said coupons had been paid and redeemed by said defendant.

Wherefore, this plaintiff prays as in its petition.

X. & X.,
Attorneys for Plaintiff.

State of ———,
—— County, ss.

R. X., being first duly sworn, says that he is one of the attorneys of the plaintiff herein, duly authorized; that the plaintiff is a foreign corporation and a non-resident of the state of ———, and that the facts stated in the foregoing reply are true as he verily believes.

R. X.

Sworn to before me and subscribed in my presence, this
—— day of ———, A. D. ———.

[Seal.]

D. M.,
Notary Public.

No. 129.

Reply by Plaintiff Denying Contributory Negligence.

[Caption.]

And now comes A. B., plaintiff in the above entitled cause, and for reply to the answer of the defendant, the C. & D. Railroad Company, filed herein, says that:

He denies that the said injury received by the plaintiff was caused by or was the result of the plaintiff's own carelessness.

He denies that the said injury received by the plaintiff was caused by or was the result of the plaintiff's own negligence; and,

He denies that any carelessness or negligence of his directly contributed to said injury.

Wherefore, plaintiff prays as in his petition.

R. X.,
Attorney for Plaintiff.

State of ———,
County of ———, ss.

A. B., being first duly sworn, according to law, upon his oath deposeth and saith that he is the plaintiff in the above entitled cause and that the facts set forth in the foregoing reply to the answer are true as he verily believes.

A. B.

Sworn to and subscribed before me, this ——— day of ———,
A. D. ———.

[Seal.]

J. N.,
Notary Public, ——— County, ———.

No. 130.

Replication and Demurrer to Defendant's Pleas.

[Caption.]

For replication the defendant comes and joins issue with the defendant upon its first, third, fourth and fifth pleas.

R. X.,
Attorney for Plaintiff.

Plaintiff demurs to defendant's second plea because the matter set forth there therein has been adjudged against the defendant by the court in this cause upon defendant's demurrer to plaintiff's original declaration and is *res adjudicata*.

Plaintiff demurs to defendant's sixth and seventh pleas. They are each of them immaterial and insufficient, because as is alleged in the amended declaration filed in this case on ———, the defendant denied all liability under the policy sued on in this cause. Such denial was a waiver of all matters referred to in each of them.

The plaintiff prays the judgment of the court as to whether it be necessary to make any other or further answer to said second, sixth and seventh pleas or either of them.

R. X.,
Attorney for Plaintiff.

No. 131.

Rejoinder to Replication.

[Caption]

Defendant, for rejoinder to said replication, says it did not waive the said condition as the plaintiff hath alleged.

For further rejoinder defendant says it did not have knowledge of the existence of the Baloise policy as stated in the replication.

R. Y.,
Attorney for Defendant.

**PROCESS, MOTIONS, JUDGMENT, BILLS OF
EXCEPTIONS, ETC.**

No. 131a.

Praecipe for Summons.

[Caption.]

The clerk of said court will issue a summons in said cause to said defendants, in a plea of trespass on the case on promises, to the damage of said plaintiff in the sum of fifteen thousand dollars, direct the same to the United States marshal for said district to execute, and make it returnable to the November term of said court, 1912.

Dated this 18th day of October, A. D. 1912.

A. and B.,
Plaintiff's Attorneys.

No. 132.**Summons at Law.**

The United States of America,

— District of —, ss.

The President of the United States of America to the Marshal of the — District of —, Greeting:

You are hereby commanded to summon C. D., citizen of and resident in the state of —, if he be found in your district, to be and appear in the district court of the United States for the — district of — aforesaid, at —, on the — Tuesday in the month —, 1894, to answer unto A. B., citizen of and resident in the state of —, in civil action for [*as may be*] —. And have you then and there this writ.

[*Add teste according to the court issuing the writ.*].

No. 133.**Teste for Writs Issuing from a District Court (1).**

Witness the Honorable G. N., Judge of the district court of the United States, this — day of —, 1894, and in the 118th year of the Independence of the United States of America.

[*Seal.*]

Attest: B. R.,
Clerk.

(1) See R. S., Sec. 911; Desty's Fed. Proc., Sec. 433, and cases there cited; Foster's Fed. Prac., 5th ed., Secs. 295 and 455, and cases cited in notes; also Gould and Tucker's Notes on the Revised Statutes, pages 283 and 287.

No. 134.

(Another form.)

Summons in Action in Assumpsit.

United States of America,

Southern District of West Virginia, ss.

The President of the United States of America.

To the Marshal of the Southern District of West Virginia, Greeting:

You are hereby commanded to summon The Chesapeake & Ohio Coal & Coke Company, a corporation of West Virginia, and as such a citizen and resident of the state of West Virginia and the southern district thereof, if it be found in your district, to be and appear in the district court of the United States, for the southern district of West Virginia, aforesaid, at rules to be held in the clerk's office of said court, at Charleston, on the first Monday in October, 1912, next, to answer unto The Toledo and Ohio Central Railway Company, a corporation of Ohio, and as such a citizen of the state of Ohio, of a plea in assumpsit; damages twenty thousand dollars (\$20,000.00).

Hereof you are to fail not, under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable X. Y., judge of the district court of the United States for the southern District of West Virginia, this —— day of ——, 1918.

Attest: K. G.,
Clerk of said Court.

No. 135.**Writ in Action of Tort, in Massachusetts, and Return.**

[Caption.]

[L. S.] Massachusetts District, ss.

The President of the United States of America.

To the Marshal of our District of Massachusetts, or his Deputy, Greeting:

We command you to attach the goods or estate of Boston Elevated Railway Company, a corporation organized and exist-

ing under the laws of the commonwealth of Massachusetts, a citizen of said commonwealth and having an usual place of business in Boston in the county of Suffolk in our district of Massachusetts, to the value of fifteen thousand dollars, and to summon said defendant (if it may be found in your district), to appear before our judge of our district court, next to be holden at Boston, within and for our said district of Massachusetts, on the first Tuesday of December. Then and there, in our said court, to answer unto Mary Hazard Teele, a citizen and resident of Chevy Chase in the county of Montgomery and state of Maryland, in an action of tort. To the damage of the said plaintiff (as she says) the sum of fifteen thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston, the ninth day of November in the year of our Lord, one thousand nine hundred and fifteen.

WILLIAM NELSON,
Clerk.

Officer's Return on Writ.

United States of America,
Massachusetts, District, ss.

Pursuant hereunto I have this day attached a chip as the property of the within-named Boston Elevated Railway Company, and on the same day I summoned the said defendant corporation to appear at court and answer as herein directed, by giving in hand to Henry L. Wilson, treasurer thereof and in charge of its business, a true and attested copy of and an original summons to this writ, at Boston, in said district.

| | |
|---------------|--------|
| FEES: | |
| Service | \$2.00 |
| Copy | .30 |
| Travel | .06 |
| | <hr/> |
| | \$2.36 |

A. B.,
U. S. Marshal,
By C. D.,
Deputy.

No. 136.**Alias Summons and Return.**

United States of America,
Eastern District of Tennessee,
Northeastern Division, ss.

The President of the United States of America.
To the Marshal of the Eastern District of Tennessee,
Greeting:

You are hereby commanded as you have heretofore been to summon Walter L. Elliott, John H. Sifford, Clarence E. Ferguson, Thomas F. Able, Claude Jones, John T. Quisenberry and John S. Martin, if to be found in your district, to be and appear before the district court of the United States, for the eastern district of Tennessee, aforesaid, at the federal court rooms in Greeneville, in said state, on the first Monday in the month of March, 1915, then and there to answer the declaration of Isaac S. Cousins in civil action for damages filed in this court for the sum of (\$15,000.00) fifteen thousand dollars.

Herein fail not, and have you then and there this writ.

Witness the Honorable Edward T. Sanford, judge of the district court of the United States, this the 13th day in January, in the year of our Lord one thousand nine hundred and fifteen and in the 139th year of the independence of the United States of America.

HORACE VAN DEVENTER,
Clerk,
By H. L. MILLIGAN,
Deputy Clerk.

United States of America,
Eastern District of Tennessee, ss.

Received this writ on the 18th day of January, 1915, at Johnson City in Washington county, Tennessee; and on the 19th day of January, 1915, executed the same by reading this summons and delivering a copy of same to Walter L.

Elliott, John H. Sifford and John T. Quisenberry. Return to office this February 18th, 1915. The other defendants not to be found.

MARSHAL'S COSTS:

— summons at \$2..\$6.00
 — miles at 6c, 16... .96
 Expenses dinner50
 Total\$7.46

_____,
 U. S. Marshal,
 By W. M. HYDER,
 Deputy Marshal.

No. 137.**Teste for Writs Issuing from the Supreme Court or a Circuit Court of Appeals.**

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this — day of —, 1894, and in the 118th year of the independence of the United States of America.

Attest: B. R.,
 Clerk.

No. 138.**Return of Writ by Marshal (1).**

Received this writ on the — day of —, 1894, and on the — day of —, 1894, I served the same by handing a true copy thereof, with the indorsement thereon, to said C. D. personally [*or say, I left a like copy thereof, with the indorsement thereon, with an adult person, who is a member (or, resident) in the family of C. D., at the usual place of residence of said C. D.*].

H. C.,
 United States Marshal for the
 — district of —.

FEEs:
 Copy, —
 Mileage, —
 Service, —
 \$—

(1) See 13th Rule in Equity.

No. 139.**Cost Bond (1).**

District Court of the United States,
for the — District of —, ss.

| | | |
|-------------------|---|--------|
| A. B., Plaintiff, | } | No. —. |
| <i>vs.</i> | | |
| C. D., Defendant. | | |

Cost Bond.

I hereby acknowledge myself security for costs in the above entitled cause.

E. F. [*Seal.*]

Taken and acknowledged before me this — day of —,
1894. B. R.,

[*Seal.*] Clerk of District Court of the United
States for the — District of —.

I, E. F., a resident of said district, do solemnly swear, that after paying my just debts and liabilities I am worth — dollars, in real estate within the jurisdiction of this court, and subject to execution, levy and sale. E. F.

Sworn to and subscribed before me this — day of —,
1894. B. R.,

[*Seal.*] Clerk of District Court of the United
States for the — District of —.

(1) This form of bond was sustained in *Fewlass v. Keeshan*, 88 Fed. Rep. 573, 32 C. C. A. 8.

No. 140.**Notice to Surety.**

The United States of America,
— District of —, ss.

| | | |
|-------------------|---|--|
| A. B., Plaintiff, | } | In the District Court of the United States for the — district of —. |
| <i>vs.</i> | | |
| C. D., Defendant. | | |

To E. F., security for costs in the above entitled cause:

This is to give you notice, that on —, the — day of —, 1894, at 10 o'clock in the morning, or as soon there-

after as counsel can be heard, the said circuit court will be moved to enter up judgment in the name of said defendant, C. D., against you as security for costs in the above entitled cause for — dollars and — cents, the amount of costs adjudged against the said C. D. at the — term of said court, 1894, and still remaining due and unpaid; also for the interest thereon, and the costs of increase that may be found due, including the costs of this proceeding.

In witness whereof, I have hereunto set my hand and
[Seal.] affixed the seal of said court at — this —
day of —, 1894. B. R.,
Clerk.

No. 141.

Affidavit by Poor Person to Dispense with Security for Costs.

[Caption.]

State of —,
County of —, ss.

A. B., administrator, being duly sworn, deposes and says that he is a citizen of the United States of America; that he is the plaintiff in the above named action and is entitled to commence and maintain the same in said court.

He further states the fact to be that because of the poverty of said estate and said widow and children (1) for whose benefit this action is brought, he is unable to pay the costs of said action or to give security for the same, and that he believes he is entitled to the redress he seeks by such action, and that the nature of his cause of action is correctly and concisely set out in his petition filed in said case.

He further states that this affidavit is made and filed for the purpose of availing himself of the rights and privileges in such case provided by the act of congress, chapter 209, ap-

proved July 20th, A. D. 1892, as amended by act of June 25, 1910, chapter 435, 36 Stat. L. 866.

A. B.

Subscribed by the said A. B. in my presence and by him sworn to before me, this — day of —, A. D. —.

B. C.,

[*Seal.*]

Notary Public.

(1) The affidavit must show that all beneficiaries and real parties in interest are unable to pay costs or furnish security. *Reed v. Pennsylvania Co.*, 111 Fed. 714; *Clay v. Southern Ry. Co.*, 90 Fed. 472, 33 C. C. A. 616; *Boyle v. R. R. Co.*, 63 Fed. 539.

See 195 U. S. 243, 49 L. Ed. 178, and 236 U. S. 43, 59 L. Ed. 457, 206 Fed. 863, and 213 Fed. 504.

The conditions under the original statute and the effect of the amendment of 1910 are succinctly set forth in *Kinney v. Plymouth Rock Squab Co.*, 236 U. S. 43, 59 L. Ed. 457, wherein it is said at page 43: "Prior to the amendment of 1910 on the face of the statute three things were certain: (a) that the statute imposed no imperative duty to grant a request to proceed as a poor person but merely conferred authority to do so when the fact of poverty was established and the case was found not to be frivolous, that is, was considered to be sufficiently meritorious to justify the allowance of the request; (b) that there was no power to grant such a request when made by a defendant; and (c) that there was also no authority to allow a party to proceed as a poor person in appellate proceedings in this court or the circuit courts of appeals. *Bradford v. Southern Railway*, 195 U. S. 243. Clarifying the first section as amended by these considerations, it becomes clear that the sole change operated by the amendment was to bring defendants within the statute and to extend its provisions so as to embrace, first, proceedings on application for the allowance of a writ of error or appeal to this court and the circuit court of appeals, and second, the appellate proceedings in such courts. This being true, it is clear that as to the new subjects, the allowance of the right in those cases was made to depend upon the exercise of the same discretion as to the meritorious character of the cause to the same extent provided under the statute before amendment."

Where attorneys are prosecuting a case on a contingent fee basis plaintiff can not proceed in forma pauperis where attorneys are able to secure costs. *Esquibel v. A. T. & S. F. Ry. Co.*, 206 Fed. 863; *Silvas v. Arizona Copper Co.*, 213 Fed. 504 (but see reversal of this case in 220 Fed. 116).

An affidavit of poverty should be so certain in its statements that a charge of perjury could be based thereon if false, and it is not suffi-

cient to swear that by reason of plaintiff's poverty "she is unable to give security for said costs" when defendant had demanded that plaintiff give security for costs in the sum of \$1,000, since inability may have been as to amount, not an absolute inability such as the statute contemplates. *Woods v. Bailey*, 111 Fed. 121. Truth of the affidavit can be contested only on motion to dismiss under section 4 of the act. 113 Fed. 390.

No. 142.

Certificate of Counsel to Poverty Affidavit (1).

[Caption.]

To the Honorable, the Judge of said Court:

I am one of the attorneys of record of the plaintiff in the cause referred to in the foregoing affidavit. I further state that I have examined said plaintiff's case and believe that he has a just cause of action and that the same is substantially as stated in his petition, and I verily believe that because of his poverty the plaintiff is unable to pay the costs of said action or to give security for the same.

I further declare and stipulate that no agreement or understanding has been entered into between said plaintiff and his attorney, or counsel for a division, or share of, or interest in, the judgment sought to be recovered, and that no assignment of such judgment shall be made prior to final disposition of this suit either in this court or in the higher courts; and I further stipulate that when judgment is finally obtained the money shall be paid into the registry of the court, there to remain until disposed of by the court as follows, to-wit:

First. To the payment of the costs.

Second. To the attorney's fees to be fixed by the court.

Third. The remainder to the plaintiff.

Respectfully,

R. X.,

Attorney for Plaintiff.

(1) A certificate of this character is not required by the statute permitting suits to be prosecuted by poor persons without giving security for costs, but is required by rule of court in some districts."

No. 143.**Order to Sue in Forma Pauperis.**

[Caption.]

This cause coming on to be heard upon the motion of plaintiff to be allowed to sue in *forma pauperis*, came the plaintiff and filed affidavit in accordance with the provisions of the act of congress of July 1, 1892.

Whereupon the court being advised, it is ordered that the plaintiff be allowed to prosecute this action in this court without making a deposit or executing bond for costs, because of her poverty as alleged in said affidavit, and it is ordered that all judicial officers who have occasion to perform services herein, shall perform same as if the deposit for costs or security for costs had been given, and it is further ordered that if the plaintiff recover judgment herein all costs for services rendered by officers as aforesaid shall be paid and a lien upon any such judgment recovered will be given to secure the payment of all such costs and fees due and unpaid.

No. 144.**Motion for Service by Publication (1).**

[Caption.]

Now comes A. B., and moves this honorable court for an order to proceed under Section 738 of the Revised Statutes of the United States to obtain service upon C. D. and G. H. by publication, on the ground that the marshal returned the *subpoena* issued in this cause, indorsed "The defendants, C. D. and G. H., are not found in my district," and that personal service is not practicable, the absent defendants being inhabitants of the dominion of Canada [*or as may be*].

X. & X.,

Attorneys for Plaintiff.

(1) As to when service by publication is allowed in federal courts, see *Desty's Fed. Proc.*, Sec. 25, and R. S., Sec. 738; 18 Stat. L. 470, 1 Supp. 84; *Bracken v. Union Pac. Ry. Co.*, 56 Fed. 447, S. C.

5 C. C. A. 548; *Batt v. Procter*, 45 Fed. 515; *Beech v. Mosgrove*, 16 Fed. 305; *Foster's Fed. Prac.*, 5th ed., Sec. 166, pp. 591 et seq.

State statutes providing for service by publication do not apply in the federal courts, *Jennings v. Johnson*, 148 Fed. 337, 78 C. C. A. 329, and the motion provided by the statute (now Judicial Code, Sec. 57) is exclusive, and the requirements of this act must be strictly followed. *Ibidem*.

The "warning order" provided for in this section need not be served upon a person in possession of property in the district upon whom a subpoena has been served. *Blake v. Foreman Bros. Banking Co.*, 218 Fed. 264; *Ladew v. Tenn. Co.*, 218 U. S. 357, 54 L. Ed. 1069.

There must be an allegation in the petition or bill that the property in question is in the district. *Jackson v. Hooper*, 171 Fed. 597; *Nickane v. Burke*, 132 Fed. 688.

Requirements of this section and their application are pointed out in *Perez v. Fernandez*, 220 U. S., 224, 55 L. Ed. 443, where the court says (page 231 of 220 U. S.): "Plainly, therefore, the previous provision to which the proviso applies exacts an actual personal notice resulting from the service on the party outside of the district of an order of the court directed to him and requiring him to appear and defend within a time stated, the whole conformably to the express terms of the statute. In other words, where the property is situated in the district where the suit is brought as provided in the statute, the right of the court to exert its authority is made to depend upon two forms of notice, which are distinct one from the other. First, an actual notice calling upon the person to appear, and which, in virtue of an express authority of the court, may be served upon the party outside of the district where the suit is pending. Second, a notice by publication calling upon the party to appear and defend within the statutory time, this latter notice, however, being only necessary where the former method can not be employed. Considering the two distinct subjects, the proviso of the statute ordains that where the actual personal notice has not been made as provided and publication has therefore been resorted to, that within a year the party has a right to appear and the case must be reopened to permit him to make his defense."

Under this section non-resident and resident of the district may be joined. *Greeley v. Lowe*, 155 U. S. 58, 39 L. Ed. 69.

An order that "service of process upon said A. B., defendant, be made by the marshal of the — district of the state of —, and in default thereof, that service be made by publication" is defective; the order must require the defendant to "appear, plead, answer or demur, by a day certain to be designated" *Jennings v. Johnson*, *supra*.

Service by publication in case of foreign attachment, permitted by state statutes, is not authorized in United States courts. *Smith v. Reed*, 210 Fed. 968, where Judge Day reviews the cases discriminatingly.

No. 145.**Affidavit for Service by Publication of non-Resident Defendants.**

[*Caption.*]

In this cause J. B. makes oath in due form of law and states that he is one of the attorneys for plaintiff in the above-styled cause; that the Union Land Company and the New York Trust Company, defendants to this cause under the amended declaration, are not inhabitants of, nor found within the — district of —; that neither of said defendants has voluntarily appeared to this action; that the Union Land Company has its principal office and domicile in —, in the state of —, and the New York Trust Company has its principal office and domicile in the city of —, state of —, and that neither of said corporations has any office, agent or representative within this district, to the best of affiant's knowledge and information and belief.

J. B.

Sworn to and subscribed before me this — day of —,
A. D. —.

[*Official signature.*]

No. 146.**Order for Service by Publication.**

[*Caption.*]

Upon the motion of X. & X., counsel for A. B., and it appearing to the court that the defendants, C. D. and G. H., are not inhabitants of, nor are found within, this district, nor have voluntarily entered their appearance herein, and that personal service upon the said defendants, C. D. and G. H., is not practicable, it is hereby ordered that said defendants, C. D. and G. H., appear, plead, answer, or demur to the said bill filed by the plaintiff herein, by the — day of —, 1894, and in default thereof that the court will proceed to

the hearing and adjudication of said suit; and that this order be published in a newspaper of general circulation, to-wit [*name the paper*], once a week for six consecutive weeks.

No. 147.

Notice for Publication.

The district court of the United States for the — district of —. A. B. *vs.* C. D., E. F., and G. H. Whereas, proceedings have been instituted by the plaintiff to subject certain moneys and credits belonging to C. D., in the possession and under the control of E. F., to the payment of a judgment against said C. D., as set forth in the bill filed in the above cause; and in pursuance of an order of said court granted in the above-entitled cause, notice is hereby given to C. D. and G. H., defendants, who are not inhabitants of nor are found within this district, that they appear, plead, answer, or demur to the bill of complaint filed by the plaintiff herein, by the — day of —, 1894, and that in default thereof, the court will proceed to the hearing and adjudication of said suit.

X. & X.,

Solicitors for Plaintiff.

A. B.,

Plaintiff.

No. 147a.

Proof of Publication.

State of —,

County of —, ss.

S. C., being first duly sworn, upon his oath says, that he is publisher of the Crossville Chronicle, a weekly newspaper published in the county and state aforesaid; that the annexed and foregoing advertisement was published in said newspaper for four (4) consecutive weeks; and that the first publication

of said advertisement was made in the issue of said newspaper on the —— day of ——.

S. C.

Sworn to and subscribed before me this —— day of ——.

J. N.,

Notary Public in and for —— County.

No. 148.

Order for Service on non-Resident Defendants.

[*Caption.*]

Upon motion of plaintiff's attorney, it appearing to the court that this is a suit to enforce a claim to real property within this district, and that defendants, Union Land Company, and New York Trust Company, are not inhabitants of or found within this district, and that they have not voluntarily appeared to this action; it is ordered that said defendants appear, plead, answer or demur to plaintiff's declaration by the —— day of ——, and in default thereof the court will proceed to the hearing and adjudication of said suit, and that a copy of this order be served on said defendants wherever found.

No. 149.

Certified Copy of Order for Service on non-Resident Defendant, and the Return of Officer Serving Same (1).

[*Caption.*]

Upon motion of plaintiff's attorney, it appearing to the court that this is a suit to enforce a claim to real property within this district, and that defendants, Union Land Company, and New York Trust Company, are not inhabitants of or found within this district, and that they have not voluntarily appeared to this action; it is ordered that said defendants appear, plead, answer or demur to plaintiff's declaration by the —— day of ——, and in default thereof the court will

proceed to the hearing and adjudication of said suit, and that a copy of this order be served on said defendants wherever found.

United States of America,
—— District of ——, ss.

I, T. J., clerk of the circuit court of the United States for the district aforesaid, do hereby certify the above and foregoing to be a full, true and correct copy of an order made and entered of record in the above styled case on the —— day of ——.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in the city of ——, this —— day of ——.

T. J.,
Clerk.

[*Court Seal.*]

[*Officer's Return.*]

United States of America,
—— District of ——, ss.

J. H., being duly sworn, on his oath says that he is a field deputy marshal of the United States for the —— district of ——, that he did on the —— day of —— instant serve a copy of the order made and entered in the within cause on the —— day of ——, on the Union Land Company by giving the same to Edwin G. Maturin, the secretary of said company at its office in —— in said district.

J. H.,
Deputy U. S. Marshal.

(1) This order is served by the marshal for the district within which the non-resident defendant resides and not by the marshal for the district within which the suit is brought.

No. 150.**Appearance.**

[Caption.]

To the Clerk of said Court:

Please enter my appearance as attorney for the defendant in the above entitled cause.

R. Y.,

Dated ———,

Attorney for Defendant.

No. 151.**Appearance for Special Pleading.**

[Caption.]

Now comes the defendant, by his counsel, and enters his appearance herein for the purpose of pleading to the jurisdiction of this court [*or as may be*] and for no other purpose.

Y. & Y.

Dated ———,

Attorneys for Defendant.

No. 152.**Appearance by Defendant in Person (1).**

I promise to appear at the return of the within writ, and pray the court to enter my appearance accordingly.

C. D.,

Dated ———,

Defendant.

(1) This appearance is usually indorsed on the writ.

No. 153.**Order Substituting Attorneys (1).**

[Caption.]

It appearing to the court that Y. & Y. have ceased to be attorneys for the defendant in this cause, and that Messrs. Z. & Z. have been retained for and on behalf of said defendants. It is ordered that the said Z. & Z. be and they hereby are substituted on the record as attorneys for said defendant.

(1) As to the right of attorneys to withdraw appearance without leave of court, see U. S. v. Curry, 6 How. 106, 111; Creighton v.

Kerr, 20 Wall. 6, 13; **Rio Grande Irrigation Co. v. Gildersleeve**, 174 U. S. 603, 606.

Client during suit may dismiss his attorney without assigning a reason, and the court will issue such order as to substitution as will protect the discarded attorney. **Everett v. Alpha Portland Cement Co.**, 225 Fed. 931, 141 C. C. A. 55. Especially in the case where the attorney has an agreement for a contingent fee. **DuBois v. City of N. Y.**, 134 Fed. 570, 69 C. C. A. 112; see also **Silverman v. Penna. R. Co.**, 141 Fed. 382; **N. Y. Phonograph Co. v. Edison**, 148 Fed. 397, 150 Fed. 233.

No. 154.

Order of Substitution of Attorneys, and Consent Thereto.

[Caption.]

On reading and filing the annexed consent of the plaintiff, and of Charles Goldzier, his attorney, and on motion of Baltrus S. Yankaus, attorney, it is:

Ordered, that Baltrus S. Yankaus, attorney and counselor at law of New York City, be and hereby is substituted in place of Charles Goldzier, as attorney for the plaintiff in the above entitled action.

VAN VECHTEN VEEDER,
U. S. D. J.

We hereby consent that Baltrus S. Yankaus, attorney and counselor at law, of New York City, be substituted in the place and stead of the undersigned Charles Goldzier, as attorney for the plaintiff in the above entitled action, and that an order to that effect may be entered without further notice.

Dated, New York, June 18, 1913.

his
MATT X YURKONIS,
mark
Plaintiff.

CHARLES GOLDZIER,
Attorney for Plaintiff.
BALTRUS S. YANKAUS,
Attorney and Counselor at Law.

No. 155.**Motion by Receivers to Quash Service of Summons.**

[Caption.]

Now come the defendants herein, K. C. and G. M., named in the petition in this case as receivers of the C. & D. Railroad Company, and entering a special appearance for the purpose of this motion and for no other purpose whatever, they here show to the court that they were discharged as such receivers on the — day of —, and that since that time they have not been in the possession of any property of the C. & D. Railroad Company as such receivers, and have not since that date had any agent in the state of —; and they, therefore, show that F. S., upon whom this writ was served, was not at the time of such service and has not been since that date, their agent for any purpose whatever, and they, therefore move to quash the summons issued in this case and the service thereof, for said reason and for the further reason that no sufficient service of said summons was made upon these defendants.

R. X.,

Attorney for Receivers.

This motion was sustained in *B. & O. R. Co. v. Freeman*, 112 Fed. Rep. 237.

No. 156.**Notice to Plead.**

[Caption.]

Y. & Y.,

Attorneys for Defendant.

Please take notice that a rule has been entered in this cause with the clerk of this court, at his office in the city of —, requiring the defendant to plead to the petition [or, declaration, etc.] filed in this cause within twenty days after service

of a copy thereof, with which you are hereby served, and
notice of rule or judgment.

X. & X.,

Dated at ———.

Attorneys for Plaintiff.

Service accepted this ——— day of ———, 1894.

Y. & Y.,

Attorneys for Defendant.

No. 157.

Notice to Declare.

[*Caption.*]

X. & X.,

Attorneys for Plaintiff.

Please take notice that the plaintiff in this cause is hereby
required to declare within ——— days after the service of this
notice, or that judgment of discontinuance will be entered
against him.

Y. & Y.,

Dated ———.

Attorneys for Defendant.

Service accepted, etc.

No. 158.

Notice of Motion for Leave to Amend (1).

[*Caption.*]

Y. & Y.,

Attorneys for Defendant [*or*, Plaintiff].

Please take notice that we shall make a motion before the
judge of the district court of the United States for the ———
district of ———, on the ——— day of ———, 1894, at ten o'clock
in the forenoon, or as soon thereafter as counsel can be heard,
that the plaintiff [*or*, defendant] in this cause have leave to
amend the declaration [*or*, answer, *or*, etc.] filed herein, on
such terms as the said court may direct; a copy of which

amendment and affidavits in support thereof, which will be presented to the court at such hearing, are herewith served upon you.

X. & X.,

Attorneys for Plaintiff [*or*, Defendant.]

Dated ———.

Service accepted, etc.

(1) The trial court in its sound discretion may allow a new cause of action to be set up by amendment of the complaint, *Thompson v. Cayser*, 243 U. S. 66, 61 L. Ed. 597, and where the amendment does not set out a new cause of action, complaint may be amended after close of testimony and dispersal of witnesses, where evidence thereof was received without objection and principally from defendant's witnesses. *Western Coal, etc., Co. v. McCallum*, 237 Fed. 1003, 151 C. C. A. 65.

It is within the discretion of a trial court, after the conclusion of the testimony, to permit an amendment to the answer to set up additional defenses to meet the evidence. *Ames v. Sullivan*, 235 Fed. 880, 149 C. C. A. 192.

Liberal provision for permitting amendment of pleadings is contained in R. S. U. S., Sec. 954, and "this statute grants the fullest power and discretion as to amendments to every federal court." *In re Glass*, 119 Fed. 509.

Where the suit has been brought on the wrong side of the court, amendments may be made to the pleadings by order or as a matter of right, to make them conform to the proper practice. *Judicial Code*, Sec. 274a, and *Webb v. Sou. Ry. Co.*, 235 Fed. 578.

After judgment, while the case was still in the jurisdiction of the trial court, plaintiff filed a motion to amend the original and first amended petition by inserting therein the following: "And is a citizen of said state and of the United States of America;" such motion was allowable in view of R. S. U. S., Sec. 954, which will govern, even where state statute forbids. *Mexican Central Ry. Co. v. Duthie*, 189 U. S. 76, 47 L. Ed. 715.

No. 159.

Demand of Oyer.

[*Caption.*]

Y. & Y.,

Attorneys for Defendant [*or*, Plaintiff].

The plaintiff [*or*, defendant] demands oyer and copy of contract mentioned in defendant's answer in this cause [*or*

specify the document desired, and the pleading in which it is mentioned].

X. & X.,

Attorneys for Plaintiff [*or*, Defendant].

Dated ———.

Service accepted, etc.

No. 160.

Notice to Reply.

[*Caption.*]

X. & X.,

Attorneys for Plaintiff.

Please take notice that the plaintiff in this cause is hereby required to reply to the plea [*or*, pleas] filed herein, with a copy of which you are hereby served, within ——— days after service of a copy thereof, and of this notice, or judgment will be entered against him.

X. & X.,

Attorneys for Defendant.

Dated ———.

Service accepted, etc.

No. 161.

Notice of Trial.

[*Caption.*]

Y. & Y.,

Attorneys for Defendant [*or*, Plaintiff].

Please take notice that the above cause will be brought to trial at the next term of the district court of the United States for the ——— district of ———, to be held at the United States court-rooms in the city of ———, before the judge of said court on the ——— day of ———, at ten o'clock in the forenoon of that day.

X. & X.,

Attorneys for Plaintiff [*or*, Defendant].

Dated ———.

Service accepted, etc.

No. 162.

Subpoena of Witness to Testify before a Commissioner.

See form under title "Criminal Proceedings."

No. 163.

Habeas Corpus ad Testificandum.

For form of affidavit and writ see forms under title "Criminal Proceedings."

No. 164.

**Order Overruling Motions to Make Complaint More Specific
and to Strike Portions Thereof, etc.**

[Caption.]

At this day comes the plaintiff, by George O. Marrs, Esquire, his attorney, and the defendant, by John Q. Dier, Esquire, its attorney, also comes, and the several motions of the defendant to require the plaintiff to make his complaint more specific and to strike out certain portions of the complaint, coming on now to be heard, are argued by counsel, and the court having considered the same, and being now fully advised in the premises,

It is ordered by the court, for good and sufficient reasons to the court appearing, that the said motions be, and the same and each thereof, are hereby denied.

It is further ordered by the court that the defendant answer the complaint herein within twenty (20) days from this day. To which ruling of the court in denying said motion of the defendant to require the plaintiff to make said complaint more specific, and said motion to require plaintiff to strike certain portions thereof therefrom, the defendant, by its counsel, then and there duly excepted.

No. 165.**Motion of Defendant to Make Complaint More Specific.**

[Caption.]

Comes now the defendant above named, by Hughes & Dorsey, John Q. Dier and Henry W. Toll, and moves the court that an order be entered herein requiring the plaintiff to make his complaint theretofore filed herein more specific in the following respects:

1. By stating more definitely what servant and employe of the defendant is referred to in paragraph (a) of section IV of said complaint, by stating the position which said servant or employe occupied and the nature of his employment.

2. By furnishing a bill of particulars setting forth definitely the services of physicians and nurses engaged and rendered as alleged in section V of said complaint, and by specifying the exact amounts expended by the plaintiff in each instance for such services.

3. By stating specifically what portion of the attempted recovery of \$36,000 is sought on account of: (1) Physical suffering sustained prior to the commencement of this action; (2) anticipated physical suffering; (3) mental suffering; (4) loss of earnings sustained prior to the commencement of this action; (5) anticipated loss of earnings.

HUGHES & DORSEY,
JOHN Q. DIER,
HENRY W. TOLL,
Attorneys for Defendant.

No. 166.**Motion of Defendant to Strike Portions of Complaint.**

[Caption.]

Comes now the defendant above named, by Hughes & Dorsey, John Q. Dier and Henry W. Toll, and moves the court that an order be entered herein requiring the plaintiff to strike

the following portions of the complaint heretofore filed herein, for the respective reasons hereinafter stated:

1. That portion of section II of said complaint reading as follows:

"Having its principal office in said state of Utah and is a citizen of said state of Utah and at all the times hereinafter mentioned was and now is doing business in the state of Colorado under the laws of said state, and at all the times hereinafter mentioned, the defendant was a common carrier of freight and passengers for hire"

for the reason that the same is irrelevant.

HUGHES & DORSEY,
JOHN Q. DIER,
HENRY W. TOLL,
Attorneys for Defendant.

No. 167.

Motion for Leave to Amend Complaint after Verdict.

[*Caption.*]

And thereafter, and on, to-wit, said 29th day of August, 1916, the plaintiff presented to the court his motion to amend the complaint herein, which said motion is in words and figures following, to-wit:

Now on this day comes the plaintiff and moves the court to enter an order permitting the plaintiff to amend his complaint by adding thereto the following paragraph on page 4 of said complaint, at the end of paragraph IV:

"(f) The defendant negligently failed to use reasonable care to maintain a reasonably safe place for plaintiff to perform his work."

on the ground that said amendment will render said complaint conformable to the evidence, the instructions and the verdict herein.

A. B. and C. D.,
Attorneys for Plaintiff.

No. 168.

(Another form.)

Motion to Make Petition Definite and Certain.

Said defendant, the C. D. Railroad Company, moves the court for its order requiring said plaintiff to make his petition more definite and certain in the following particulars, to-wit:

First. That he be required to definitely state and specifically set forth what, if any, injury other than the loss of his right arm, he sustained by reason of the accident in his petition alleged.

Second. That he be required to definitely state and specifically set forth what said plaintiff means by, and to what injuries is referred in the allegation contained in the next to the last paragraph of said petition, to-wit: "That the plaintiff was at the same time otherwise severely cut, bruised and injured."

The C. & D. Railroad Company.

By R. Y., its Attorney.

No. 169.**Order Granting Motion to Make Petition More Definite and Certain.**

[Caption.]

This day came the parties, and the court being fully advised herein, sustains the motion of the defendant to make the petition definite and certain. And on motion of the defendant it is further ordered that the plaintiff have two weeks in which to file his amended petition herein.

No. 170.**Order Allowing Amendment to Count in Declaration.**

[Caption.]

In this cause came the plaintiff, by attorney, and it appearing upon motion to the court for satisfactory reasons that leave to amend the third count of plaintiff's declaration filed in the

above entitled cause should be granted, the demurrer of the Northern Railway Company thereto, having been heretofore sustained. It is therefore ordered by the court that leave be granted the plaintiff to file an amended count in lieu of said third count to which the demurrer of said defendant was sustained. Said amended count having remedied defects in the said third count of plaintiff's declaration shall stand in lieu of said third count.

No. 171.

Order Granting Leave to Plead.

[Caption.]

In this cause leave is granted to the defendant to plead in fifteen days from this date.

No. 172.

Affidavit to Withdraw a Plea in Bar.

State of ———,
County of ———, ss.

Personally appeared before me R. A., clerk of the district court of ——— county, the within named affiant, J. B., who makes oath in due form of law that he is the attorney for the Northern Railway Company, and as grounds for asking to withdraw the plea in bar heretofore filed in this cause says that since the filing of said plea in bar the defendant, Northern Railway Company, has come into the possession of facts which it heretofore had not the means of knowing and which will operate to its prejudice if not allowed to file another form of plea embracing these facts.

G. P.,
Attorney N. R. R.

Sworn to and subscribed before me this ——— day of ———.
R. A.,

Clerk of the District Court for the
——— District of ———.

No. 173.**Motion to Strike out Pleas.**

[Caption.]

First. Plaintiff by counsel moves to strike out defendant's second plea and for cause thereof says: Said plea presents no valid defense to the action brought and the same is therefore irrelevant and immaterial and if the facts pleaded in said plea were true it would not defeat plaintiff's action.

Second. Plaintiff by counsel moves to strike out defendant's third plea and for cause thereof says: Said plea presents no valid defense to the action brought and the same is therefore irrelevant and immaterial and if the facts pleaded in said plea were true it would not defeat plaintiff's action.

Third. Plaintiff by counsel moves to strike out defendant's fourth plea and for cause thereof says: Said plea presents no valid defense to the action brought and is therefore irrelevant and immaterial and if the facts pleaded in said plea were true it would not defeat plaintiff's action.

X. & X.,

Attorneys for Plaintiffs.

No. 174.**Order Allowing Amendment to Plea.**

[Caption.]

The defendant this day moved the court for leave to file an amended plea, setting up as a defense that the policy sued on is void by reason of the procurement of additional insurance from the B. D. Fire Insurance Company, the plea being presented in open court.

Upon consideration thereof it is ordered that the motion be allowed and the amendment be filed, and thereupon it was filed.

No. 175.**Order Allowing Amendment (Plea of Statute of Limitations)
and Striking Same from Files.**

[Caption.]

Defendant, by leave of the court first had and obtained, filed a further plea that the suit of plaintiff as such administrator

with the will annexed was barred by the terms of the policy, which plea plaintiff moved to strike out, which motion the court was pleased to allow and said plea was accordingly struck out as being insufficient in law, to which action of the court the defendant then and there excepted.

No. 176.

Writ of Venire for Jury (1).

The United States of America,
— District of —, ss.

The President of the United States of America to the Marshal
of the — District of —, Greeting:

We command you to summon, without delay [*here state the names and addresses of all the jurors*], to be and appear before our district court of the United States, within and for the district aforesaid, at the court-rooms in the city of —, on the — day of —, 1894, at 10 o'clock a. m., then and there to serve as petit [*or, grand*] jurors for and during the — term, 1894, of said court, and not depart the court without the leave thereof.

. Hereof fail not, and have then and there this writ, with your proceedings thereon.

[*Add teste according to the court issuing the writ.*]

(1) The Judicial Code, Secs. 275 to 288.

A fundamental discussion may be seen in *U. S. v. Reed*, 2 Blatch. 435, Fed. Cas. No. 16134.

That a grand jury is in existence until formally discharged. *U. S. v. Phil., etc., Ry.*, 227 Fed. 206.

No. 177.

Order Impanelling Jury and Trial Begun.

[*Caption.*]

This day came the parties herein, by their attorneys; also came the following named persons as jurors, to-wit: [*naming*

them], who were duly impaneled and sworn according to law; and thereupon the case came on for hearing on the pleadings and evidence. And said jury having heard the testimony adduced in part, and the hour of adjournment having arrived, the further hearing of said cause was postponed until to-morrow morning at 9:30 o'clock.

No. 178.

Order Discharging Jury until Future Day.

[*Caption.*]

This day again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn, and the trial proceeded. And the said jury having heard the remaining testimony, the argument and charge of the court, retired to their room in charge of a sworn officer, for deliberation. And said jury not having agreed upon a verdict, and the hour of adjournment having arrived, the court discharged said jury until to-morrow morning at 9:30 o'clock.

No. 179.

Order for Trial by Eleven Jurors.

[*Caption.*]

This cause coming on for trial, and the jury herein having been duly impaneled and sworn, one of the jurors herein, to-wit: John B. Batlin, being taken ill, and declaring himself unable to proceed with the hearing of said case, came the parties plaintiff and defendant, by their respective attorneys, and consented that said juror might be excused. Whereupon the court being advised, orders that said juror be excused from further services herein. Came again the parties plaintiff and defendant, by their respective attorneys as aforesaid, and now consent to a trial of this case with eleven jurors as a full panel.

No. 180.**Stipulation Waving Jury (1).**

[Caption.]

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court, without the intervention of a jury.

R. X.,

Attorney for Plaintiff.

R. Y.,

Attorney for Defendant.

(1) Constitutional right of trial by jury may be waived, by writing or orally, or by common consent, or by acquiescence. *Hawkins v. Bleakley*, 220 Fed. 378, 381.

U. S. R. S., Secs. 649 and 700, prescribe a stipulation in writing filed with the clerk. *Citizens' Bank v. Farwell*, 56 Fed. 570, 6 C. C. A. 24; *Supervisors v. Kennicott*, 103 U. S. 554-556.

Where jury has been waived and the court has made a finding and rendered judgment thereon, review lies by writ of error. *Porter v. Davies*, 223 Fed. 465, 140 C. C. A. 11. Where jury has been waived on the first trial but judgment was reversed, the parties are not bound by the former waiver on the second trial. *Davies v. Porter*, 248 Fed. 397, 160 C. C. A. 407, and *Burnham v. N. Chi. St. Ry. Co.*, 88 Fed. 627.

Under R. S., Sec. 700, the reviewing court will not notice the facts found unless the stipulation of waiver is in writing. *Abraham v. Levy*, 72 Fed. 124. On review the record must show that the stipulation was made in writing, *Bond v. Dustin*, 112 U. S. 604, and some recitals in a record which are insufficient to show this are seen in *Rush v. Newman*, 58 Fed. 158.

R. S., Sec. 649, confers authority upon the circuit court, and Judicial Code, Sec. 291, confers the circuit court powers upon the district court; hence R. S., Secs. 649 and 700, apply to the present district courts.

No. 181.**Oath of Jury on Voir Dire.**

You and each of you do solemnly swear [or, affirm] that you shall full, true and perfect answers give to such questions as shall be put to you touching your competency to sit as jurors in this case.

No. 182.**Oath of Witness.**

You solemnly swear that your testimony in this cause shall be the truth, the whole truth and nothing but the truth as you shall answer unto God.

No. 183.**Affirmation of Witness.**

You do solemnly declare and affirm that your testimony in this cause shall be the truth, the whole truth and nothing but the truth and this you do under the pains and penalties of perjury.

No. 184.**Motion to Dissolve Attachment and Vacate Bond.****[Caption.]**

Now comes the said defendant, C. D., and moves the court to dissolve the attachment hereinbefore issued in this cause and to vacate and hold for naught the bond given to release the property held under said attachment, and to restore the said defendant to all things it may have lost by reason of said attachment, because :

First. Said defendant was not at the time said attachment was issued, subject to attachment under the laws of the state of —.

Second. The said plaintiff had no authority in law to have said attachment issued.

Third. Said attachment was illegal, and therefore void.

R. Y.,

Attorney for the Defendant.

No. 185.**Motion to Transfer Suit from One Division to Another Division of the Same District (1).**

In the United States District Court of the — District of —, Eastern Division.

| | | |
|-------------------|---|---------|
| A. B., Plaintiff, | } | Motion. |
| vs. | | |
| Defendants. | | |

Now comes the plaintiff herein, and moves the court for an order transferring this case for trial to the district court of the United States for the — district of —, and the western division thereof, for the reason that said case was improperly removed to said court of the eastern division of said — district of —.

Plaintiff says that the eastern division of the — district of — is not the proper court in which to try said case for the following reasons, to-wit:

First. That said cause was originally brought in the common pleas court of — county, —, which county is situated within the western division of the said — district of —.

Second. That the receivers of said railroad company, the defendants herein, maintain and operate the principal and general offices of said railroad in —, — county, —, being in the western division of the — district of —.

Third. That the plaintiff herein is a resident of —, — county, —, in the — division of said — district of —, and was appointed administratrix by the probate court of said county of — and state of —.

Fourth. That the occurrences complained of in plaintiff's petition filed in said case, all happened and occurred in the said city of —, — county, —, and that all the witnesses for plaintiff and defendant reside in said city of —, in the western division of the — district of —.

A. B.,
By X. & X., Her Attorneys.

State of ———,
County of ———, ss.

W. F., being first duly sworn, says that he is one of the attorneys for the plaintiff in the above entitled action, that said plaintiff is at the present time absent from said county, and for that reason affiant makes oath and says that the allegations and statements contained in the foregoing motion are true as he verily believes. W. F.

Sworn to before me and signed in my presence, this ——— day of ———, A. D. ———.

[Seal.]

J. N.

Notary Public in and for ——— County, ———.

(1) See *Barrett v. U. S.*, 169 U. S. 231; *Rosecrans v. U. S.*, 165 U. S. —.

No. 186.

Order Transferring Suit to Another Division in the Same District (1).

[Caption.]

This cause coming on to be heard upon the motion of the plaintiff herein for an order transferring and removing this cause for trial to the western division of the district court of the United States, for the ——— district of ———, and all parties consenting thereto, the court finds that said motion should be granted, and that this action should have been removed to said district court within and for the western division of the ——— district of ———.

It is therefore ordered, adjudged and decreed by the court that this action be, and the same is hereby transferred for further proceedings and trial to the district court of the United States for the western division of the ——— district of ———, and that the same stand for trial in said court at the next term thereof, and the clerk of this court is hereby ordered and

directed to transfer all papers and records filed herein to the said district court of the United States, for the western division of the ——— district of ———.

(1) See *Barrett v. U. S.*, 169 U. S. 231.

No. 187.

Order Transferring Cause to Another Place in Same District (1).

[Caption.]

By consent of parties, it is ordered that these causes be transferred from this court at Roanoke to this court at Lynchburg. The deputy clerk at Roanoke will transmit the papers in these causes together with a copy of this order to the clerk of this court at Lynchburg.

H. C. M.,
D. J.

(1) The Judicial Code, Sec. 58, authorizes a transfer to another division upon stipulation of parties and written order of the judge; Section 53 has similar provisions respecting the transfer of a criminal proceeding.

Where a district is not made into divisions the court may, even over objection of a party, transfer a criminal case to another place in the district, under the power resident in the court at common law, and the reasoning of the court seems applicable to a civil case in the same situation. *U. S. v. Sutherland*, 214 Fed. 320.

No. 188.

Motion to Transfer to Equity Docket (1).

[Caption.]

Now comes defendant and shows to the court that the alleged cause of action of plaintiffs as set out in their petition filed herein is cognizable only in a court of equity, and that the same is improperly on the law docket of this court.

Wherefore, defendant prays that this cause be transferred to the equity docket of this court, and the plaintiffs be required to replead in accordance with the rules in equity, and that the same be tried in accordance with the practice in equity.

A. B. and C. D.,
Attorneys for Defendant.

(1) Judicial Code, Sec. 274a, and Equity Rule 22.

Prior to enactment of Section 274a it was held that by agreement of parties the court could transfer to the equity side an action at law which should have been brought in equity, instead of requiring a dismissal thereof. *U. S. v. Wells*, 203 Fed. 146.

That the courts are inclined to regard this section as authority for transferring from the equity docket to the law docket and vice versa, and for amending the pleadings appropriately, seems clear from the cases. *Webb v. Sou. Ry. Co.*, 235 Fed. 578; *Natl. Surety Co. v. U. S.*, 228 Fed. 577, 143 C. C. A. 99; *John A. Roebling Sons v. Kinnicut*, 248 Fed. 596. Where a bill of complaint is insufficient to give jurisdiction in equity but states a cause of action at law, the court must transfer to the law side. *Clinton Mining & Mineral Co. v. Cochran*, 247 Fed. 449, 159 C. C. A. 503.

An action at law for damages for breach of contract to make a bequest can not be transferred to the equity side, and to transfer is error, rectifiable by mandamus issuing out of the supreme court. *In re Simons*, 247 U. S. 231, 62 L. Ed. 1094.

Where an action at law was tried as a suit in equity, injunctions being issued, and a decree (which was really a money judgment), and appeal, the reviewing court remanded with directions to transfer to the law side and to vacate the injunctions, and affirmed as so transferred. The error in this case was "that plaintiff brought in equity that which was not an equity action, and thereby obtained injunctive relief, which when considered in the light of the case actually made, amounted to a use of the writ of injunction as the substantial equivalent of the warrant of attachment, and for this there was no warrant, in that it gave rise to an appearance of lien or priority not justified by the evidence." *Equitable Trust Co. v. D. & R. G. R. R.*, 250 Fed. 327, 162 C. C. A. 397.

The action of the judge upon motion to transfer to the other side of the court is reviewable in error, and is not the subject for mandamus proceedings. *Ex parte Mason*, 244 Fed. 154, 156 C. C. A. 582.

What the court says about Section 274a in *Waldo v. Wilson*, 231 Fed. 654, 145 C. C. A. 540, in apparent contradiction to the above cases, must be regarded as obiter.

No. 189.**Petition of Defendant for Transfer of Case to Equity Docket.**

[Caption.]

Comes now Union Pacific Railroad Company, defendant above named, by its attorneys, and respectfully petitions the court that by order entered herein, all issues, both of law and of fact, presented by or which may arise in connection with that portion of the plaintiff's reply herein designated as subdivision IV, and being "with reference to the allegations contained in the fifth affirmative defense" of the defendant's answer, be heard and determined upon the equity side of this court; and for ground hereof shows unto the court that while by the act of Congress of March 3, 1915, an equitable defense to the accord and satisfaction and release pleaded by the defendant herein in the fifth affirmative defense of its answer herein filed, may be interposed by replication without necessity of filing a bill on the equity side of this court, that nevertheless the said statute was not intended and does not undertake to do away with the distinction between legal and equity defenses and the former distinction between matters of legal and matters of equitable cognizance still exists; that all of the issues, both of law and of fact, presented by the said portion of the plaintiff's reply herein filed, are essentially of an equitable character and should be determined in limine by this court, sitting as a court of equity, prior to any trial of any of the other issues in this case as determined by the allegations of the complaint, the defendant's answer and the plaintiff's reply. *x*

(Signed) HUGHES & DORSEY,

(Signed) JOHN Q. DIER,

Attorneys for Defendant.

No. 190.**Notice to Plaintiff of Motions to Transfer Case to Equity Side and Strike Portions of Reply, etc.**

[Caption.]

You are hereby notified that at the incoming of the United States district court for the district of Colorado, on Wednes-

day, the 28th day of June, 1916, or as soon thereafter as counsel for the defendant in the above entitled cause can be heard, we will present to the court the petition of the defendant that all issues, both of law and of fact, presented by or which may arise in connection with that portion of the plaintiff's reply herein designated as sub-division IV and being "with reference to the allegations contained in the fifth affirmative defense" of the defendant's answer, be heard and determined upon the equity side of the court, and pray the entry of an order granting said petition, a copy of which petition is herewith served upon you:

You are further notified that at said time and place, the defendant will present to and ask that the court hear and determine the defendant's motion, which is in the nature of a demurrer for insufficiency, that there be stricken from the reply of the plaintiff herein filed that portion thereof designated as sub-division IV, the same being "with reference to the allegations contained in the fifth affirmative defense," of the defendant's answer herein, a copy of which said motion is herewith served upon you.

(Signed) HUGHES & DORSEY,
JOHN Q. DIER,
Attorneys for Defendant.

No. 191.

**Order Denying Motion of Defendant to Strike Portions of
Reply to Answer, and Petition of Defendant to Trans-
fer the Case to the Equity Docket.**

[Caption.]

At this day comes defendant, by John Q. Dier, its attorney, no one appearing for or on behalf of the plaintiff. And the motion of defendant to strike out certain portions of the reply to the answer herein, and the petition of the defendant to transfer this cause to the equity docket of this court, coming on now to be heard, are argued by counsel, and the court, having con-

sidered the same, and being now fully advised in the premises:

It is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion and petition and each thereof be, and the same are, hereby denied.

No. 191a.

Petition for Assignment of a District Judge.

[*Caption.*]

To the Honorable, the Circuit Judges of the Fifth Circuit:

The petition of The N. K. Fairbank Company, defendant in the above entitled cause, with respect, shows that the same was removed into said court from the [name of state court] on the [date] and the transcript duly filed in said district court on the [date], as will appear by reference to the certificate of the clerk hereto annexed and made a part hereof; that in spite of diligent effort, your petitioner has been unable, up to the present time, to secure a trial of said cause; that, at very great expense, it has procured the attendance of witnesses at said court, expecting and urging a trial, but various matters and things intervened to prevent; that one of its witnesses has already died, and there is danger of others, whose oral testimony is desired, becoming scattered and rendering it impossible for petitioner to secure their attendance; that his Honor, the presiding judge of said court, has recently announced his purpose to hold a court for two weeks at —, and will not resume the trial of causes in said district court until [time], and that petitioner has reason to believe that, unless another judge shall be presently assigned to hold said court for the trial of said cause among others, petitioner will be greatly delayed through no fault of its own, and may lose the opportunity to present its defense fully as it desires and is now able to do. And petitioner represents that, in thus applying for the assignment of a district judge to hold said court temporarily, or during the absence of the presiding judge, no disrespect whatever is meant to the latter.

Prayer. The premises considered, your petitioner respectfully prays that it may please your Honors to assign and direct a district judge to proceed and hold said court, within some short date, for the purpose of trying and disposing of said cause at least; and that the clerk of said court be directed to notify all parties of such assignment.

[Date.]

A. B.,

Attorney for Defendant.

No. 191b.

Certificate of Good Faith.

[Caption.]

I hereby certify that I am the attorney for the N. K. Fairbank Company, the defendant in the above entitled cause, and that I reside in the city of St. Louis, and am a member of the bar of the city of St. Louis, of the state of Missouri, and that I have prepared the foregoing affidavits at the request and as the attorney of the said defendant, and that I prepared the former petition which was presented by —, attorneys, to the circuit judges of the fifth circuit, and I further certify that I am familiar with the proceedings in this cause, and that the affidavit and application for the designation of a district judge are made in good faith and not for the purpose of delay or hindrance of the proceedings herein, and therefore the defendant prays that the said Thomas G. Jones, judge of the district court for the northern division of the middle district of Alabama, shall proceed no further in the hearing hereof, and defendant further prays that the said Thomas G. Jones shall cause this fact to be entered on the records of the court, and also for an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge of the said fifth circuit, and for all other and further proceedings herein as may be provided in sections 14, 20, 21 and 23 of an act to codify, revise and amend the laws relating to the judiciary passed by Congress, approved March 3, 1911, and effective from January 1, 1912.

[Date.]

X. Y. Z.,

Attorney for Defendant.

No. 192.**Disqualification of Judge (1).****[Caption.]**

Whereas, in the above entitled action the undersigned judge of the district court for the Canal Zone is a party to the litigation and has a pecuniary interest therein, and

Whereas, said judge is disqualified under section 8 of the code of civil procedure of the Canal Zone from sitting as judge in the hearing of said cause;

The undersigned judge hereby declares himself disqualified from sitting in the hearing in this cause or from participating herein in any manner other than as a litigant.

WM. H. JACKSON,
Judge District Court.

(1) The Judicial Code, Secs. 13 to 21.

An order by the senior circuit judge may properly be worded thus: The honorable Rufus E. Foster, judge of the eastern district of Louisiana, is hereby designated to hold the district court in the western district of Louisiana, in the place and in aid of the judge thereof, and therein to have the powers provided in Section 14 of the Judicial Code. *Apgar v. U. S.*, 255 Fed. 16.

An affidavit in support of a motion to disqualify for bias or prejudice, stating that the judge has formed an opinion as to the law of the case and the rights of the parties, is insufficient; special allegations must be made of personal prejudice and bias. *Henry v. Harris*, 191 Fed. 868, 201 Fed. 869, 120 C. C. A. 207.

Affidavit that affiant is informed and believes that the judge has a personal prejudice and bias is insufficient. *Ex parte N. K. Fairbank Co.*, 194 Fed. 778. It is proper for the judge attacked to pass on the affidavit. *Ibidem*. The certificate of good faith required by the act may not be made by an attorney who has never been admitted to practice before the court in question, and has never been recognized in any proceeding therein. *Ibidem*.

In *Henry v. Harris*, 201 Fed. 869, 120 C. C. A. 207, it is decided that the judge complained of under Judicial Code, Sec. 21, must examine the affidavit to determine its legal sufficiency, but it is not his duty to decide the question of his own disqualification; he shall merely proceed in accordance with Judicial Code, Sec. 20. Further, the affidavit in such case is strictly construed, and the term "personal" qualifying "bias or prejudice" must be employed as specified in the statute. *Ibidem*.

It seems that mandamus will be awarded only in case it is clear and indisputable that there is no other legal remedy, and the remedy is by exception to the rulings and proceedings in error where the judge complained of holds the affidavit insufficient, or where a judge has been designated under conditions regarded as illegal; the rulings of the designated judge may be made the basis of proceedings in error in the same manner. *Glasgow v. Moyer*, 225 U. S. 420, 56 L. Ed. 1147.

Section 21 does not apply to an appellate tribunal. *Kinney v. Plymouth Rock Squab Co.*, 213 Fed. 449, 130 C. C. A. 586.

No. 192a.

Order of Disqualification of District Judge.

[Caption.]

An affidavit of personal bias and prejudice and application that another judge be designated for further proceedings in this action, accompanied by a certificate of counsel of record for plaintiff herein that such affidavit and application are made in good faith, having been filed by said plaintiff in this action, it is hereby ordered that the fact of the filing of such affidavit and application be entered on the records of this court and that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for this circuit now present in the circuit, to the end that such proceedings may be had thereon as are provided by law.

A. B.,
District Judge.

No. 193.

Designation of Judge by President.

THE WHITE HOUSE.

Hon. Henry D. Clayton,
United States District Judge,
Montgomery, Alabama.

Sir:—Pursuant to the authority vested in me by the act of Congress, approved August 24, 1912, known as the Panama Canal act, I do hereby designate you to perform the duties of

the judge of the district court of the Canal Zone in the trial of the case of William H. Jackson, Relator, v. H. A. A. Smith, Auditor of the Panama Canal, Respondent, on account of the disqualification of William H. Jackson, judge of the district court of the Canal Zone, by reason of personal interest, and to perform the duties of said judge for a period of six weeks thereafter during the absence of such judge from the Canal Zone on leave of absence.

Dated, Washington, D. C., May 22, 1916.

WOODROW WILSON,
President of the United States.

No. 193a.

Order Designating Judge for Special Service.

Circuit Court of the United States,
District of Massachusetts.

Whereas, in my judgment, the public interest so requires, I do hereby designate and appoint the Honorable Clarence Hale, district judge for the district of Maine, to hold the February term, 1910, of the district court of the United States, for the district of Massachusetts.

Witness my hand at Boston, in the district of Massachusetts, this 23d day of February, in the year of our Lord one thousand nine hundred ten.

FRANCIS C. LOWELL,
U. S. Circuit Judge.

No. 194.

Designation of Judge by Circuit Judge.

[Caption.]

The Hon. Clarence W. Sessions, district judge of the western district of Michigan, is hereby designated and appointed to hold the district court of the United States for the northern district of Ohio, in the matter of all things pertaining to all interlocutory proceedings, and the hearing and final disposition of the above entitled cause.

This designation is made in the aid of the district judges of the northern district of Ohio, and for the reason that it has been made to appear to me, the senior circuit judge of the sixth circuit now present in the circuit, that the public interest requires such designation. The circumstances evidencing such requirement are shown by stipulation of counsel in the cause hereto attached.

Dated at Grand Rapids, Michigan, September 3, 1914.

ARTHUR C. DENISON,
Circuit Judge.

No. 195.

Verdict Directed by the Court.

[*Caption.*]

This cause coming duly on for trial the following jury was called and sworn, to-wit [*naming them*]. And thereupon the jurors of the jury aforesaid sat in the jury seats and heard the evidence in this cause; and thereupon, by direction of the court, without leaving their seats, say upon their oath that the said defendant did not undertake and promise in manner and form as the said plaintiff hath in his declaration in this cause complained against him.

No. 196.

Verdict for the Plaintiff.

[*Caption.*]

We, the jury, find in favor of the plaintiff and against the defendant in the sum of \$—— and interest on the same from the —— day of —— and for costs herein expended.

S. T., Foreman.

No. 197.

Joint and Several Judgment, Order.

[*Caption.*]

Now at this time this matter coming on regularly to be heard upon plaintiff's motion for a judgment on the pleadings in

favor of the plaintiff, and it appearing to the court that the pleadings are insufficient to sustain a different judgment, notwithstanding any evidence which might be produced, and this court has heretofore sustained plaintiff's demurrer to defendants' further and separate answer and defense, and said defendants have failed and declined to amend said further and separate defense, or further plead, and the answer as it now stands admits and leaves undenied all of the material allegations of the complaint, but denies only the legal conclusions contained in said complaint, and it further appearing to the court that said motion should be granted, it is therefore considered, ordered and adjudged that plaintiff's motion for a judgment on the pleadings is hereby granted and that plaintiff do have and recover of and from the defendants herein, and each of them, the sum of eight hundred seventy dollars and seventy cents (\$870.70), together with interest thereon from June 27, 1911, and for plaintiff's costs and disbursements taxed and allowed at the sum of twenty and 85/100 dollars (\$20.85), and that execution issue therefor.

X. Y.,
District Judge.

No. 198.

**Order of Supreme Court in Suit, between States, on an
Indebtedness.**

Supreme Court of the United States.

Original No. 2.

October Term, 1914.

Commonwealth of Virginia, Complainant,

v.

State of West Virginia, Defendant.

This cause came to be heard on pleadings and proofs, the reports of the special master and the exceptions of the parties thereto, and was argued by counsel.

On consideration whereof, the court finds that the defendant's share of the debt of the complainant is as follows:

Principal, after allowing credits as stated, \$—; interest from January 1, 1861, to July 1, 1891, at 4% per annum, \$—; interest from July 1, 1891, to July 1, 1915, at 3% per annum, \$—; making a total of interest of \$—, which added to the principal sum makes a total of \$—.

It is therefore now here ordered, adjudged and decreed by this court that the complainant, Commonwealth of Virginia, recover of and from the defendant, State of West Virginia, the sum of \$—, with interest thereon from July 1, 1915, until paid, at the rate of 5% per annum.

It is further ordered, adjudged and decreed that each party pay one-half of the costs.

June 14, 1915.

No. 199.

Verdict for the Plaintiff against Two or More Defendants Jointly (1).

[Caption.]

We, the jury, find in favor of the plaintiff and against both the defendants jointly in the sum of \$—, with interest thereon from the — day of — and for costs herein expended.

G. R., Foreman.

(1) Where the action is joint the verdict must be joint. *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 556; *Albright v. McTighe*, 49 Fed. Rep. 817.

No. 200.

Verdict for the Defendant.

[Caption.]

We, the jury, find in favor of the defendant and against the plaintiff.

G. R., Foreman.

No. 201.**Order Overruling Demurrer to Petition and Permitting Amendment.**

[Caption.]

The demurrer of the defendant to the petition herein having been heretofore argued and submitted and due consideration having been given the same, considered that said petition is good and sufficient in law, and that said demurrer be and the same hereby is overruled with — dollars costs; further that said defendants have — days in which to file and serve answer to said petition.

No. 202.**Order Sustaining Demurrer to Declaration and Allowing Amendment.**

[Caption.]

In this cause came the parties, by their attorneys, and came on to be heard the demurrer of the defendant, Northern Railroad Company, to the plaintiff's declaration, and the same having been argued by counsel, considered of and well understood by the court, the court is pleased to sustain the following grounds in said demurrer, to-wit: Nos. 1 and 2 to the effect that plaintiff shows no right to recover, and No. 7, because the third count is against the Northern Railroad Company alone, the court being of opinion that this makes a misjoinder of counts; and No. 8, because the latent defects of the engine are not alleged with reasonable certainty, and the court is pleased to overrule all other grounds in said demurrer.

Thereupon on motion of plaintiff's attorney for leave to amend, and it appearing that it is necessary for the satisfactory adjustment of the rights of all parties, it is accordingly ordered and decreed by the court that leave be granted, and the same is granted plaintiff to amend his declaration filed in the above entitled cause, by showing in each count that this suit is for the benefit of the next of kin, and also by setting out the next

of kin to plaintiff's intestate as follows: Mrs. Virgie Mozely, Mrs. Lilly Jerrard, Minnie Buice, Mamie Buice and Allie Buice, sisters of the deceased.

No. 203.

Leave to Amend Answer in Open Court.

[Caption.]

The defendant is given leave to amend its answer instanter by interlining in the ninth line of defendant's answer to plaintiff's amended complaint, after the words "on cross-petition" these words, "for liquidated damages."

No. 204.

Order Overruling Demurrer (1).

[Caption.]

The defendants in this action, having filed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and said demurrer being duly brought on for hearing at this term of court, and

After hearing Hillard P. Jessup, Esq., attorney for the defendants in support of said demurrer, and A. B. and C. S., Esqs., attorneys for the plaintiff in opposition thereto, and after due deliberation, it is hereby

Ordered, that said demurrer be, and the same hereby is overruled, but defendants may answer in ten days after being served with a copy of this order; if no answer is interposed, the plaintiff will have judgment in due course.

X. Y.,
District Judge.

(1) See No. 201.

No. 205.**Order Overruling Demurrer for Failure to Prosecute.**

[Caption.]

Defendant's demurrer having been called on three consecutive law calendars without answer, it is ordered that said demurrer be and the same is hereby overruled for want of prosecution.

X. Y.,
District Judge.

No. 206.**Election of Defendants to Stand on Answer after Demurrer Thereeto Allowed.**

[Caption.]

Come now M. A. Miller, collector of internal revenue for the United States for the district of Oregon, and David M. Dunne, the above-named defendants, by E. A. Johnson, assistant United States attorney for Oregon, and attorney for defendants above named, and show unto the court that they are unable to further amend their answer heretofore in the above entitled cause filed, and by this honorable court on the 3d day of August, 1914, held insufficient upon demurrer of plaintiff, and by reason thereof hereby elect to stand upon their answer heretofore filed as aforesaid.

E. A. JOHNSON,
Attorney for Defendants.

No. 207.**Order Sustaining Demurrer to Pleas.**

[Caption.]

The court having considered and being now fully advised, it is ordered that the demurrers of the plaintiff to the fourth, fifth and sixth pleas of the defendant be and the same are hereby sustained.

No. 208.**Judgment where no Jury.****[Caption.]**

This cause having come on regularly for trial before the court without a jury, and having been submitted for decision and judgment on the pleadings and agreed statement of facts filed therein, and the court having heard the arguments of the attorneys for the respective parties and having duly considered said pleadings and agreed statement of facts, it is now ordered, adjudged and decreed that the plaintiff do have and recover of and from the defendant the sum of — dollars, with interest thereon from this date at the rate of —% per annum and costs hereby taxed at — dollars.

No. 209.**Judgment where Jury Waived.****[Caption.]**

This cause having come on regularly on Wednesday, the 17th day of June, 1914, being a day in the January term, A. D. 1914, of the district court of the United States for the southern district of California, southern division, to be tried before the court and a jury to be impaneled; Harry R. Archbald, Esq., assistant U. S. attorney, and Monroe C. List, Esq., special assistant to the U. S. attorney-general, appearing as counsel for the United States; Paul Burks, Esq., appearing as counsel for the defendant; and a stipulation as to facts having been filed in open court, and it appearing that said stipulation contains an express waiver of the right to trial by jury herein; and said cause having thereupon come on to be tried by the court, sitting without a jury; and said cause having been argued, on behalf of the government, by Monroe C. List, Esq., special assistant to the U. S. attorney-general, of counsel for the United States, and on behalf of defendant by Paul Burks, Esq., of counsel for defendant, and on behalf of the government in reply by Monroe C. List, Esq., special assistant to the

U. S. attorney-general, of counsel for the United States; and said cause having been submitted to the court for its consideration and decision; and on the 20th day of June, 1914, findings of fact and conclusions of law having been filed by the court herein, and the court having ordered that, in accordance with said findings of fact and conclusions of law, judgment be entered in favor of the plaintiff and against the defendant on each of the three causes of action set forth in the complaint herein, together with costs of plaintiff incurred herein; and that a penalty of \$100 be assessed on each of said causes of action;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that the United States of America, plaintiff herein, have and recover of and from The Atchison, Topeka & Santa Fe Railway Company, defendant herein, three hundred dollars (\$300), together with plaintiff's costs herein, taxed at \$36.50.

Judgment entered June 22, 1914.

WM. M. VAN DYKE, Clerk.

By LESLIE S. COLYER, Deputy Clerk.

No. 210.

(Another form.)

Judgment on Stipulation of Facts and Waiver of Jury.

[*Caption.*]

This day came again the parties by their respective attorneys, and tendered to the court and asked leave to file herein an agreed statement of facts, entitled "Stipulation of Facts," dated December 2, 1916, and signed by the attorneys for the plaintiff and defendant respectively, which stipulation is ordered to be filed and made a part of the record in this cause.

And thereupon neither party desiring to introduce additional evidence, and neither party requiring a jury, by consent of the parties this cause was submitted to the court, in lieu of a jury,

upon said stipulation of facts and upon argument of counsel; upon consideration whereof the court is of opinion to and doth find for the plaintiff and assess its damages at twenty-one thousand, six hundred and fifty-two dollars and thirty-five cents (\$21,652.35), as of this date, and the decision of the court is set forth in a written opinion, filed herein and made a part of the record in this cause.

It is therefore considered by the court that the plaintiff, the Toledo and Ohio Central Railway Company, a corporation, do recover of and from the defendant, the Chesapeake and Ohio Coal and Coke Company, a corporation, the sum of twenty-one thousand six hundred and fifty-two dollars and thirty-five cents (\$21,652.35), with interest thereon from this day until paid, and that the said plaintiff do also recover of and from the said defendant its costs about the prosecution of its action in this cause expended, including an attorney's fee as allowed by statute, and all proper taxable costs herein; and to the judgment of the court herein the defendant, by its attorneys, objects and excepts. And the defendant is given sixty (60) days to prepare and present to the court such bill or bills of exceptions herein as it may be advised.

No. 211.

(Another form.)

Judgment where Jury Waived and Court Makes Findings and States Conclusions of Law.

[*Caption.*]

The issues in this action having been duly brought to trial before Hon. George W. Ray, United States district judge, at a term of this court held at Syracuse, N. Y., on the 12th day of September, 1912, all the parties appearing, and the court having heard the allegations and proofs of the parties, and after due deliberation having duly made its decision in writing in favor of the plaintiff and against the defendants,

with findings of fact and conclusions of law duly filed in the clerk's office of said court.

Now, on said decision and on motion of Elisha B. Powell, plaintiff's attorney, it is:

Ordered, adjudged and decreed, that the plaintiff, Louis R. Hunter, recover of the defendants, The Baker Motor Vehicle Company, and its surety, American Bonding Company of Baltimore, the sum of \$8,329.75 and interest thereon from the 4th day of February, 1909, less \$692.69 and interest thereon from October 14, 1908, to-wit, \$10,683.07, besides the costs of this action taxed at \$107.50, in all, \$10,790.57, and have execution therefor.

Judgment signed and entered this 7th day of October, 1915, at 3 o'clock p. m.

W. S. DOOLITTLE,
Clerk.

No. 212.

Judgment (1)—non-Suit as to Certain Parties Defendant.

[Caption.]

This cause having been brought on for trial at this term of said court and having been tried before his Honor, J. C. Pritchard, circuit judge, and a jury, and his honor being at the close of the evidence of opinion that upon the evidence and the record in the case the plaintiff is not entitled to recover as against the defendants, the Western North Carolina Railroad Company, and Luther Long, the plaintiff voluntarily submits to judgment of non-suit herein as to said defendants.

Whereupon, it is ordered and adjudged by the court that the said defendants, The Western North Carolina Railroad Company, and Luther Long, go hence without day; that the plaintiff as to them take nothing by his writ, and that they, the said defendants, The Western North Carolina Railroad Company, and Luther Long, have and recover of the plaintiff herein and his surety upon his prosecution bond herein, their

costs in this behalf incurred to be taxed by the clerk of this court, this 10th day of October, 1905.

J. C. PRITCHARD,
Circuit Judge.

(1) Compulsory non-suit is permissible in a federal court only where a statute of the state authorizes it; it has been generally displaced by the practice of directing a verdict for defendant. *Board of Commissioners v. Home Sav. Bank*, 200 Fed. 28, 118 C. C. A. 256, and see also 187 Fed. 80.

"The difference between a compulsory non-suit and a directed verdict for the defendant is matter of form rather than substance, except that in the case of the former, a new action may be brought, while in the case of a directed verdict and judgment thereon the action is ended, unless a new trial is granted on motion or on appeal." *Board of Commissioners v. Home Sav. Bank*, *supra*. And in *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364, 57 L. Ed. 879, Justice Van Devanter examines the practice re (1) demurrer to evidence, (2) non-suit, and (3) request for directed verdict, and sharply distinguishes them, at pages 394, 395.

Where a person, whose presence in a suit is proper but not indispensable, can not be made a party without ousting the jurisdiction of the trial court, it may in its discretion proceed in his absence, by allowing amendments to pleadings and dismissal of the party. *Thomas v. Anderson*, 223 Fed. 41, 138 C. C. A. 405.

No. 213.

Entry—Impaneling of Jury and Beginning of Trial. (1)

[Caption.]

At this day comes the plaintiff by Omar Garwood, Esquire, his attorney, and the defendant by John Q. Dier, Esquire, its attorney, also comes. And thereupon, comes a jury, to-wit:

Abraham S. Nadel
Jesse Schwayder
Edward J. McCabe
Walter Appledorn
Fred Berbower
Joseph O. Mitchell

J. H. McDonald
E. W. Loudon
Thomas H. Bower
Edward W. Dunn
Henry Yant
Patrick O. Sullivan.

twelve good and lawful men, and they are each duly selected and tried, impaneled and sworn to well and truly try the issues

herein joined and a true verdict render according to the law and the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment. And the said jurors being now each duly cautioned by the court not to converse among themselves or with others touching this case, or the matters at issue herein, or the evidence heard, or any part thereof, nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

(1) See No. 177.

No. 214.

Motion to Dismiss Complaint in Open Court upon Completion of Prima Facie Case.

The Court: Are there any motions?

Mr. Clark: I move to dismiss the complaint as to the defendants, Chiarello Brothers Company and Dick Chiarello & Brothers, Inc., on the ground that no negligence has been shown upon the part of either of those companies; upon the ground that it has not been in any way shown that they were in any way connected with this transaction at all, bearing in mind that they are two corporations. There is no evidence that the corporation was present at the time of this accident, or previous to it by any authorized representative. There is no evidence that either one of these corporations entered into any contract with the Long Leaf Pine Company. The evidence, so far as it goes, shows clearly that the stevedoring there was done by the Merritt & Chapman Derrick & Wrecking Company and that it was done under orders and directions issued by a Mr. Wild, the representative of the Long Leaf Pine Company. The only employe that any witness has testified to of either Chiarello Brothers Company or Dick Chiarello & Brothers does not state anywhere as to which one of these companies he was employed by. It was stated to be the captain of the lighter. It certainly is inconceivable in view of

the testimony, in view of the weights of these packages of lumber, that Captain Samsen single-handed was there acting as a stevedore to unload that lumber from the dock to the lighter.

The Court: Is that all?

Mr. Clark: Yes.

The Court: I will deny the motion at this stage of the case.

Mr. Clark: Exception.

No. 215.

Motion by Defendant to Dismiss and to Direct Verdict, upon Completion of Plaintiff's Prima Facie Case.

Defendant moves that the plaintiff's complaint be dismissed and that the court direct a verdict for the defendant on the following grounds:

First. That the plaintiff has failed to show any negligence for which the defendant is liable as a matter of law.

Second. That the evidence shows conclusively that the plaintiff's injuries were caused wholly by his own negligence.

Third. That the plaintiff must be held as a matter of fact and of law, under the evidence, to have assumed the risks of being injured in the way and manner in which he was injured.

Fourth. That the sole proximate cause of the plaintiff's injuries was his own negligent acts in doing his work.

Fifth. That the evidence shows conclusively that the mine structure, ways, works and facilities, whatever their condition may have been at the time of the accident, are not relevant or material to this case.

Sixth. That the evidence shows conclusively that there was no explosion of accumulated gas in the chamber or working place where the plaintiff was working at the time of the accident.

Seventh. That the evidence shows conclusively that plaintiff's injuries were not caused by anything directly or indirectly related to the ventilation of the mine.

Eighth. That the defendant owed no duty to the plaintiff to furnish plaintiff with anything except a properly ventilated place to work in.

Ninth. That the evidence shows conclusively that the defendant violated no legal duty towards the plaintiff.

Tenth. That the evidence shows conclusively that plaintiff's injuries were caused by an explosion of powder which he shot off himself, and that plaintiff was an expert miner of long experience in handling explosives and in firing them off.

No. 216.

Motion by Defendant to Dismiss and Direct Verdict at Conclusion of All Testimony.

[*Caption.*]

The defendant moves that the plaintiff's complaint be dismissed and also moves for the direction of a verdict on behalf of the defendant on all the grounds specified in the defendant's previous motion for the same purpose, which was made at the close of the plaintiff's evidence.

No. 217.

Motion to Exclude All Evidence and to Instruct Jury to Find for Defendant.

[*Caption.*]

And now at the close of all the evidence in said cause, comes the defendant, Kawin & Company, by Ringer, Wilhartz, Louer & Concannon, its attorneys, and moves the court to exclude all of the evidence offered or admitted in this cause and to give to the jury the following instruction:

The court instructs the jury to find the issues joined for the defendant.

A. and B.,

Attorneys for Defendant.

No. 218.**Judgment for Plaintiff.**

[Caption.]

Came again the said plaintiff, with his attorneys, and the said defendant, by its attorneys, and came again also the jury heretofore impaneled and sworn herein, when the trial of this case was again resumed and the jury having heard the testimony, listened to the arguments of counsel and received the charge of the court upon their oaths do say they find the issues herein joined to be in favor of the said plaintiff and against the said defendant, and that they assess the amount of the plaintiff's damage and recovery herein against the defendant at the sum of ——— thousand dollars.

On motion of the plaintiff it is therefore hereby considered by the court that said plaintiff, A. B., do have and recover of and from said defendant, The L. Railroad Company, said sum of ——— thousand dollars and the costs of this suit for the collection of which said sum and costs, execution is hereby awarded.

No. 219.**Judgment for Defendant.**

[Caption.]

The jury by whom the issue joined in this cause was tried having rendered a verdict in favor of the said defendant and against the said plaintiff; therefore, it is considered that the said plaintiff take nothing by his suit, and that the said defendant do go thereof without day. And it is further considered that the said defendant do recover against the said plaintiff his costs and charges by him about his defense in this behalf expended, to be taxed; and that the said defendant have execution thereof.

No. 220.**Order Sustaining Demurrer and Judgment for Defendant.**

[Caption.]

This cause being heard this day upon the demurrer of the defendant to the petition of the plaintiff and was argued by counsel and the court being fully advised in the premises, is of the opinion and do therefore order that said demurrer be, and the same is hereby sustained, to which ruling of the court said plaintiff, by its counsel, excepts.

And thereupon the plaintiff not asking to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff its costs herein expended.

No. 221.**Motion for Judgment on the Pleadings.**

[Caption.]

Comes now the plaintiff, the Snake River Valley Railroad Company, and moves the court for a judgment on the pleadings in favor of the plaintiff herein, upon the grounds and for the reasons that the pleadings are insufficient to sustain a different judgment, notwithstanding any evidence which might be produced, and this court has heretofore sustained plaintiff's demurrer to defendants' further and separate answer and defense, and said defendants have failed and declined to amend said further and separate defense or further plead, and the answer as it now stands admits and leaves undenied all of the material allegations of the complaint, more particularly as follows, to-wit:

[Here follow the items.]

A. B. and C. D.,
Attorneys for Plaintiff.

No. 222.**Judgment in Condemnation Proceeding.****[Caption.]**

In this cause heretofore tried before a jury of freeholders, the court considering the verdict of the jury, and the law and the evidence, and the same being in favor of plaintiff and against defendant, and justifying the relief hereinafter granted, it is ordered, adjudged and decreed that the right of way or easement described in plaintiff's petition herein be, and the same is hereby, condemned and adjudged to plaintiff, the Western Union Telegraph Company, for the purposes and subject to the conditions named in said petition, the same to vest in plaintiff when the amount of the said verdict, to-wit, the sum of six thousand dollars (\$6,000.00) shall have been paid to the defendant, or the clerk of this court, in accordance with law, and that plaintiff pay all costs.

The said right of way or easement is more specifically described as follows, to-wit:

The right to construct, maintain and operate a line of telegraph poles and wires along the right of way of the defendant in the parishes of Orleans and St. Tammany in this state, beginning at a point in the city of New Orleans at the intersection of the property lines at the corner of Elysian Fields street and Laforce street (now North Tonti street) in square No. 1210, and running thence in an easterly direction through the parishes of Orleans and St. Tammany to the thread of the stream known as Pearl River, the dividing line between the states of Louisiana and Mississippi, a distance of approximately 35.38 miles, including the bridges belonging to the said defendant traversing the streams known as "Little Rigolets" and "Rigolets" respectively, and forming part of defendant's said right of way.

For a distance of approximately two miles from the corner of Elysian Fields and North Tonti street said line shall extend along the south side of said right of way; at this point

it shall cross over the line of track, roadbed and structures of defendants' railroad and for a distance of approximately two miles shall extend along the northern side of said right of way; at this point it shall recross the line of track, roadbed and structures of the defendant's railroad and thence to the bridge, known as the Rigolets bridge, it shall extend along the southern side of defendant's right of way; at this point it shall recross the tracks and along the said bridge extend on the northern side of the track: it shall then recross the track and from the eastern end of the Rigolets bridge to Pearl River shall extend along the southern side of the right of way.

On the bridges crossing the streams known as Little Rigolets and Rigolets, respectively, there shall be three and thirty-four poles, respectively, erected and attached as shown on the sketch attached to plaintiff's petition and marked Exhibit C.

The poles on which wires are strung shall be located at approximately a distance of 91.65 feet apart and approximately at distances from the center of defendant's main track shown on the profile attached to plaintiff's petition and marked Exhibit B, that is to say, from North Tonti street to Gentilly, at an average distance of 46.57 feet; from Gentilly to Michaud at an average distance of 29.50 feet; from Michaud to Chef Menteur at an average distance of 32 feet; from Chef Menteur to Lake Catherine at an average distance of 32.13 feet; from Lake Catherine to Rigolets at an average distance of 33.13 feet; from Rigolets to Dunbar at an average distance of 28 feet; from Dunbar to Pearl River at an average distance of 32.25 feet.

The whole of said line shall be so constructed and maintained as not to interfere with the use of its said right of way by the defendant for the purposes of its business of operating a railroad, and if at any time in the future it shall become necessary for the defendant to change the location of its tracks, or to construct new tracks or side tracks, or other structures for the purposes of its said railroad business, and for such purpose to use and occupy the portion of the right

of way on which plaintiff's telegraph line may be, then plaintiff shall at its own expense, upon reasonable notice from the defendant, remove its poles, cross-arms and wires to such other point or points on said right of way as may be reasonably designated by the defendant.

The right of way or easement herein condemned is especially described and set forth in plaintiff's petition and the exhibits attached thereto, marked Exhibits A, B and C, respectively, to which reference is made as parts of this judgment.

It is further ordered, adjudged and decreed that all rights, ways, privileges, servitudes and appurtenances connected with the property upon which said line of telegraph is to be erected, and necessary for the erection, operation and maintenance of said line, shall also vest in the plaintiff upon payment by it of the sum aforesaid, and that the plaintiff pay the costs of this suit.

Judgment entered November 23, 1912.

Judgment signed November 29, 1912.

(Signed) RUFUS E. FOSTER,
Judge.

No. 223.

Judgment where Undertaking to Dissolve Attachment.

[Caption.]

This cause coming on for hearing at this, the November, 1911, adjourned term, and being heard before his Honor Boyd, judge and jury, and the jury having answered the issue submitted, viz: Is the defendant indebted to the plaintiffs and, if so, in what amount? Answer. Yes. \$2,916.00 (twenty-nine hundred and sixteen dollars); with interest from February 2, 1911.

It is now

Considered, adjudged and decreed upon motion of Locke Craig, counsel for the plaintiffs, that the plaintiffs have and recover judgment against the defendant, D. J. McDonald,

in the sum of twenty-nine hundred and sixteen dollars, with interest on the same from the 2d day of February, 1911; and it further appearing to the court from an inspection of the record that the defendant executed an undertaking to dissolve an attachment in said cause, conditioned to pay the plaintiffs all such sums as they might recover in this action, with the United States Fidelity Company as surety, it is now,

Ordered that judgment be and is hereby entered against said surety for said sum of \$2,916.00, together with the costs of this action by the plaintiffs in this behalf incurred.

This 13th day of January, 1912.

X. Y.,
Judge Presiding.

No. 223a.

**Motion in Open Court to Determine Equitable Defense in Law
Action by Court as Chancellor in Equity.**

Defendant further at this time desires to move the court that the court sitting as a chancellor in equity determine the equity issues raised by the plaintiff's replication to the defendant's fifth defense prior to a trial of the law issues which are involved in this case

No. 223b.

**Defendant's Reservation of Rights Respecting Certain Re-
quested Instructions to Jury, where Equitable Defense.**

Defendant earnestly contends that the issue presented upon pleadings herein by the release pleaded as a defense in the answer herein and by the allegations of plaintiff's reply directed thereto and seeking to have release set aside, cancelled and annulled, is purely one of equitable cognizance to be tried by the court, sitting as a court of chancery, and not by the jury heretofore impaneled herein.

Defendant has heretofore earnestly urged and does now earnestly urge said contention and has heretofore requested and does now respectfully request that said issue be so tried.

In the event, however, that the court should rule against said contention, and deny said request, and only in such event and without in any manner waiving said contention, defendant presents and requests certain instructions to the jury pertaining to said issue, without prejudice, however, to its right to renew said contention and request at a later stage in these proceedings and either in this court or in an appellate court.

(Signed) HUGHES & DORSEY,
JOHN Q. DIER,
Attorneys for Defendant.

No. 223c.

Objection in Open Court to Taking Testimony on Entire Case, where Equitable Defense, until Later Disposed of.

For the record I want to at this time object to the introduction of any testimony in this case for the reason, first, that there has been no return or tender of return to the defendant of the \$750.00 consideration paid at the time of the execution of the release; second, that the issues in this case with reference to the defendant's fifth affirmative defense raise issues cognizable only in equity which are triable by the court sitting as an equity court prior to any trial of the law issues before and by the jury.

No. 224.

Advisory Verdict (1) on Equitable Defense in Action at Law, and Adoption Thereof, and Judgment Thereon.

"We, the jury, on our oath do say we find that plaintiff was induced to execute the written release offered in evidence, by fraudulent representations and promises made to plaintiff by the witness White; that said representations and prom-

ises were material, were believed and relied on by the plaintiff, and induced the plaintiff to sign the release and that he would not have agreed to and signed said release but for his belief in and reliance on said representations and promises."

And thereupon, the court sitting as a chancellor adopts as its own the finding of facts made by the jury as to the fraudulent representations and promises made to plaintiff by which he was induced to sign the release and settlement of date March 5, 1915, and set up as a fifth defense in the answer herein, and finds that said release and settlement was fraudulently obtained as alleged and pleaded in the reply to said answer.

Wherefore, it is considered by the court that the release and settlement made, executed and delivered by plaintiff to defendant on the fifth day of March, A. D. 1915, under and by which the plaintiff accepted the sum of seven hundred and fifty dollars (\$750.00) in full satisfaction of his claim for damages against the defendant, sued upon in his complaint herein, be, and the same is, hereby vacated, set aside and for naught held. But upon the condition nevertheless that the plaintiff pay to the defendant the said sum of seven hundred and fifty dollars (\$750.00), together with interest thereon at the rate of eight per cent. per annum from the fifth day of March, A. D. 1915; said payment, however, to be made by crediting the defendant with said sum and interest on its payment of the judgment herein rendered against it for the damages assessed to the plaintiff for the injuries by him sustained.

(1) Where a case is one of equitable jurisdiction only, the court is not bound to submit any issue of fact to a jury, and if it does so it is at liberty to disregard the verdict and findings of the jury either by setting them or any of them aside, or by letting them stand and allowing them more or less weight in its final decree. It is not necessary that the verdict be formally set aside if the court wishes to disregard it. The purpose of submitting issues of fact to a jury in such case is to inform the conscience of the court and aid it in making up its own judgment upon the facts. *Idaho, etc., Land Co. v. Bradbury*, 132 U. S. 509, 33 L. Ed. 433; *Perego v. Dodge*, 163 U. S.

160, 41 L. Ed. 113. That the verdict of a jury in such case is merely advisory and may be disregarded, see *Flippen v. Kimball*, 87 Fed. 258.

No. 225.

Petition and Motion that the Court, Sitting as a Court of Chancery, Make Findings and Enter Decree, Notwithstanding Advisory Verdict of the Jury.

[Caption.]

And thereafter, on July 26, 1916, the defendant filed a petition and motion that the court, sitting as a court of chancery, make findings and enter decree, notwithstanding advisory verdict of the jury, which is in the words and figures following, to-wit:

Comes now the Union Pacific Railroad Company, the defendant above named, by its attorneys and, deeming that all issues both of law and of fact presented by or arising in connection with that portion of the plaintiff's reply, herein designated as subdivision IV, being "with reference to the allegations contained in the fifth affirmative defense" of the defendant's answer, are purely of equitable cognizance and triable solely by the court sitting as a court of chancery prior to and separate from the trial by the court and a jury, of all the other issues arising upon and under the pleadings herein, hereby respectfully petitions and requests the court as follows, to-wit: *[Each request to be deemed, considered and dealt with by the court as a separate and several request, and not joint with the others.]*

1. That the court, sitting as a court of chancery, notwithstanding the advisory verdict of the jury heretofore returned herein, now find, determine and decree that the said instrument of release pleaded and set forth in the fifth affirmative of defendant's answer, is an existent, valid and enforceable contract and bars plaintiff's right of recovery herein.

2. That the court, sitting as a court of chancery, notwithstanding the advisory verdict of the jury heretofore returned

herein, find, determine and decree as a matter of fact and of law, that the allegations in that portion of the plaintiff's reply above referred to, by reason of which the plaintiff seeks to set aside, cancel and annul said release, have not been sustained by the proof and that said release must stand as a valid, existent and enforceable contract, barring any right upon the part of the plaintiff to recovery herein.

3. That the court, sitting as a court of chancery, notwithstanding the advisory verdict of the jury heretofore returned herein, find, determine and decree that the plaintiff did not, in apt time and as required by law, pay back or return, or tender or offer to pay back or return to the defendant the consideration theretofore received by him at the time of the execution of the said release, and that therefore the attempt of the plaintiff to set aside, cancel and annul said release must fail.

4. That the court, sitting as a court of chancery, notwithstanding the advisory verdict of the jury heretofore returned herein, find, determine and decree that there was an absolute failure of proof upon the part of the plaintiff of any artifice or fraud upon the part or on behalf of the defendant, concealing or tending to conceal the terms of said contract of release, prior to its execution by the plaintiff or which prevented the plaintiff from reading said release prior to or at the time of its execution by him.

5. That the court, sitting as a court of chancery, notwithstanding the advisory verdict of the jury heretofore returned herein, find, determine and decree that no representations, promises or agreements made, or opinions expressed in the previous parol negotiations between and on behalf of the plaintiff and of the defendant, as to the terms or legal effect of the resulting written contract of release, can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of said contract of release, in the absence of some artifice, or fraud which concealed its terms or prevented plaintiff from reading it; that there is an absolute

failure of proof upon the part of the plaintiff of any such artifice or fraud which concealed or tended to conceal the terms of said contract of release prior to its execution by the plaintiff, or which prevented the plaintiff from reading said release; and that therefore, said release stands and must be held to be a valid, existent and enforceable contract barring any right of recovery by the plaintiff herein.

6. That the court, sitting as a court of chancery, notwithstanding the advisory verdict of the jury heretofore returned herein, find, determine and decree that none of the representations or promises made, or opinions expressed in the previous parole negotiations by defendant's claim agent, White, as testified to by and on behalf of the plaintiff, even if believed and found by the court to have been established by clear, convincing and unequivocal testimony, notwithstanding the making of said representations or promises or the expressing of said opinions was earnestly and vigorously denied by said White and by the defendant's witness, Lucas, who, it was admitted by the plaintiff, was present when said representations and promises so claimed to have been made were made and said opinions expressed, can not in law or equity constitute fraudulent representations warranting or justifying the setting aside, cancelling and annulling of said release.

7. That the court, sitting as a court of chancery, notwithstanding the advisory verdict of the jury heretofore returned herein, find, determine and decree that said contract of release was actually executed by the plaintiff; that in consideration therefor defendant paid plaintiff and plaintiff received and retained a substantial sum of money, to-wit, seven hundred fifty dollars (\$750.00); that prior to the execution of said release by plaintiff, said release was read by the plaintiff, or read to the plaintiff, by plaintiff's representative and agent, Mrs. Katie Hoffman; that plaintiff was in no manner hindered or prevented by defendant from reading or having read to him and fully understanding said contract of release

and all of its terms prior to the execution thereof, and that said release is an absolute bar to any right of recovery by plaintiff in this action.

(Signed) HUGHES & DORSEY,
JOHN Q. DIER,
Attorneys for Defendant.

No. 226.

Judgment for Plaintiff upon Sustaining Demurrer to Answer (1).

This day this cause came on to be heard upon the demurrer of the plaintiff to the answer of the defendant, and was argued by counsel, and the court being fully advised in the premises, is of the opinion and does hereby order that said demurrer be, and the same hereby is, sustained, to which ruling of the court said defendant, by its counsel, excepts.

And thereupon said defendants, not asking to plead further, it is considered and adjudged by the court that the said plaintiff, The A. B. Banking Company, recover against the said defendant, The City of —, said sum of — dollars and — cents, the amount claimed in the petition, with interest computed up to —, the first day of the present term of this court, together with its costs herein expended taxed at \$—, and that said defendant pay its own costs.

(1) It is not necessary or proper to except to judgment.

No. 227.

Remittitur (1)

[Caption.]

Now comes the plaintiff in the above entitled action within thirty days from the order of the honorable court, and remits

all damages in the above entitled cause in excess of three thousand dollars.

By her Attorneys,
ASA P. FRENCH,
DANIEL A. SHEA.

(1) See Foster's Federal Practice, 5th ed., page 1601.

No. 228.

**Plaintiff, a Minor, by His Testamentary Guardian, Consents
to Reduction of Assessed Damages.**

[Caption.]

The court having expressed the opinion that the damages assessed by the jury in the above entitled action, to-wit, twenty-seven thousand five hundred dollars (\$27,500.00), are excessive, and having offered to the plaintiff the choice of remitting the sum of seventeen thousand five hundred dollars (\$17,500.00) of said assessment of damages, or of submitting to an order of the court granting a new trial in said cause, the plaintiff, upon the said suggestion of the court, comes into court in his own person, and by his guardian and attorneys, and remits of record the sum of seventeen thousand five hundred dollars (\$17,500.00) of said verdict, and consents that the same may be for the sum of ten thousand dollars (\$10,000.00), and to accept judgment for the same.

J. C. PRITCHARD,
Circuit Judge.

No. 229.

**Order Denying Motion for a New Trial where Verdict
Reduced.**

[Caption.]

The above entitled action having regularly come on for trial before Hon. Thomas I. Chatfield, district judge, and a jury on the 30th day of March, 1914, and the issues having

been tried, and the jury having, on the 4th day of April, 1914, rendered a verdict upon the merits in favor of the plaintiff and against the defendant for the sum of fifty thousand dollars (\$50,000), and the defendant having immediately after the rendition of the said verdict, moved to set the same aside upon the ground, among others, that it was excessive, and the court having entertained the said motion and having thereafter, and after due deliberation, rendered its decision in writing reducing the said verdict to the sum of thirty-six thousand dollars (\$36,000) and directing that if the plaintiff agrees and consents to the said reduction, then in all other respects and upon all other grounds, the said motion be denied; and an order having thereupon and on the 8th day of May, 1914, been made requiring the plaintiff through his attorney to file on or before May 12, 1914, with the clerk of this court, his consent in writing that the said verdict shall be reduced to the sum of thirty-six thousand dollars (\$36,000), or otherwise to move with respect to the verdict for the amount in excess of that sum; and the plaintiff having thereafter and on the 9th day of May, 1914, through his attorney, filed with the clerk of this court his consent in writing to the reduction of said verdict to the sum of thirty-six thousand dollars (\$36,000); now, upon motion of Baltrus S. Yankaus, attorney for the plaintiff, it is:

Ordered, that the said motion be, and the same hereby is in all other respects denied.

THOMAS I. CHATFIELD,
United States District Judge.

No. 230.

Alternative Order Reducing Verdict.

[Caption.]

The above entitled action having come on regularly for trial in this court, upon the 30th day of March, 1914, before the Honorable Thomas I. Chatfield, judge, and a jury, and

the jury having, on the 4th day of April, 1914, rendered a verdict in favor of the plaintiff, Matt Yurkonis, and against the defendant, The Delaware, Lackawanna and Western Railroad Company, in the sum of fifty thousand dollars (\$50,000.00), and a motion having been made by the defendant, upon the return of said verdict, to set the same aside on the ground, among others, that it was excessive, and that the said motion having been duly heard, and after hearing F. W. Thomson, one of the defendant's attorneys, in support thereof, and Baltrus S. Yankaus, Esq., attorney for plaintiff, and Thomas J. O'Neill, Esq., of counsel for plaintiff, in opposition thereto, and due deliberation having been had thereon, it is:

Ordered, that the plaintiff, through his attorney, Baltrus S. Yankaus, Esq., file on or before May 12, 1914, with the clerk of this court, his consent in writing that the said verdict shall be reduced to the sum of thirty-six thousand dollars (\$36,000), or make some application with respect to the verdict for the amount in excess of that sum.

Enter,

THOMAS I. CHATFIELD,

Judge of the United States District Court.

Filed and entered May 8, 1914.

No. 231.

Judgment on Reduced Verdict.

[Caption.]

The above entitled action having been regularly reached for trial before Honorable Thomas I. Chatfield, district judge, and a jury on the 30th day of March, 1914, and the issues having been tried, and the jury having on the 4th day of April, 1914, rendered a verdict upon the merits in favor of the plaintiff and against the defendant for the sum of fifty thousand dollars (\$50,000.00); and the court having thereafter reduced the said verdict to the sum of thirty-six thousand dollars (\$36,000.00), and the plaintiff having in writing

consented to such reduction; and the costs and disbursements of the plaintiff having been duly taxed by the clerk of this court at the sum of ninety-nine and 80/100 dollars; it is on motion of Baltrus S. Yankaus, attorney for the plaintiff,

Ordered and adjudged that the plaintiff, Matt Yurkonis, do recover of and from the defendant, The Delaware, Lackawanna & Western Railroad Company, the sum of thirty-six thousand dollars (\$36,000.00) damages, together with the sum of ninety-nine and 80/100 dollars costs, amounting in the aggregate to the sum of thirty-six thousand and ninety-nine and 80/100 dollars, and that plaintiff have execution therefor.

Judgment signed, entered and filed, this — day of —, 1917.

A. B.,
Clerk.

No. 232.

(Another form.)

Judgment on Reduced Verdict.

[Caption.]

This cause coming on to be heard before his Honor, J. C. Pritchard, circuit judge, and a jury in the district court held at Asheville, in the state of North Carolina, and having been heard, the plaintiff at the close of the testimony took a *nol. pros.* as to the defendants, The Western North Carolina Railroad Company and Luther F. Long.

The following issues were submitted to the jury:

I. "Was the plaintiff by the negligence of the defendant railway company, as alleged in the complaint?"

II. "Did the plaintiff, Ernest Thomason, by his own negligence contribute to his injury, as alleged in the answer?"

III. "What damage, if any, is the plaintiff, Ernest Thomason, entitled to recover?"

And the jury having answered all of the issues in favor of the plaintiff; that is to say, having answered the first issue "Yes," the second issue "No," and having answered the third

issue twenty-seven thousand five hundred dollars, and having assessed the plaintiff's damages at that amount, and his honor, Judge Pritchard, having expressed the opinion that the amount of said damages, so assessed in favor of the plaintiff, is excessive, and the plaintiff having remitted of record seventeen thousand five hundred dollars of the amount of said verdict, whereby the said verdict was reduced to the sum of ten thousand dollars:

It is now, on motion of James H. Merrimon and Locke Craig, attorneys for the plaintiff, ordered and adjudged and decreed that the plaintiff, Ernest Thomason, have and recover of the defendant, the Southern Railway Company, the sum of ten thousand dollars, with interest thereon from the — day of September, 19—, together with the costs of this cause, to be taxed by the clerk.

J. C. PRITCHARD,
Circuit Judge.

No. 233.

(Another form.)

Judgment for Plaintiff upon Remitting Part of Verdict.

[Caption.]

This cause having come on to be heard before the Hon. C. D., district judge, upon the motion for a new trial heretofore made, and the briefs of attorneys for both sides relative thereto, and after due consideration thereof the court is pleased to overrule the said motion for a new trial upon all the grounds therein contained, except that of excessive verdict, and upon this ground, upon plaintiff's entering a remittitur of — dollars, making the judgment of the court stand at — dollars, the court is pleased to overrule the motion for a new trial upon that ground also.

Thereupon came the attorneys for plaintiff and enter a remittitur of — dollars as hereinbefore suggested.

It is therefore considered by the court that defendant's motion for a new trial herein be overruled and for nothing held, and that the plaintiff recover of the defendant the sum of — dollars and the costs of this cause, for which let execution issue.

No. 234.

Judgment for Plaintiff, Overruling Motion for New Trial and Settling Bill of Exceptions.

[Caption.]

This day this cause was heard upon the motion of the said defendant, for an order setting aside the verdict heretofore rendered herein and for a new trial hereof, and was argued by counsel.

On consideration whereof, the court being fully advised in the premises, doth find that said motion is not well taken and should be overruled, and that a judgment should be rendered upon said verdict.

It is therefore ordered and adjudged by the court that the motion of said defendant for a new trial be, and the same hereby is, overruled, and that the said plaintiff, A. B., recover of said defendant, The C. & D. Railroad Company, the sum of — dollars, together with his costs herein expended, taxed at \$—.

And thereupon came the said defendant, and presented to the court its bill of exceptions herein, which having been examined by the court and found in all respects to be true, and correct, is hereby approved, allowed, signed and when filed, is ordered to be made a part of the record hereof.

No. 235.**Verdict and Judgment in Ejectment.****[Caption.]**

Comes again the jury heretofore empaneled, and after hearing all the evidence, the arguments of the counsel of the respective parties, and the charge of the court, returns into court the following verdict:

That they find that the plaintiffs are the owners in fee and entitled to and in possession of the following lands situated in — county, —, to wit: [*Description of land.*]

As to the other land herein sued for, not embraced in the above descriptions, the jury finds the plaintiffs are not entitled to the same.

It is therefore considered, ordered and adjudged, that the plaintiffs do have and recover of and from the defendants severally the lands hereinbefore described, found by the verdict of the jury to belong to them in fee, and that the plaintiffs do have and retain the possession of such lands under and in accordance with their said title; and that as to the lands herein sued for, not embraced by the verdict of the jury in favor of the plaintiffs, the defendants go hence without day; and that the plaintiffs recover of the defendants all their costs herein expended, and that execution issue therefor. No costs are adjudged against the defendants, E. F. and G. H., as they have not set up any claim to the lands recovered by the plaintiffs, and the plaintiffs will pay the costs as to them, for which execution may issue.

No. 236.**[Caption.] Motion for a New Trial.**

The defendant moves that the verdict herein rendered be vacated and a new trial awarded for the following reasons:

First. Said verdict was not sustained by sufficient evidence.

Second. There was no testimony tending to sustain the verdict.

Third. Said verdict was contrary to law.

Fourth. The court erred in refusing to instruct the jury to render a verdict for the defendant.

Fifth. The court erred in refusing each of defendant's special charges, numbered respectively 1, 2, 3 and 4.

Sixth. The court erred in certain particulars of its general charge, excepted to by the defendant at the time.

Seventh. There were other errors of law appearing upon the trial, prejudicial to the defendant.

R. X.,

Attorney for Defendant.

No. 237.

Motion for New Trial by Defendant (1).

[Caption.]

Now comes defendant and moves the court to set aside the verdict of the jury and to grant it a new trial herein for the following reasons:

First. Court erred in overruling defendant's motion to instruct the jury to find for defendant made at the close of all the testimony.

Second. Court erred in so much of its general charge to the jury as left to it to determine whether or not plaintiff was a passenger at the time of the injury, as charged, and that the duty of defendant towards plaintiff was that due a passenger, and that the care and caution to be exercised by her was that of a passenger, if they believed she was such, and each and every portion of the charge that grew out of leaving that question to the jury.

Third. The verdict of the jury is contrary to law and against the weight of evidence.

Fourth. The verdict is excessive.

R. Y.,

Attorney for Defendant.

(1) The defendant waives his exception to motion to instruct for defendant at close of plaintiff's evidence by putting in his case. *Columbia, etc., R. Co. vs. Hawthorne*, 144 U. S. 202.

No. 238.

Motion for New Trial Where Court Instructed Jury to Find for Defendant.

[*Caption.*]

And now comes the said plaintiff, by R. S., his attorney, and moves the court now here to set aside the verdict and judgment in said cause and grant a new trial therein for the reason that:

The court erred in instructing the jury that the plaintiff can not recover under the proofs in this cause and directing a verdict for the defendant.

This motion is based on the records and files in said cause and the testimony taken on the trial thereof.

R. X.,

Attorney for Plaintiff.

No. 239.

Order Setting Aside Order Sustaining Motion for New Trial.

[*Caption.*]

The order of the court heretofore made granting the motion for a new trial is now set aside for the reason that counsel for the plaintiff misunderstanding the order of the court as to the time for hearing the motion for a new trial were not present. Leave is given to counsel for both sides to submit briefs within ten days from this order. Briefs of counsel shall be served upon opposing counsel.

No. 240.**Order Sustaining Motion for New Trial and Ordering a New Trial.**

[*Caption.*]

This cause being heard on the motion of the defendant to set aside the verdict of the jury heretofore rendered herein and for a new trial, for reasons set forth in said motion, which was argued by counsel and the court being fully advised in the premises is of the opinion and does hereby sustain said motion. The verdict is accordingly vacated and a new trial granted.

No. 241.**Order Overruling Motion for New Trial and Judgment for Defendant upon the Verdict.**

[*Caption.*]

This cause again came on to be heard upon the motion of the plaintiff for a new trial of this cause, for reasons set forth in said motion, and was argued by counsel and the court being fully advised in the premises do overrule said motion, to which ruling of the court, said plaintiff, by his attorneys, excepts.

It is thereupon considered and adjudged by the court that said defendant go hence without day and recover of the said plaintiff its costs herein expended, taxed at \$—— and that said plaintiff pay his own costs, to which judgment of the court, said plaintiff, by his attorneys, excepts. And for good cause shown, leave is given the plaintiff to prepare and have allowed and signed his bill of exceptions in sixty days from this date.

No. 242.**Motion for New Trial (1).**

[Caption.]

And now comes defendant, by its counsel, and moves the court to set aside the verdict heretofore rendered herein, and to grant a new trial in this cause, and for grounds for said motion presents and shows to the court the following, to-wit:

1. The court admitted on the trial improper evidence on the part of the plaintiff.
2. The court refused to admit proper evidence offered by the defendant.
3. The court improperly refused and denied the defendant's motion for peremptory instruction at the close of the plaintiff's evidence, and refused to give to the jury the peremptory instruction asked by the defendant.
4. The court improperly denied the defendant's motion for peremptory instruction at the close of all the evidence and refused to give to the jury the peremptory instruction offered by the defendant.
5. The court gave improper instructions to the jury.
6. The verdict was contrary to the law.
7. The verdict was contrary to the evidence.

CHICAGO & NORTH WESTERN RAILWAY COMPANY,

By A. B.,

Its Attorney.

(1) See No. 236.

No. 243.**Motion for a New Trial, and Order Overruling, and Judgment (1).**

[Caption:]

Now comes the defendant in the above entitled cause and moves the court to set aside the verdict of the jury herein and grant it a new trial of said cause for the following reasons:

1. The court committed error in overruling the defendant's objection to the introduction of any testimony under the peti-

tion, interposed at the beginning of the trial, to which ruling defendant duly excepted at the time.

2. The court committed error in the exclusion of competent, relevant, material and proper evidence offered on behalf of the defendant, to which action of the court in excluding such evidence the defendant duly excepted at the time.

3. The court committed error in admitting incompetent, irrelevant, immaterial and improper evidence offered on behalf of the plaintiff over the objections and exceptions of defendant duly made at the time.

4. The court committed error in overruling the demurrer to the plaintiff's evidence offered and filed on behalf of the defendant at the close of plaintiff's case, to which action and ruling of the court the defendant duly excepted at the time.

5. The court committed error in refusing to give to the jury the peremptory instruction requested by and on behalf of the defendant at the close of the entire case to which action of the court in refusing to give said peremptory instruction defendant duly excepted at the time.

6. The court committed error in the refusal to give to the jury of each and every of the instructions requested by and on behalf of the defendant and refused by the court being instructions numbered 1, 4, 5, 8, 9, 10, 12, to which action of the court in refusing to give said instructions and in the refusal to give each of them defendant duly excepted at the time.

7. Because the verdict is against the weight of the evidence.

8. Because the verdict is against the law and the evidence.

9. Because under the pleadings and all of the evidence in the case the verdict should be in favor of the defendant.

10. Because the verdict is the result of bias, passion and prejudice upon the part of the jury:

A. B. and C. D.,
Attorneys for Defendant.

(1) See No. 241.

No. 244.**Order Overruling Motion for New Trial and Judgment (1).**

[*Caption.*]

Now on this 26th day of June, A. D. 1913, this cause come on for decision upon the motion of the defendant for a new trial, the same having been heretofore submitted to the court and taken under advisement, and the court being fully advised in the premises:

It is ordered, adjudged and decreed that said motion be and the same hereby is overruled and denied, to which ruling of the court the defendant excepted and excepts.

Thereupon, it is by the court ordered, adjudged and decreed that the plaintiff, Fred Harvey, do have and recover of and from the defendant, United Kansas Portland Cement Company, the sum of five thousand dollars (\$5,000.00), and his costs herein expended to be by the clerk taxed; and this judgment shall bear interest at the rate of six per cent. per annum from the date of the rendition thereof, to which judgment the defendant excepted and excepts.

It is further ordered that the defendant be granted until the first day of November, 1913, to prepare and present for settlement bill of exceptions.

(1) See No. 241.

No. 245.**Order Overruling Motion for New Trial, Motion in Arrest, and Judgment.**

[*Caption.*]

This cause having heretofore come on to be heard upon the motion of the defendant for a new trial and the court having considered said motion and being now fully advised in the premises, it is ordered that the motion for a new trial be and the same is hereby overruled, to which ruling said defendant excepts.

It is further ordered, that the motion of said defendant in arrest of judgment be and the same is hereby overruled, to which ruling said defendant excepts.

It is thereupon considered and adjudged by the court that said plaintiff do have and recover of and from said defendant, Kawin and Company, the sum of \$11,119.47, in damages, so as aforesaid assessed by the jury herein, together with its costs to be taxed and that execution issue therefor.

It is further ordered, that said defendant present and file its bill of exceptions in sixty days from this date and a bond in the sum of \$15,000.00 with security to be approved by the clerk in thirty days from this date.

No. 248.

Entry on Motion for New Trial (1).

[Caption.]

This day came the parties, and this cause came on to be heard upon the motion of the defendants to set aside the verdict heretofore rendered herein, and for a new trial, and the same was argued by counsel; and the court, being fully advised in the premises, is of the opinion that as to the defendants, S. M. and G. H., as receivers of The C. & D. Railway Company, the same should be, and is hereby, overruled; and the court, on motion of said defendants' counsel, fixed the time in which said defendants may prepare and file their bill of exceptions on or before fifty (50) days from this date. And as to the defendant, The S. R. Belt Railway Company, the court is of the opinion that said verdict is contrary to law and the evidence, and said motion for a new trial as to said defendant is therefore allowed, and said verdict set aside and the judgment heretofore entered in this case on said verdict against said The S. R. Belt Railway Company is hereby vacated, and said defendant dismissed.

(1) Taken from Herrick et al. Receiver v. Kerr. (Not reported.)

No. 247.**Petition for Extension of Time within which to Make Motion
for New Trial.**

[Caption.]

To the Honorable Edward T. Sanford, Judge:

Your petitioner, H. H. Shelton, respectfully represents to the court that he has been employed in the above case to represent the defendants in a proposed appeal of this case to the United States Circuit Court of Appeals, Sixth Circuit; that petitioner did not appear in the case in the trial before this honorable court, and he is, therefore, not as familiar with the record as he would otherwise be. A verdict was rendered against the defendants on Monday, October 11, 1915, and, under rule 15 of your honor's court, a motion for a new trial must be filed not later than October 16, 1915. The proceedings in your honor's court were stenographically reported, but the stenographer will be unable to furnish your petitioner with a copy thereof until Saturday, October 16. Petitioner, in preparing said motion for a new trial, will be unable to comply with the rules of your honor's court covering the matter to be set forth in said motion, where the matter objected to involves the admission or exclusion of evidence because, until he receives said stenographic report he will be unable to set forth in said motion the evidence admitted or excluded, to the court's action concerning which objection is made.

Petitioner further states, however, that he will use his best efforts to have said motion filed within the prescribed time, and he further states that, as he now believes, said motion will not involve to any appreciable extent the facts in the case, but that said motion will raise questions of law. For that reason petitioner believes that it will not greatly inconvenience the court in granting an extension of time within which to file said motion.

Petitioner has been engaged in trying other cases in your honor's court since his employment in this case and only reached his office last night. He is compelled to go to Nashville, Tennessee, today, and will probable be detained there until Friday.

Petitioner, therefore, asks that, in the event he is unable to file his said motion for a new trial on or before October 16, 1915, he be given five days additional time within which so to do.

H. H. SHELTON,

[*Affidavit.*]

No. 248.

Entry of Trial in Progress; Verdict for Defendant by Direction of Court.

[*Caption.*]

This day again came the parties by their attorneys, and also came the jury heretofore impaneled and sworn herein, and the trial proceeded. And the said jury having heard all the evidence adduced on behalf of the plaintiff and a part of the evidence adduced on behalf of the defendant, were directed by the court to find for the plaintiff. And now come said jury with their verdict in writing, which verdict reads and is in the words and figures following, to-wit: "In the district court of the United States, northern district of Ohio, eastern division. Manuel Llera, Plaintiff, vs. The Canton-Hughes Pump Company, Defendant. No. 8035, Law. We, the jury on the issue joined, find for the plaintiff, and do assess his damages in the sum of forty-three hundred seventeen 16-100 dollars (\$4,317.16). J. W. Baker, Foreman."

It is, therefore, considered and adjudged by the court, that said plaintiff recover of said defendant, the sum of forty-three hundred and seventeen and 16-100 dollars (\$4,317.16), so as aforesaid assessed by said jury, together with his costs herein expended, taxed at \$——, and that said defendant pay its own costs.

No. 249.**Affidavit in Support of Motion to Set Aside a Verdict Reached by Improper Method (1).**

[Caption.]

D. J. McDonald, being duly sworn, in addition to the affidavit heretofore filed in support of his motion to set aside the verdict of the jury, says:

That one of the jurors who tried this case stated to this affiant, since the trial, that when the jury retired to the jury room for the consideration of the case, that the foreman, Dr. Gillespie, proposed to the jury that each juror write down on a piece of paper the amount he thought the plaintiffs were entitled to recover and that the amounts be added together and then divided by twelve and let the result be the amount the jury should return as their verdict; that the foreman stated that he had done this in a number of cases wherein he was juror; that this method was fair and thereupon the proposition of the foreman was agreed to by the jury and each juror wrote the amount he thought the plaintiffs were entitled to recover upon a slip of paper and put it in a hat; that thereupon the slips were taken out of the hat and the amounts called out and as the amounts were called it was observed that three of the jurors had written down the amount of \$5,000, as being the amount in their opinion the plaintiff *was* entitled to recover; that the jury thereupon objected stating that this could not be done, whereupon the jurors who had voted for \$5,000 each, or some of them, stated that they and each of them had as much right to vote as much above \$4,000, the amount sued for, as the other jurors had to vote for amounts less than the amount sued for; that the various amounts were finally added up and divided by twelve and there was dissatisfaction; that it was at least three quarters of an hour after the calculation had been made before all the jury would consent to stand by the bargain they had made and return the amount figured out, or quotient verdict, as their verdict in this case; that said juror stated to this affiant that he would never have consented to go

into the agreement had he known or thought that any of the jury would have put down an amount over \$4,000; that after the calculation had been made and the amount found to be so high, there was quite a discussion about the matter and certain jurors who voted in favor of large amounts insisted that the jury should be bound by the agreement and not try to kick out of the proposition.

That another juror had stated since the trial, to two gentlemen of character, that the jury agreed upon the manner of arriving at their verdict in the manner hereinabove stated; that said juror stated that he voted for \$5,000, and did all he could for the plaintiffs, and that when the amount was figured out, some of the jurors objected and tried to get out of it, but that he insisted upon the verdict.

That the jurors refuse to file an affidavit in this case but state that they are willing to testify to the facts hereinbefore alleged, provided the court thinks it proper for them to do so.

D. J. McDONALD.

Sworn to and subscribed before me this the 15th day of January, 1912.

A. R.,

Deputy Clerk.

(1) Granting a new trial for the misconduct of the jury is in the discretion of the court. *Buckeye Powder Co. v. DuPont Co.*, 223 Fed. 881.

The testimony of a juror may not be received to prove misconduct of himself or his colleagues, and the conformity act does not apply in such case. *McDonald v. Pless*, 238 U. S. 264, 59 L. Ed. 1300.

No. 250.

Extract from Charge, on Weighing of Testimony.

When you come to consider the evidence of the witnesses, you are the exclusive judges of the weight of the evidence and the credibility of the witnesses and the facts proven. You should take into consideration, of course, the interest any witness has in the result of the litigation; you should take into

consideration his manner and demeanor while testifying on the stand; his apparent fairness or lack of fairness; his knowledge of the situation, as shown by the testimony, or his lack of knowledge, and all the other facts and circumstances which tend to give weight to or detract from his testimony. If, in any matter, you believe any witness has wilfully testified falsely concerning any material matter, then it is your privilege to disregard the entire testimony of any such witness, or you can give it credence where you think it is entitled to belief or is corroborated, and lay aside the remainder.

No. 251.

Writ of Replevin (1).

The United States of America,
 — District of —, ss.

The District Court of the United States.

| | | | |
|-------------------|---|---------|-------|
| A. B., Plaintiff, | } | At Law. | No. — |
| v. | | | |
| C. D., Defendant. | | | |

The President of the United States of America to the Marshal
 of the — district of —, Greeting:

You are commanded to take [*here describe the property to be taken*] from the possession of the defendant, C. D., and deliver the same to the plaintiff, A. B., upon A. B. giving the undertaking required by law.

You will make due return of this order on or before the
 — Tuesday of —, 1894.

[*Add teste according to the court issuing the writ.*]

(1) A proceeding in the nature of a replevin proceeding is authorized by the copyright act, 35 Stat. L., 1075, and the earlier statute on the same subject, R. S. U. S., Sec. 4965. Section 25 of the present copyright act deals with infringements and is amended in 37 Stat. L. 489; this together with the rules prescribed by the supreme court for its enforcement, provides generally that when in an infringement pro-

ceding an affidavit and bond have been filed with the clerk and approved, the clerk shall issue a writ to the marshal directing him to seize and hold the copies mentioned in the affidavit, and the marshal shall seize them and serve a copy of the affidavit, bond and writ upon the defendant.

No. 252.

Return of Marshal on above Writ of Replevin.

—, 1894. I have this day executed the foregoing order of delivery, by taking the property therein mentioned: ascertaining by the oaths of E. F. and G. H., two responsible persons, the value thereof, which is — dollars: delivering the same to plaintiff, A. B. having executed to the defendant a written undertaking in the sum of \$—, with S. L. and A.

L. as sureties; and by serving a copy of this order on C. D., said defendant.

[See schedule and undertaking hereto attached.]

Marshal's Fees.
 Copy
 Service
 Mileage
 Writing bond
 Inventory
 Writing ap. report
 Sum. and swear. ap.
 Removing property
 Caring for property
 Appraisers' fees

H. C.,
 United States Marshal for the
 — district of —.

No. 253.

Replevin Bond.

Know all men by these presents, that we, the A. B. Company, a corporation organized under the laws of the state of —, and doing business in the county of —, as principal and S. R. and W. B. as sureties, both of the city of —, are held and firmly bound unto R. P., United States marshal, for the — district of —, in the sum of — dollars, lawful money to be paid to the said marshal, or his assigns, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors and administrators jointly and

severally, firmly by these presents. Sealed with our seals,
Dated the — day of —, A. D. —.

The condition of this obligation is such that if the above bounden, the A. B. Company, shall prosecute to effect a certain suit in replevin which it has commenced in the District Court of the United States for the — district of —, — division, against C. D. and the E. F. Company, defendants, for taking and unjustly detaining the following described goods and chattels, to wit: [*Here specify property.*]

And if the said defendants shall recover judgment against it in the said action, then if the said A. B. Company shall return the same property, if return thereof be adjudged, and shall pay to the defendants all such sums of money as may be recovered by the said defendants against it in the said action, then the above obligation to be void, otherwise to remain in full force and virtue.

[*Seal.*]

A. B. Company,
By K. S., Prest. [*Seal.*]
S. R. [*Seal.*]
W. B. [*Seal.*]

State of —,
County of —, ss.

S. R. and W. B., the sureties in the foregoing bond, being duly sworn, each for himself, says that he is worth the penal sum in said bond named, over and above all debts, liabilities and exemption.

S. R.,
W. B.

Subscribed and sworn to before me this — day of —,
A. D. —, F. D., Notary Public,
[*Seal.*] In and for — County.

No. 254.

Oath of Appraisers of Goods Taken on Writ of Replevin.

[*Caption.*]

You do solemnly swear that you will, according to your best judgment make a true appraisement of the goods and

chattels taken by me and now in my custody, by virtue of a writ of replevin now in my hands, issued out of the District Court of the United States for the ——— district of ———, at the suit of the A. B. Company as plaintiff, against C. D.; so help you God.

A. F.,

C. H.

Subscribed and sworn to before me this ——— day of ———,
A. D. ———.

A. A. J.,

Deputy United States Marshal.

No. 255.**Report of Appraisers.**[*Caption.*]

We, the undersigned, disinterested persons, residing in the county of ——— and state of ———, having first been duly sworn by the deputy United States marshal for the ——— district of ———, do make a true appraisalment of all the goods and chattels above described and so replevied as follows, to-wit: [*Here specify property appraised*], at the sum of ——— dollars (\$——).

A. F.,

Dated, ———, A. D. ———.

C. H.

Appraisers.

No. 256.**Fieri Facias.**

The United States of America,

——— District of ———, ss.

The President of the United States of America to the Marshal
of the ——— District of ———, Greeting:

You are hereby commanded, that of the goods and chattels, and for want thereof, then of the lands and tenements of C. D. in your district, you cause to be made the sum of ——— dollars damages, and ——— dollars costs of suit, which, by the judgment of the district court of the United States for the

— district of —, at the — term thereof, in the year 1894, A. B. recovered against the said C. D., with interest thereon from the — day of —, 1894, until paid, together with the further sum of — dollars, costs of increase on said judgment; and also the costs that may accrue on this writ.

And have you the said moneys in the said district court, before the judges thereof, at the city of —, in said district, within sixty days from the date of this writ, to be paid to the persons entitled to receive the same. And have you then and there this writ.

[Add teste according to court issuing the writ.]

No. 257.

Vendi Exponas.

The United States of America,

— District of —, ss.

The President of the United States of America to the Marshal
of the — district of —, Greeting:

You are hereby commanded to expose to sale the following described — property, viz.: [*Set forth the description*], which, according to command, you have levied on, and which remains in your hands unsold, as you have certified to the judges of the district court of the United States for the — district of — aforesaid, to satisfy a judgment of said court, rendered at the — term thereof, in the year —, in favor of A. B. against C. D. for the sum of — dollars, and — dollars costs for suit, with interest thereon from the — day of —, 1894, until paid, together with the further sum of — dollars, costs of increase on said judgment; and also the costs that may accrue on this writ. And if, in your opinion, the property remaining in your hands, not sold, will be insufficient to satisfy the judgment aforesaid, then you are hereby commanded that you levy the same upon other goods and chattels, lands and tenements, or either, as the law shall permit,

being the property of the judgment debtor; which, together with the property on hand not sold as aforesaid, will be sufficient to satisfy the judgment aforesaid. And have you the said moneys in the said district court, before the judges thereof, at the city of —, in said district, on the third Tuesday in the month of — next, to be paid to the persons entitled to receive the same. And have you then and there this writ.

[Add teste according to the court issuing the writ.]

No. 258.

Rule to Show Cause.

In the District Court of the United States,
— District of —.

| | | |
|-------------------|---|-------|
| A. B., Plaintiff, | } | No. — |
| vs. | | |
| C. D., Defendant. | | |

The President of the United States of America, to C. D., —:

You are hereby cited and admonished to be and appear before our district court of the United States, within and for the — district of —, on —, the — day of —, 1894, at 10 o'clock a. m., to show cause, if any you know or have, why *[here set forth the grounds for the rule, as, you should not be attached for contempt of court in that, etc.]*. And it is ordered that the marshal of this district make legal service and due return of this rule on or before the appearance day above noted.

[Add teste according to the court issuing the writ.]

No. 259.

Undertaking in Attachment.

The United States of America,
— District of —, ss.

Whereas, A. B. has commenced a civil action against C. D. in the district court of the United States for the — district

of — to recover the sum of — dollars; and, whereas, the said A. B. has applied to the clerk of said court, by filing the necessary affidavit, for an order of attachment, to be issued in said action, against the said C. D. Now, therefore, we, A. B., E. F., and G. H., hereby undertake to the said C. D. in the sum of — dollars, that the said A. B. shall pay the said C. D. all damages which the said C. D. may sustain by reason of said attachment if the order should have been wrongfully obtained.

Dated at — this — day of —, 1894.

A. B. [Seal.]

E. F. [Seal.]

G. H. [Seal.]

[Add acknowledgment and justification of sureties.]

No. 280.

Writ of Attachment.

The United States of America,

— District of —, ss.

The President of the United States of America, to the Marshal of the — District of —, Greeting:

Whereas, A. B. has this day, on the necessary affidavit being filed, obtained an order of attachment against C. D. in a certain action of [*name of action*] now pending in the district court of the United States, for the — district of —, wherein the said A. B. is plaintiff, and the said C. D. is defendant, to recover of the said defendant the sum of — dollars.

Now, therefore, you, the said marshal, are hereby commanded to attach and safely keep the lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, moneys, and effects of the said C. D., defendant, in your district, not exempt by law from being applied to the plaintiff's claim, or so much thereof as will satisfy to the said plaintiff his claim for — dollars, and one hundred dollars, the probable cost of this action.

And of this order of attachment, and of your proceedings thereon, you will make due return on the — day of —, 1894.

[*Add teste according to the court issuing the writ.*]

No. 261.

Writ of Attachment for Contempt.

The United States of America,
— District of —, ss.

The President of the United States of America to the Marshal
of the — District of —, Greeting:

We command you that you attach C. D. so as to have his body before our district court of the United States, within and for the district aforesaid, at the court rooms in the city of —, on the — day of —, 1894, then and there to answer of a certain contempt by him lately committed against said court, in that [*set forth briefly the grounds for attachment*], and further to do and receive what our said court shall in that behalf consider.

And have you then and there this writ.

[*Add teste according to the court issuing the writ.*]

No. 262.

Scire Facias to Revive a Judgment (1).

The United States of America,
— District of —, ss.

The President of the United States to the Marshal of the
— District of —, Greeting:

Whereas, A. B., citizen of the state of —, lately in our district court of the United States for the — district of —, before our judges of our said court at —, to-wit: on the — day of —, 18—, by the consideration of our said court, recovered against C. D. a judgment for the sum of —

dollars for his debt, as well as fifty dollars for his costs and charges by him about his suit in that behalf expended, whereof the said defendant is convict, as appears to us of record. And whereas, by the insinuation of the said A. B., we have in our said court understood, that although the judgment in form aforesaid be given, yet execution thereof still remains to be done, whereof he besought us to grant unto him in his behalf a proper remedy, and we, being willing that what is right and just should be done herein, do command you, the said marshal, that, by good and lawful men of your bailiwick, you give notice to the said C. D. that he be and appear before our judges at —, at our said court, there to be held for the district aforesaid, the — Monday of — next, to show if anything he can say why the said judgment should not be revived, and the lien continued, and why the said plaintiff ought not to have his execution against C. D. for debt, interest and cost aforesaid, according to the force, form and effect of the recovery aforesaid, if he shall think fit. And further to do and receive whatsoever our said court shall then and thereof and concerning him in this behalf consider. And have you then and there the names of those by whom you shall make known to — and this writ.

[*Add teste.*]

(1) The rule of practice is that of the state in which proceedings are had. See *McKnight v. Craig's Adm.*, 6 Cranch 183 (187); *Walden v. Craig*, v. 14 Pet. 147 (151); *Kenosha, etc., R. R. v. Sperry*, 3 Biss. 309.

Judicial Code, Sec. 262, makes this writ issuable by the supreme and district courts.

For a discussion of the nature, effect and service of this writ, see *Collin County National Bank v. Hughes*, 152 Fed. 414, 81 C. C. A. 556.

R. S. U. S., Sec. 955, provides for the bringing in of an executor or administrator of a deceased defendant or plaintiff by scire facias. In *re Connaway*, Recr., 178 U. S. 421, 44 L. Ed. 1134.

See *Foster's Federal Practice*, 5th ed., pages 1527 to 1530.

In a writ of scire facias issued upon a defaulted recognizance in a criminal proceeding, a recital of all proceedings thereon was made, and the order for service of the writ ran as follows:

"You are hereby commanded to make known to said — and — that they and each of them be and appear before the judge of the

district court of the United States in and for said eastern division of the southern district of Georgia at a court to be holden in the city of Savannah on the second Tuesday of May, 1902, that being the May term, 1902, of said court, then and there if they know or have anything to say for themselves why the said sums of money should not be levied for the said United States of America, to-wit, the sum of — of the goods and chattels, lands and tenements of the said —, and the sum of — of the goods and chattels, lands and tenements of —, to be levied according to the said recognizance if it to them shall seem expedient, and have you then and there this writ. Witness, etc.

———— Clerk.

Sealed with the seal of the court."

The nature, uses and effect of this writ are extensively discussed in *Kirk v. U. S.*, 124 Fed. 324, and *S. C.* 131 Fed. 331, and as to service it was held that it could not be made outside of the district of the court issuing it. On a recognizance the writ is an original one, but in a suit to revive a judgment the writ is in continuation of the same suit in which the judgment was decreed, and the court may entertain jurisdiction of the revivor proceeding although it is between parties resident in the state, as where an assignee of the judgment brought the writ to revive it. *Wonderley v. Lafayette County*, 77 Fed. 664, 92 Fed. 313.

No. 263.

Notice of Taxation of Costs.

[Caption.]

Y. & Y.,

Attorneys for Defendant [or, Plaintiff].

Please take notice that the bill of costs in the above entitled cause will be taxed before the clerk of said court at his office at —, in the city of —, on the — day of —, at ten o'clock in the forenoon of that day as follows, to-wit:

Marshal's fees,\$—.

Clerk's fees,\$—.

Commissioner's fees,\$—.

Attorney's fees,\$—.

X. & X.,

Attorneys for Plaintiff [or, Defendant].

Dated —.

Service accepted, etc.

No. 264.

Cost Bill.

A. B., Plaintiff, } District court of the United States for
 vs. } the ——— district of ———.
 C. D., Defendant. } No. ———.

| CLERK'S FEES (1). | @ | PLAINTIFF. | | DEFEND'T. | |
|--|------|------------|---|-----------|---|
| Entering appearance of ——— parties, . | .15 | . | . | . | . |
| Drawing, filing and ack. cost bond, . . | . | . | . | . | . |
| Issuing ——— process (except for witness), | 1.00 | . | . | . | . |
| Indorsing cause of action on ——— writs, | .15 | . | . | . | . |
| Issuing ——— subpoenas for witnesses, . | .25 | . | . | . | . |
| Entering marshal's return on ——— writs; | . | . | . | . | . |
| —— folios, | .15 | . | . | . | . |
| Filing ——— papers, | .10 | . | . | . | . |
| Indorsing certificate of opening ——— | . | . | . | . | . |
| depositions, | .15 | . | . | . | . |
| Copying ——— folios, | .10 | . | . | . | . |
| Certificate and seal to ——— copies, . . | .35 | . | . | . | . |
| Taking ——— affidavits, | .10 | . | . | . | . |
| Certificate and seal thereto, | .35 | . | . | . | . |
| Indorsing papers; ——— folios, | .15 | . | . | . | . |
| Entering ——— folios on journal, | .15 | . | . | . | . |
| Drawing ——— bonds; ——— folios, | .15 | . | . | . | . |
| Taking ——— ack's under seal, | .45 | . | . | . | . |
| Swearing ——— sureties to bond, | .10 | . | . | . | . |
| Certificate and seal thereto, | .35 | . | . | . | . |
| Swearing witnesses ——— to testify, | .10 | . | . | . | . |
| Swearing ——— witnesses to att. and | . | . | . | . | . |
| travel, | .10 | . | . | . | . |
| Entering ——— folios claims of witnesses, | .15 | . | . | . | . |
| Issuing ——— certificates of attendance, . | .10 | . | . | . | . |
| Entering ——— folios complete record, . | .15 | . | . | . | . |
| Making dockets, indexes, etc., \$1.00, | . | . | . | . | . |
| \$2.00, \$3.00, | . | . | . | . | . |
| Commission on amount received, \$ | . | . | . | . | . |
| Making copy of cost bill; ——— folios, . | .10 | . | . | . | . |
| GENERAL STATEMENT. | | | | | |
| Clerk, | . | . | . | . | . |
| Marshal, | . | . | . | . | . |
| Docket fee, | . | . | . | . | . |
| Attorney's fees on depositions, | . | . | . | . | . |
| Plaintiff's notary's fees on depositions, | . | . | . | . | . |
| Defendant's notary's fees on deposi- | . | . | . | . | . |
| tions, | . | . | . | . | . |
| Defendant's witnesses' fees, | . | . | . | . | . |
| Plaintiff's witnesses' fees, | . | . | . | . | . |
| TOTAL, | . | . | . | . | . |

(1) See R. S. Sec. 828.

No. 265.**Stipulation Extending Time to Settle Bill of Exceptions (1).**

[Caption.]

Whereas, the settlement of the bill of exceptions in the above entitled cause has been heretofore noticed before the Hon. H. H., for —, the — day of —, A. D. —, it is hereby stipulated by and between the attorneys for both parties hereto that the same be adjourned till —, the — day of —, 190—.

Dated —.

R. Y.,

Attorney for Defendant.

R. X.,

Attorney for Plaintiff.

(1) Such stipulation should be filed on or before the date noted for settling the bill of exceptions.

No. 266.**Order Enlarging Time for Filing Bill of Exceptions (1).**

[Caption.]

This day came the defendants and made application for an order extending the time for the signing, allowance and filing of the bill of exceptions herein, and cause being shown therefor, such application is granted, and the time for the signing, allowance and filing of the bill of exceptions of the above named defendants is extended for ten days from and after the last day of the present term of court, to wit, from and after —.

(1) This order should be made during the trial term. See *Bank vs. Eldred*, 143 U. S., 298; *Merchants' Ins. Co. vs. Buckner*, 39 C. C. A., 19, S. C. 98 Fed. 222.

No. 267.**Order Permitting Defendants to File Bill of Exceptions after Time Allowed.**

[Caption.]

On motion of Denegre and Blair and Victor Leovy, counsel for defendant, and on suggesting to the court that at the hearing of this cause counsel for defendant presented a motion for thirty days' time in which to prepare, settle and file bills of exception, and it was thereupon informally agreed upon between all counsel and the court that all counsel should have all the time that might be reasonably proper for that purpose; and that no harm should be suffered in that regard by delays to the cause; and considering that thereafter the hearing of the motion for new trial was continued indefinitely on account of absence of opposing counsel; and for good and valid reasons, including necessary absences of the court, has only lately been refixed; and considering that said motion has not yet been heard nor judgment entered and that the whole matter is still within the control of the court and the presentation of bills of exception is still timely under the law; and considering the presentation of such bills at this time by said counsel and the consent of opposing counsel in open court, it is ordered that the counsel for defendant be now permitted to present his bills of exception taken at the trial for settlement as of date of trial.

A. B.,
D. J.

No. 268.**Order Permitting Bill of Exceptions to be Prepared, Agreed To and Settled, after Term.**

[Caption.]

It is, by consent of the parties hereto, ordered that The Southern Railway Company have 18 days from the adjourn-

ment of this court in which to prepare and file with the clerk of this court formal bills of exceptions in this case, and that the plaintiff shall have 5 days thereafter in which to file with said clerk his objections and amendments thereto. The clerk shall then forthwith forward to his honor, J. C. Pritchard, circuit judge, said bill of exceptions and amendments thereto, if there be any, for final settlement of the same at such time and place as said judge shall designate, provided that the parties hereto or their attorneys shall have at least 3 days' notice of the time and place fixed by said judge for the final settlement by him of said bill of exceptions. Such bill of exceptions, when settled, shall be taken and deemed as filed in apt time and during this term, shall be dated as of this term, and in all respects shall be considered the bills of exceptions in this case.

J. C. PRITCHARD,
Circuit Judge.

[Date.]

No. 269.

Bill of Exceptions—Introduction.

[Caption.]

Before —, District Judge, without a jury, at common law.

This action was originally commenced in the supreme court of the State of New York, Oswego County, by the issuance of a summons dated March 17, 1911, which together with a copy of the complaint was served on the defendant, American Bonding Company, of Baltimore, on or about March 27, 1911, which thereafter and on or about April 11, 1911, duly appeared by Willard P. Jessup, its attorney. On or about April 11, 1911, the defendant, Baker Motor Vehicle Company, appeared voluntarily by Willard P. Jessup, its attorney. Thereafter and on

the 15th day of April, 1911, this action was duly removed to the United States district court for the northern district of New York on petition of both defendants. On or about May 8, 1911, a demurrer was served by both defendants. The issue of law raised by said demurrer thereafter duly came on to be heard and was overruled by an order entered September 12, 1911.

The answers of the defendant, Baker Motor Vehicle Company, and the defendant, American Bonding Company of Baltimore, were served on October 21, 1911.

The case duly came on to be tried. Plaintiff appeared by —, his attorney, and —, his counsel, and the defendants appeared by —, their attorney, and —, their counsel.

In the course of the trial counsel for the defendant did take and allege sundry exceptions (1) to the rulings of the court which said exceptions are hereinafter set forth herein.

The trial of this case was begun on September 12, 1912.

A jury having been duly waived by all parties the case was opened to the court on behalf of the plaintiff, and thereupon the parties to maintain the issue on their part, introduced oral and documentary testimony and evidence as follows:

Here follow the introduction of exhibits and the objections thereto and the rulings of the court thereon, and exceptions to said rulings, and the same with respect to oral testimony, and exceptions to rulings of the court on instructions requested and objections to charges given, and so forth.

(1) The office of the exception is to challenge the correctness of the rulings or decisions of the trial court promptly when made to the end that the rulings may be corrected by the court itself, if deemed erroneous, and to lay the foundation for their review, if necessary, by the proper appellate tribunal. In the federal courts the taking of an exception immediately on the making of the ruling is indispensable to a review by the appellate court. *Board of Commissioners v. Home Savings Bank*, 200 Fed. 28, 118 C. C. A. 256.

No. 270.**Bill of Exceptions (1).**

The District Court of the United States,
 ——— District of ———, ——— Division.

| | | | |
|-------|---|----------|---------------------|
| A. B. | } | No. ———. | Bill of exceptions. |
| vs. | | | |
| C. D. | | | |

Be it remembered, that on the trial of this cause in this court, at the ——— term, A. D. ———, of said court, the Hon. C. D., judge, presiding, when the following proceedings were had, to-wit: A jury was impaneled and sworn according to law, and thereupon the plaintiff, to sustain the issue upon his part, offered the testimony of the following witnesses as his evidence in chief: [*Here set forth the plaintiff's testimony at length.*]

At the close of the foregoing evidence in chief offered by the plaintiff, the counsel for the defendant moved the court to direct a verdict for the defendant, submitting the same and the reasons therefor in writing in the words and figures following: [*Here set out the motion to instruct for the defendant.*]

The court overruled said motion, stating that defendant could rely upon the same at the close of its evidence, to which ruling of the court counsel for the defendant then and there excepted.

The defendant, to sustain the issue upon its part, then, through its counsel, offered the testimony of the following witnesses as his evidence in chief: [*Here set out the defendant's testimony at length.*]

This was all the evidence in the case, and at its conclusion the defendant again renewed its said motion in writing, as above printed, to direct a verdict in its favor, and after the argument of counsel, both of the plaintiff and defendant, to the court upon said motion, and also to the jury upon said case upon its merits, the said motion was by the court, in its charge

to the jury, overruled, and to which action of the court in overruling same the defendant then and there, by the permission of the court, excepted. After said argument the court charged the jury as follows:

[Here set out the charge of the court to the jury, the exceptions thereto and the special requests to charge, indicating whether given or refused and exceptions taken and allowed.](2)

The jury thereupon retired to consider their verdict, and having returned into court a verdict for the plaintiff [*or the defendant*], the defendant [*or plaintiff A. B.*] afterwards on, to-wit: the — day of —, moved the court to set aside the said verdict and grant it a new trial.

[Set out motion for a new trial.]

Which motion for a new trial was, after argument by counsel for and against the motion, respectively, and after due consideration by the court on the — day of —, overruled.

And now, in furtherance of justice and that right may be done the defendant, C. D. [*or plaintiff, A. B.*] tenders and presents the foregoing as his bill of exceptions in this case to the action of the court, and prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record, and the same is accordingly done this the — day of —.

C. D.,

Trial Judge.

(1) In preparing a bill of exceptions counsel should be careful to observe that the grounds of exception to the admission of testimony are specifically stated. A general exception which fails to point out the grounds of exception does not furnish a proper basis for review in an appellate court. The objection that the question is irrelevant and immaterial is general and insufficient. *Merchants' Ins. Co. v. Buckner*, 110 Fed. 345; *R. R. Co. v. Hellenthal*, 31 C. C. A. 414, 88 Fed. 116; *Burton v. Driggs*, 20 Wall. 125; *Toplitz v. Hedden*, 146 U. S. 252.

The general rule as to the allowance of bills of exceptions is thus stated by Mr. Justice Gray (*Bank v. Eldred*, 143 U. S. 298, 12 Sup. Ct. 452, 36 L. Ed. 163):

"By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties, and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or to amend a bill of exceptions already allowed and filed, is at an end. *U. S. v. Breitling*, 20 How. 252, 15 L. Ed. 900; *Mueller v. Ehlers*, 91 U. S. 249, 23 L. Ed. 319; *Jones v. Machine Co.*, 131 U. S. Append. 150, 24 L. Ed. 925; *Hunnicutt v. Peyton*, 102 U. S. 333, 26 L. Ed. 113; *Davis v. Patrick*, 122 U. S. 138, 7 Sup. Ct. 1102, 30 L. Ed. 1090; *Chateaugay Ore & Iron Co., Petitioner*, 128 U. S., 544, 9 Sup. Ct. 150, 32 L. Ed. 508."

A bill of exceptions may be settled and filed at the term a motion for new trial is overruled. *Merchants' Ins. Co. v. Buckner*, 98 Fed. 222, 29 C. C. A. 19.

(2) See Supreme Court Rule 4 and C. C. A. Rule 10.

No. 271.

Bill of Exceptions (Another Form).

In the District Court of the United States for the ——— District,
of ———, ——— Division.

| | | |
|-------|---|---------------------|
| A. B. | } | Bill of exceptions. |
| , vs. | | |
| C. D. | | |

This cause came on for hearing before the Hon. C. D., Judge, etc., and a jury; present, R. X. and G. X., attorneys for the plaintiff, and R. Y. and G. Y., attorneys for defendant, when the following proceedings were had, to-wit:

[Here insert in full the stenographic report of the evidence, the charge to the jury, requests for special instructions, rulings of the court thereon, and exceptions.]

After hearing all the evidence, the argument of counsel and charge of the court, the jury retired to consider their verdict;

and returned their verdict in favor of plaintiff, assessing his damages at — dollars, upon which judgment was by the court entered up against defendant, to all of which defendant excepted.

Upon motion of defendant, the court allows defendant fifteen days within which to present and argue motion for new trial. And thereupon within the time allowed, and on the — day of —, 19—, defendant moved for new trial on the following grounds:

[Here insert motion for new trial.]

After consideration of said motion, the court overruled the same in the following language, to which the defendant excepted:

[Insert opinion overruling motion for new trial.]

Thereupon defendant tenders this its bill of exceptions to the action of the court in the various particulars therein set out, which is signed in open court, sealed and made a part of the record in this case.

This the — day of —, A. D. —.

C. D., Trial Judge.

No. 272.

Certificate of Reporter to Testimony.

[Caption.]

State of Kansas, Wyandotte County, ss:

I, E. L., the official stenographer who reported the proceedings and testimony in the trial of the above entitled cause, hereby certify that the above and foregoing is a full, true and correct transcript of all of the proceedings and testimony, both oral and documentary, offered and introduced in the trial of the foregoing action, and also of all exceptions taken and noted, together with the instructions given in the charge of

the court to the jury, and all exceptions and changes therein;
and I now certify the foregoing to be such transcript; and

In Testimony Whereof, I have hereunto signed my name at
Kansas City, Kansas, this —— day of ——, 1918.

E. L.

No. 273.

Certificate of Judge to Bill of Exceptions.

[Caption.]

Thereafter on the 4th day of October, 1912, and within the
time allowed by said United States District Court, the defend-
ant duly tendered this, its bill of exceptions herein, which
having been seen and examined by the court and counsel, is by
the court allowed and approved, and the said bill of exceptions
is signed and sealed by the Hon. John C. Pollock, the Judge
of said court, before whom said proceedings were had, and
the same is ordered by said court to be filed and made a part of
the record herein which is now accordingly done.

Given under the hand and seal of the judge of said court
before whom said proceedings were had, this 4th day of Oc-
tober, 1913.

(Copy)

(Seal)

JOHN C. POLLOCK,
Judge of the United States District Court for the District
of Kansas.

The above and foregoing bill of exceptions is hereby ap-
proved.

A. B.,
Attorney for Plaintiff.
C. D.,
Attorney for Defendant.

Let the bill be filed and the filing shown of record as of this
4th day of October, 1913.

JOHN C. POLLOCK,
Judge.

No. 274.

(Another form.)

Certificate of Judge to Bill of Exceptions.

[*Caption.*]

And forasmuch as the above and foregoing matters and things do not fully appear of record, the defendant tenders this its bill of exceptions by it reserved herein, and prays that the same may be allowed, signed and sealed by the judge of this court and filed and made a part of the record in this case, which is accordingly done this 17th day of May, A. D. 1916.

ROBERT E. LEWIS,
District Judge.

Approved:

A. B., Attorney for Plaintiff.

C. D., Attorney for Defendant.

MANDAMUS.***No. 275.****Petition for Writ of Mandamus to Compel a Municipality to Levy Tax to Pay a Judgment (1).**

The District Court of the United States for the ——— Division
of the ——— District of ———.

To the Honorable A. B., Judge of the District Court of the
United States for the Division and District aforesaid:

The petition of R. J., receiver of the Water & Electric Light
Company.

Petitioner would respectfully state that he is a resident and
citizen of the state of ———, and was, on the ——— day of ———,

* The courts of the United States derive power to issue a writ of mandamus only from the constitution and laws of the United States and not from common law. *Knox County v. Aspinwall*, 24 How. 384.

The supreme court is given power to issue this writ by R. S., Sec. 688. *Marbury v. Madison*, 1 Cranch 137; *In re Green*, 141 U. S. 326; *Ex parte Bradstreet*, 7 Pet. 646. The circuit courts of appeal by section 12 of the act of March 3, 1891, 26 Stat. L. 826. *U. S. v. Severens*, 18 C. C. A. 314, 71 Fed. 768. The circuit and district courts by R. S., Sec. 716 and the supreme court of the District of Columbia by R. S. relating to D. C., Sec. 763, as amended February 27, 1877, 19 Stat. L. 253; *U. S. v. Schurz*, 102 U. S. 394.

In no case can a court issue a writ of mandamus in the exercise of original jurisdiction but only as ancillary to some other proceeding the right of which they have acquired jurisdiction. *McIntire v. Wood*, 7 Cranch 505; *Rosenbaum v. Bauer*, 120 U. S. 450, or in the exercise of appellate jurisdiction. *Marbury v. Madison*, 1 Cranch 137; *In re Green*, 141 U. S. 326; *U. S. v. Severens*, 18 C. C. A. 314, 71 Fed. 768.

The proceedings are on the law side of the court. *Ward v. Gregory*, 7 Pet. 633; *Muhlenberg County v. Dyer*, 13 C. C. A. 64, 65 Fed. 634.

R. S. U. S., Sec. 688, is now found in the Judicial Code, Sec. 234, 36 Stat. L. 1156, giving power to the supreme court to issue writs of mandamus. R. S. U. S., Sec. 716, regarding the power of United States courts generally over the issue of writs is now found in the Judicial Code, Sec. 262, 36 Stat. L. 1162.

appointed receiver of the Water & Electric Light Company, by an order of the District Court of the United States for the

"The circuit court of appeals will not issue this writ where there is nothing to which the right to issue such a writ can be said to be an incident." *U. S. v. Sessions*, 205 Fed. 502, 123 C. C. A. 570. The same may be said of the district courts. *U. S. v. Nashville, etc., R. Co.*, 217 Fed. 254.

The practice in mandamus proceedings conforms in general to the practice in common law actions. *Cleveland v. U. S.*, 127 Fed. 667, 62 C. C. A. 393.

In *Ex parte Harding*, 219 U. S. 363, 55 L. Ed. 252, the question was whether the decision of the circuit court not to remand a case to the state court could be the subject of mandamus proceedings in the supreme court; in other words, whether by mandamus a court having asserted jurisdiction could be compelled to let go by this writ, and Chief Justice White reviewed the cases in the supreme court, reaffirming the rule that, in spite of conflicting decisions, mandamus is not the proper remedy in such case. To so use it would be to usurp the function of error or appeal, and it has many times been held that this writ can not be used for that end.

In *Ex parte Simons*, 247 U. S. 231, 62 L. Ed. 1094, the district court transferred a cause of action to the equity side of the court under an erroneous conception of the law of New York; petition was made to the supreme court for mandamus, or that being regarded as improper then prohibition or certiorari, whichever would be approved. Justice Holmes, speaking for the court, says that "it does not much matter in what form an extraordinary remedy is afforded in this case. But as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the district court to produce and to give the plaintiff her right to a trial at common law."

For the general principles governing the issue of this writ, see *Foster, Federal Practice*, 5th ed., pages 1445 to 1456, and for the general rules of practice therein, see *ibidem*, pages 1461 to 1469.

Mandamus is not a writ of right, and the petitioner must come with clean hands, as in equity. *Turner v. Fisher*, 222 U. S. 204.

A suit was brought in the United States district court for infringement of patent, of copyright, and for unfair competition, decree and accounting ordered; appeal and circuit court of appeals upheld in part and disaffirmed in part, and district court decreed accordingly and appointed a master to proceed with the accounting. Meanwhile in another circuit an opposite holding had been made as to the validity of the patent in suit, and certiorari proceedings were entertained by the supreme court; thereupon the circuit court of appeals was moved to stay accounting in the district court, but refused, be-

—— Division of the —— District of ——, pronounced in the cause of the National Construction Company against said Water & Electric Light Company and others. By said order petitioner, as receiver, was authorized to sue for the debts due said Water & Electric Light Company, and did, on the —— day of ——, by leave of said court, file a bill in said cause to collect from the city of —— the amount due from it to said Water & Electric Light Company.

After appearance and defense made by the city of ——, and on a final hearing of said cause, petitioner, as receiver as aforesaid, recovered of the city of —— the sum of —— (\$——) dollars, and the costs of said cause, as appears from a copy of said decree herewith filed as Exhibit "A," and asked to be taken as a part hereof, but not for copy.

Petitioner further states that the city of —— is a municipal corporation, chartered and existing under acts passed by the General Assembly, of the state of ——, and is situated in —— county, state of ——, and within division and district aforesaid. Under the laws of —— the real and personal property of said municipal corporation held and used for its corporate purposes is exempt from levy and sale by execution.

cause the case was beyond its jurisdiction and anyway no stay had been requested in the district court; thereupon the district court was moved on the same ground to stay the account, but refused on the theory that conditions were right for the accounting after a prolonged litigation, and it could not be expected to anticipate an adverse decision in the supreme court. Thereupon a petition for a writ of mandamus was asked, directed to both courts below to do nothing further in the case until the certiorari proceeding might be determined; it was refused, the court saying that it would not lie to the circuit court of appeals, since the case was not in that court, nor to the district court, because the writ was not intended to control interlocutory proceedings, as here, and it could not be used to suspend the action of a lower court in view of the prophesied adverse holding in a court of review. *Ex parte Wagner*, 249 U. S. 465, 63 L. Ed. —.

Mandamus may issue from the supreme court to the clerk of a district court upon refusal under order of the court, to compel him to file the record in the circuit court of appeals of a case in which the supreme court has ultimate discretionary power of review. *Ex parte Abdu*, 247 U. S. 27, 62 L. Ed. 966.

See the note on mandamus in *U. S. v. Lamont*, 39 L. Ed. 160.

But petitioner charges that said city of —, by the laws of — and its charter, is authorized through and by its board of mayor and aldermen to levy and collect taxes on all property, privileges and polls subject to taxation for state purposes, for the payment of judgments and decrees rendered against it, and it is the duty of said board of mayor and aldermen to levy and collect taxes sufficient to pay off and discharge the judgment aforesaid in favor of petitioner, and the costs adjudged against it.

Petitioner further states that in the year 189—, the board of mayor and aldermen of said city did levy a tax of — cents on the \$100 for water rent, and — cents on the \$100 for lights, collected the same, or a large part thereof, and the amount so levied and collected did become, under the contract then existing between the city of — and the Water & Electric Light Company, a fund exclusively for the payment for water and lights under said contract, the judgment aforesaid being for water and lights furnished under same contract. But notwithstanding its duty in this respect, the board of mayor and aldermen refused to pay over the amount collected of said levy, and has refused to enforce payment to itself from certain taxpayers of a considerable amount of the levy.

Petitioner further states that since the rendition in his favor of the judgment aforesaid against the city of —, he has, through his attorneys, demanded payment of the same, but the said city has failed and refused to pay any part of said judgment or the costs incident thereto, or to make any levy of taxes for that purpose.

Petitioner further states that he has also had execution issued on said judgment, and the same was, by the marshal, presented for payment to the officials of said city, but payment of same was refused, and it has been returned *nulla bona*.

Petitioner is informed and believes that the mayor and aldermen of the city of — have refused and have determined not to assess or collect any taxes for the payment of the

judgment aforesaid, and he is advised that he had no other adequate remedy to enforce the payment of said judgment.

Petitioner therefore prays that your honor grant an order for the issuance of an alternative writ of mandamus commanding and directing the city of ——— to forthwith pay the amount of plaintiff's judgment, with interest and costs, or to appear before the court on some day to be named in said writ, and show cause, if any there be, why a peremptory writ of mandamus should not issue requiring a sufficient tax to be levied, assessed and collected on and out of the taxable property within the corporate limits of the city, to pay said judgment, interest and costs, and requiring said judgment, interest and costs to be paid out of the proceeds of such levy, assessment and collection, within ninety (90) days from the service of said writ; that said alternative writ of mandamus be issued and directed to said city of ———, C. L., Mayor, and to W. S., J. S., J. L., R. J., I. E., the aldermen of said city; he further prays for such other and general relief as he may be entitled to in the premises.

This is the first application for writ of mandamus in this cause.

X. & X.,

Attorneys for Petitioner.

State of ———, ——— County, ss.

Personally appeared before me, W. P., a notary public, W. W., and made oath in due form of law that he is agent and superintendent of plaintiff, is acquainted with the facts alleged in the foregoing petition, and same are true to the best of his knowledge, information and belief.

W. W.

Subscribed and sworn to before me, this ——— day of ———,
A. D. ———,

W. P.,

[Seal.]

Notary Public.

(1) Taken from *Cleveland, Tenn., v. Cunningham*, Recr., 98 Fed. 657, 39 C. C. A. 311.

As to when a writ of mandamus may issue to compel state officers to levy a tax to satisfy a judgment obtained in the United States court, see *Knox County v. Aspinwall*, 24 How. 383; *Riggs v. Johnson County*, 6 Wall. 184; *Louisiana v. U. S.*, 103 U. S. 289; *Board v. Thompson*, 10 C. C. A. 154, 61 Fed. 915.

The court may order that the tax levy be distributed over a term of years where the amount to be collected is large and it appears too much of a burden to make the entire collection at once. *Graham v. Quinlan*, 207 Fed. 268, 124 C. C. A. 654; *Cleveland v. U. S.*, 166 Fed. 677, 93 C. C. A. 274.

In *Cunningham v. Cleveland*, 152 Fed. 907, 82 C. C. A. 55, it is said that the order of the court is continuous and therefore subject to such changes or amendments as the exigencies of the case may require from time to time.

In *Riverside County v. Thompson*, 122 Fed. 860, 59 C. C. A. 70, it is said that no notice or demand on the taxing officers is necessary prior to the filing of a petition for a writ of mandamus to compel them to levy a tax to pay a judgment which has been obtained, the petition being such notice.

The order may state the amount to be collected by referring to the judgment and need not specifically contain the statement of the amount independently thereof. *Estill County v. Embry*, 144 Fed. 913, 75 C. C. A. 654.

No. 276.

Notice of Application for Writ of Mandamus.

To the Board of Mayor and Aldermen of the City of —:

You are hereby notified that we will, on the — day of —, before the Hon. C. D., at his office in the Custom House at —, apply for alternative writ of mandamus to be issued by the district court of the United States for the — division of the — district of —, against you, the city of —, requiring you to levy a tax upon all the property, privileges and polls subject to levy, to pay and satisfy a judgment recovered by me against you in said court, for the sum of — (\$—) dollars.

Dated this — day of —, A. D. —.

R. J., Receiver.

By R. X., His Attorney.

State of —, — County, ss.

Personally appeared before me, W. P., a notary public, W. W., and made oath that he, on the — day of —, delivered a copy of the foregoing notice to the mayor of the city of —.

W. W.

Sworn to and subscribed before me, this — day of —,
 A. D. —. W. P.,
 [Seal.] Notary Public.

—
No. 277.

**Petition for Writ of Mandamus Directed to a Judge of an
 Inferior Court to Compel Him to Allow an Appeal (1).**

United States Circuit Court of Appeals for the — Circuit.
 A. B., Petitioner,

vs.

G. R., U. S. District Judge
 for the — District
 of —.

To the Honorable Circuit Judges of the United States holding
 said Court:

The petitioner, A. B., respectfully states that on the —
 day of — a suit was begun by him against C. D., in the dis-
 trict court for the — district of —, and was duly prose-
 cuted in said court. [*Here state the substance of the action or*
suit.]

The cause came on to be heard upon the pleadings and proof
 and was argued by counsel for the plaintiff and by counsel for
 the defendant and submitted to his honor, G. R., for a decree.

On consideration whereof on the — day of — a decree
 was entered therein in the following words, to-wit: [*Here*
insert the order or decree sought to be reviewed.]

And thereupon on the — day of —, your petitioner,
 feeling himself aggrieved by the order of his honor, prayed
 an appeal from said decree in due form of law and tendered
 his bond with security thereon, which petition was filed with
 the clerk of said court on the — day of — and thereafter
 was presented to his honor for an allowance of the appeal.
 And the petitioner further states that on the same day, to-wit,

on the —— day of ——, his honor, G. R., refused to allow said appeal for the reason that no appeal was allowable from said decree to the said circuit court of appeals for the —— circuit for the purpose of reviewing said decree.

Wherefore, your petitioner, A. B., prays for a writ of mandamus to issue out of this honorable court, directed to the Hon. G. R., judge of the district court of the United States for the district of ——, sitting at ——, to compel said district judge to grant him an appeal in the case of A. B. *vs.* C. D., pending on the equity side of said court, from the decree entered by said court in said cause on the —— day of ——.

A. B.

State of ——, —— County, ss.

I, A. B., the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief. Those statements made on my own knowledge I know to be true and those statements made upon information and belief I verily believe to be true, and I have read said petition.

A. B.

Subscribed and sworn to before me this —— day of ——, 19——.

B. R.,

Notary Public in and for said County.

(1) A writ of mandamus will issue to compel a court to take jurisdiction and to proceed to exercise such jurisdiction. *Ex parte Bradstreet*, 6 Pet. 774, s. c. 7 Pet. 634; *Hollen Parker, Petitioner*, 131 U. S. 221; *Ex parte Parker*, 120 U. S. 738; *In re Hohorst*, 150 U. S. 658. But not to take jurisdiction of a case removed from a state court. *In re Pennsylvania*, 137 U. S. 453. The statute, formerly 25 Stat. L. 434, enacted Aug. 13, 1888, is brought forward in the Judicial Code, Sec. 28, and provides that the "remand shall be immediately carried into execution, and no appeal or writ of error from the decision * * * etc., shall be allowed, and in this case the court held that such statute rendered the remand final and conclusive against mandamus also.

It may issue to compel a judge to act but not to control his discretion. *Ex parte Newman*, 14 Wall. 152; *Ex parte Bradstreet*, 6 Pet. 774;

Ex parte Many, 14 How. 171; *Ex parte Chateaugay Iron Co.*, 128 U. S. 554; *Ex parte Jordan*, 94 U. S. 248.

Under the act now embodied without change as to that feature in the Judicial Code, Sec. 266, requiring that an application for interlocutory injunction to restrain state officers from enforcing a state law in certain cases, be heard before three judges, held that the order made by a single judge in such case was unauthorized and mandamus was the proper remedy to require him to vacate his order: the statute made no provision for appeal from the action of a single judge, and a right of appeal is nowhere given in the statutes in such case. *Ex parte Metropolitan Water Company*, 220 U. S. 539, 55 L. Ed. 575. This decision is of importance also in connection with the act of Oct. 22, 1913, 38 Stat. L. 220, requiring a hearing before three judges on application for injunction affecting an order of the interstate commerce commission.

No. 278.

Order Granting Alternative Writ of Mandamus.

[*Caption.*]

On motion of R. J., receiver of the Water & Electric Light Company, on petition this day filed praying for alternative writ of mandamus to issue against the city of —, and the mayor and aldermen thereof, requiring them to levy taxes to pay a judgment obtained against them in this court for \$—, notice of which motion was given on the — day of —, A. D. —.

It is ordered that the clerk of this court issue the alternative mandamus according to the prayer of said petition, on petitioner giving bond in the sum of \$—, to be approved by the court, and security for costs.

No. 279.

Alternative Writ of Mandamus to Compel Levy of Tax to Pay Judgment.

The President of the United States of America, to the City of —, and to C. L., Mayor, and W. S., J. S., J. L., R. J. and I. E., Aldermen of said City:

Whereas, it appears from the petition of R. J., receiver of

the Water & Electric Light Company, that by suit which he, as such receiver, was by order of court authorized to bring in the district court of the United States for the — division of the — district of —, against the said city of —, he did, after appearance and defense made by said city, and on the — day of —, recover against said city a judgment for the sum of — dollars, and the cost of said cause, amounting to the additional sum of \$—, that the said city of — is a municipal corporation chartered and existing under Acts passed by the General Assembly of the state of —, and is situated in — county, and in the — division of the — district of —; and that under the laws of — the real and personal property of said municipal corporation held and used for its corporate purposes, is exempt from levy and sale by execution; and

Whereas, it is further alleged in said petition that said city of —, by the laws of the state of — and its charter, is authorized through and by its board of mayor and aldermen to levy and collect taxes on all property, privileges and polls subject to taxation for state purposes, for the payment of judgments and decrees rendered against it, and it is the duty of said board of mayor and aldermen to levy and collect taxes sufficient to pay off and discharge the judgment aforesaid in favor of petitioner, and the costs adjudged against it; that in the year — the board of mayor and aldermen of said city did levy a tax of — cents on the \$100 for water rent, and — cents on the \$100 for lights, and collected the same, or a large part thereof, and the amount so levied and collected did become, under the contract then existing between the city of — and the Water & Electric Light Company, a fund exclusively for the payment of water and lights under said contract — the judgment aforesaid being for water and lights furnished under the same contract. But that notwithstanding its duty in this respect the said city refused to pay over the amount that had been so levied and collected, and has refused

to enforce payment to itself from certain taxpayers of a considerable portion of the levy; and

Whereas, it is further alleged that since the rendition of said judgment petitioner has demanded payment of same, but the said city has failed and refused to pay any part of the same or of the costs incident thereto, or to make any levy of taxes for that purpose; that execution was issued on said judgment and placed in the hands of the marshal, and presented by him to said city, but payment of same, or any part thereof, was refused, and it has been returned *nulla bona*; and

Whereas, it is further alleged that the board of mayor and aldermen of said city of — have refused and have determined not to assess or collect any taxes for the payment of the judgment aforesaid, and that petitioner has no other remedy or means by which to enforce the payment of said judgment except as prayed in said petition for writ of mandamus commanding the city of — and the board of mayor and aldermen thereof forthwith to pay the amount of petitioner's judgment, with interest and costs, or to levy, assess and collect a sufficient amount of taxes on and out of the taxable property, privileges and polls within the corporate limits of said city; and

Whereas, it has been ordered by the Hon. C. D., sitting as judge of the district court of the United States for the — division of the — district of —, that writ of mandamus issue as prayed.

You are, therefore, commanded, unless said judgment, with interest and cost, is paid, forthwith to levy, assess and collect on and out of all the property, privileges and polls within the corporate limits and subject to taxation, a sufficient amount to pay said judgment, interest and costs, and to pay the same out of the amount so levied and collected, or to appear before said district court of the United States for the — division of the — district of —, on the — day of —, and

show cause, if any there be, why said tax should not be levied, assessed and collected as hereinbefore ordered.

Herein fail not, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, chief justice of the supreme court of the United States, at —, in said district, the — day of —, in the year of our Lord nineteen hundred and —.

[Seal.]

B. R.,

Clerk of the District Court of the United States
for the — District of —.

No. 280.

Answer of a U. S. Judge to an Alternative Writ of Mandamus to Allow an Appeal from an Order Refusing to confirm a Composition in Bankruptcy (1).

United States Circuit Court of Appeals, — Circuit.
United States of America, *ex rel.*

A. D., Bankrupt, Petitioner,

vs.

G. R., United States District Judge
for the — District of —.

No. —

The answer of G. R., judge of the District Court of the United States for the — District of —, to the rule upon him to show cause why a peremptory mandamus should not issue commanding him, in said court, to allow an appeal to A. B., petitioner, from a decree filed and entered in said cause —, disapproving a composition proposed by said petitioner.

The respondent respectfully answers and certifies to the honorable Circuit Court of Appeals, for the — circuit:

First. That he supposes the petitioner has correctly set out the matters appearing of record in the proceedings in bankruptcy, so far as in said petition he undertakes to relate them, but for greater certainty respondent refers to the record itself

when produced in evidence for accurate information as to the matters and things therein recorded.

Second. Referring to the general orders in bankruptcy No. 36, regulating appeals from courts of bankruptcy, respondent submits whether the said petition for mandamus against him be not vexatious and without authority of law, inasmuch as the appeal demanded might have been allowed, or may now be allowed, if demandable in law, by any of the judges of this court, and presumably by the court itself.

Third. Respondent denied the appeal demanded as set out in the petition for a mandamus, solely for the reason set forth by him in the memorandum endorsed on the application therefor, as found in the record of said proceedings in bankruptcy, and appearing in the printed record of the petition for mandamus at pages 6 and 7, and again at pages 16 and 17. Respondent now submits that no appeal was or is now demandable in law from the said order complained of by the petitioner, to wit, the order of the 26th day of May, 1900, disallowing and refusing to confirm the composition offered by the petitioner to his creditors, as appears by the record of the proceedings in bankruptcy.

Fourth. Respondent is advised that it is not necessary that he should make any further or other answer to the rule aforesaid than this herein contained, nor more specifically to any of the allegations set forth in the petition for mandamus aforesaid. And having fully answered said rule, he prays to be hence dismissed with all proper costs.

And these are the causes and reasons which this respondent has offered why a mandamus should not issue, commanding him to allow said appeal. But he respectfully submits to the judgment of the court and will enforce by order any direction given by the court in the premises.

Respondent respectfully refers to brief of counsel for Heber Jones filed in this honorable court, and the authorities referred

to in support and maintenance of the positions assumed by
this answer. G. R.,

Judge of the District Court of the United States
for the — District of —.

(1) Taken from record in U. S. *vs.* Hammond, 100 Fed. Rep. 1006, 40
C. C. A. 689.

No. 281.

**Order Sustaining Demurrer to Defense to Alternative
Writ of Mandamus.**

[Caption.]

This cause came on to be heard upon the demurrer of the
relator to the return and answer of the defendant to the
alternative writ of mandamus, and the same having been
heard upon argument of counsel, and the court being of the
opinion that such return presents no valid and sufficient de-
fense, and that the demurrer is well taken, the same is sus-
tained, and the said return adjudged insufficient as presenting
no sufficient defense.

It is, therefore, adjudged that the plaintiff is entitled to
proceed as if no return had been made.

No. 282.

**Order Granting Alternative Writ of Mandamus Directed to a
District Judge, and Stay of Execution (1).**

United States Circuit Court of Appeals,

For the — Circuit.

United States of America *ex rel.* C. D.

vs.

Honorable G. R., U. S. District Judge,

for the — District of —.

On this day a petition was presented for a writ of mandamus

to be directed to the Honorable G. R., United States district judge for the ——— district of ———, requesting him to allow an appeal upon the application of the respondent in a certain proceeding wherein A. B. is plaintiff and C. D. is defendant, pending in the district court of the United States for the ——— district of ———.

On consideration whereof, it is hereby ordered that a rule to show cause why said writ should not issue be granted. It is further ordered that the petition, exhibits and a copy of this order be printed by the direction of the clerk of this court, and served upon the Honorable G. R., district judge for the ——— district of ———, in lieu of issuing a rule to show cause, with a request that his honor, G. R., reply thereto within thirty days after the filing of the printed record in this court.

It is further ordered that execution in the above-mentioned cause in the district court of the United States for the ——— district of ——— be stayed until the further order of this court upon the petitioner, C. D., giving a bond, to be approved by the district judge, in a sum twice the amount of the decree rendered against him by said district court conditioned to pay damages and costs and abide the decree of this court.

It is further ordered that a certified copy of this order be sent to the clerk of the district court for the ——— district of ——— to be filed with the proceedings above mentioned in that court and to operate as a stay of proceedings therein in said cause until the further order of this court.

(1) Taken from the record in the case of *Michigan Central R. R. Co. v. Swan*, in the United States circuit court of appeals for the sixth circuit (not reported).

In practice a rule to show cause is rarely issued to a judge; a request that he reply to the petition is ordinarily sufficient. The judge thereupon files his answer or other pleading without formal service of process.

No. 283.**Order for Alternative Writ of Mandamus to be Directed to a Judge (1).**

The Supreme Court of the United States.

Ex parte Martha Bradstreet in the Matter
of Martha Bradstreet,*against*Apollos Cooper *et al.*

Mr. Jones, of counsel for the demandant in the above named cases, moved the court for a rule to be granted, to be served on the district judge of the District Court of the United States for the Northern District of New York, commanding him to be and appear before this court, either in person or by an attorney of this court, on the first day of the next January term of this court, to wit, on the second Monday of January, Anno Domini 1833, to show cause, if any he have, why a mandamus should not be awarded to the said district judge of the northern district of New York, commanding him,

First. To reinstate, and proceed to try and adjudge according to the law and right of the case, the several writs of right and mises thereon joined, lately pending in said court, and said to have been dismissed by order of said court, between Martha Bradstreet, demandant, and Apollos Cooper *et al.*, tenants.

Second. Requiring said court to admit such amendments in the form of pleading, or such evidence as may be necessary to aver or to ascertain the jurisdiction of said court in the several suits aforesaid.

Third. Or if sufficient cause shall be shown by the said judge on the return of this rule, or should otherwise appear to this court, against a writ of mandamus requiring the matters and things aforesaid to be done by the said judge, then to show cause why a writ of mandamus should not issue from this court, requiring the said judge to direct and cause full records of the judgments or orders of dismissal in the sev-

eral suits aforesaid, and of the processes of the same, to be duly made up and filed, so as to enable this court to re-examine and decide the grounds and merits of such judgments or orders upon writs of error, such records showing upon the face of each what judgments or final orders dismissing, or otherwise definitely disposing of said suits, were rendered by the said district court, at whose instance, upon what grounds, and what exceptions or objections were reserved or taken by said demandant, or on her behalf, to the judgments or decisions of the said district court in the premises, or to the motions whereon such judgments or decisions were found; and what motion or motions, application or applications, were made to said court by the demandant, or on her behalf; and either granted or overruled by said district court, both before and after said judgments or decisions dismissing or otherwise finally disposing of said suits; especially what motions or applications were made by said demandant or on her behalf to the said district court, to be admitted to amend her counts in the said suits, or to produce evidence to establish the value of the lands, etc., demanded in such counts, together with all the papers filed, and proceedings had in said suits respectively.

On consideration whereof, it is now here considered and ordered by this court that the rule prayed for be, and the same is hereby granted, returnable to the first day of the next January term of this court, to wit, on the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-three. *Per* Mr. Chief Justice Marshall.

(1) Taken from 6 Peters 774. See note to No. 146a.

No. 284.

Motion for Peremptory Writ of Mandamus.

[Caption.]

Relator comes, by his attorneys, and moves the court for an order directing the issuance of a peremptory writ of man-

damus as prayed in the petition filed in this cause, and directing defendant to forthwith levy and collect a tax sufficient to pay the judgment referred to in said petition and the alternative writ of mandamus, together with interests and costs, because the return of defendant shows no good and sufficient reason why said peremptory writ should not be awarded.

R. X.,

Attorney for Relator.

No. 285.

Peremptory Writ of Mandamus Directed to Judge of District Court (1).

United States of America, ss.

To the Hon. Alfred Concklin, Judge of the District Court of the United States for the Northern District of New York,
Greeting:

Whereas, one Martha Bradstreet hath heretofore commenced and prosecuted in your court several certain real actions, or writs of right, in your court lately pending between the said Martha Bradstreet, demandant, and the following named tenants severally and respectively, to wit, Apollos Cooper and other [*naming them*]. And whereas, heretofore, to wit, at a session of the Supreme Court of the United States, held at Washington on the second Monday of January, in the year 1832, it appeared, upon the complaint of the said Martha Bradstreet, among other things, that at a session of your said court, lately before holden by you, according to law, all and singular the said writs of right then and there pending before your said court, upon the several motions of the tenants aforesaid, were dismissed for the reason that there was no averment of the pecuniary value of the lands demanded by the said demandant in the several counts filed and exhibited by the said demandant against the several tenants aforesaid; which orders of your said court, so dismissing the said actions,

were against the will and consent of said demandant; whereupon the said Supreme Court, at the instance of said demandant, granted a rule requiring you to show cause, if any you had, among other things, why a writ of mandamus from the said Supreme Court should not be awarded and issued to you, commanding you to reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right aforesaid, and the mises therein joined. And whereas, at the late session of the said Supreme Court held at Washington on the second Monday of January in the year 1833, you certified and returned to the said Supreme Court, together with the said rule, that after the mises had been joined in the several causes mentioned in the said rule, motions were made therein, on the part of the tenants, that the same should be dismissed upon the ground that the counts respectively contained no allegation of the value of the matter in dispute, and that it did not therefore appear, by the pleadings, that the causes were within the jurisdiction of the court: that, in conformity with what appeared to have been the uniform language of the national courts upon the question, and your own views of the law, and in accordance especially with several decisions in the circuit court for the third circuit (see 4 Wash. C. C. Rep. 482, 624), you granted their motions; and assuming that the causes were rightly dismissed, it follows of course that you ought not to be required to reinstate them unless leave ought also to be granted to the demandant to amend her counts; and whereas, afterwards, to wit, at the same session of the said Supreme Court last aforesaid, upon consideration of your said return and of the cause shown by you therein against the said rule's being made absolute, and against the awarding and issuing of the said writ of mandamus, and upon consideration of the arguments of counsel, as well on your behalf, showing cause as aforesaid, as on behalf of the said demandant, in support of the said rule, it was considered by the said Supreme Court, that you had certified and returned

to the said court an insufficient cause for having dismissed the said actions, and against the awarding and issuing of the said writ of mandamus, pursuant to the rule aforesaid; the said Supreme Court being of the opinion, and having determined and adjudged upon the matter aforesaid, that in cases where the demand is not made for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of the said Supreme Court and of the courts of the United States, is to allow the value to be given in evidence; that in pursuance of this practice, the demandant in the suits dismissed by order of the judge of the District Court had a right to give the value of the property demanded in evidence, either at or before the trial of the cause, and would have a right to give it in evidence in the said Supreme Court; consequently that she cannot be legally prevented from bringing her cases before the said Supreme Court; and it was also then and there considered by the said Supreme Court that the peremptory writ of the United States issue, requiring and commanding you, the said judge of the district court, to reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right and mises therein joined, lately pending in your said court between the said Martha Bradstreet, demandant, and Apollos Cooper and others, the tenants aforesaid; therefore you are hereby commanded and enjoined that immediately after the receipt of this writ, and without delay, you reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right and the mises therein joined, lately pending in your said court between the said Martha Bradstreet, demandant, and the said Apollos Cooper and others, the tenants herein above named, so that the complaint be not again made to the said Supreme Court; and that you certify perfect obedience and due execution of this writ to the said Supreme Court, to be held on the first

Monday in August next. Hereof fail not at your peril, and have then there this writ.

Witness the Honorable John Marshall, chief justice of said supreme court, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-three.

[*Scal.*]

W. T. CAROL,

Clerk of the Supreme Court of the United States.

(1) Taken from *Ex parte Bradstreet*, 7 Pet. 648.

As to when mandamus will issue to an inferior court, see *Ex parte Schollenberger*, 96 U. S. 369; *Pennsylvania Co., Petitioner*, 137 U. S. 451-453; *American Construction Co. v. Jacksonville, etc., Ry.*, 148 U. S. 372, 379; *Hohorst, Petitioner*, 150 U. S. 653, 664; *In re Grossmayer, Petitioner*, 177 U. S. 48.

Dowagiac Mfg. Co. v. McSherry Co., 155 Fed. 524, 84 C. C. A. 38, to the effect that mandamus will issue from the circuit court of appeals to a district court where the action of the latter fell short of or transcended its jurisdiction and no other adequate remedy appeared.

That an inferior court can not be reviewed and reversed in an action in mandamus, when the act complained of is within its jurisdiction and discretion, see *Barnes v. Lyons*, 187 Fed. 881, 110 C. C. A. 15.

Mandamus will issue from the supreme court to an inferior court to compel it to set aside a decree made after the term and vacating a decree of dismissal of a defendant, and to assume no jurisdiction thereafter over such defendant. *In re Metropolitan Trust Co.*, 218 U. S. 312, 54 L. Ed. 1051.

If the lower court commits error in administering the mandate of the reviewing court, mandamus may be resorted to for its correction. *Sou. Bldg. Assn. v. Carey*, 117 Fed. 328.

No. 286.

Order Making Alternative Writ of Mandamus Peremptory.

[*Caption.*]

This cause came on to be heard on motion of relator for peremptory writ of mandamus, of which motion notice was given to defendants, and the said defendants having failed to make any further return or defense, it is considered by the court that said motion be allowed.

It is, therefore, decreed that the alternative writ of mandamus be made peremptory, and that unless relator's judgment,

interest and costs be forthwith paid, a peremptory writ of mandamus will issue requiring defendants, or their board of mayor and aldermen, to levy, assess and collect on and out of all the property within the corporate limits and subject to taxation, a sufficient amount to pay said judgment, interest and cost, and to pay the same out of the amount so levied and collected.

Defendants will, immediately after the issuance of said writ, make the levy of taxes aforesaid, and will on or before the — day of —, make return to this court, showing that said levy has been made, the amount levied, etc.

And after said levy has been made defendants will proceed with all due diligence to the collection of same, and continue until a sufficient sum has been collected to pay the judgment aforesaid, with interest and costs.

Defendants will pay the costs of this proceeding, for which execution may issue.

But on application of defendants the issuance of the peremptory writ herein ordered, will be suspended until the — day of — next, to give said defendants an opportunity to prepare petition for writ of error and other papers necessary for the review of this decree by the court of appeals.

No. 287.

Order that Marshal Protect Tax Collector in the Discharge of His Duty (1).

The District Court of the United States for the District of Kentucky.

A. B.

vs.

D. J., Presiding Judge of —
County Court and — County.

This day came the plaintiff, A. B., of —, —, by counsel,
• and filed a report of E. M., the special collector of taxes, here-

tofore appointed herein, and it appearing from the said report and the exhibits filed therewith, that there exists in the county of ——— such a hostile public sentiment against the collection of the special tax of ——— cents on each \$100.00 of property in said county subject to taxation under the general revenue laws of the state of ——— for the year 1889, as shown by the assessor's list of said county, of property liable for taxation as of ——— day of ———, said levy of taxes being the same heretofore referred to in the former orders of the ——— day of ———, and the ——— day of ———; and it further appearing from said report this day filed that threats of violence and other hostile opposition to the collection of said tax by said special collector E. M. have been made by individuals and published in the newspapers in the said county of ———, and it appearing that the said special collector E. M. has been deterred from the performance of his duties as special collector of taxes herein, and it being the opinion of the court that a necessity has arisen for the further exercise of its power and authority to enforce obedience to the judgment and orders hereinbefore made, it is now ordered that the United States marshal for the ——— district of ———, do proceed without unnecessary delay, with such force of deputies general or special as may be necessary in his judgment to the county of ———, in the state of ———, and report with such force to the said E. M. for duty, and the said marshal and his force shall be and remain subject to the orders of said E. M. as collector as aforesaid while engaged in the performance of his duties as such collector as aforesaid and he shall see to it that the said E. M. collector shall be fully and amply protected from violence in the performance of his duties as special tax collector herein, and said United States marshal shall protect all property levied upon or seized by said E. M. by virtue of his authority as tax collector.

The said United States marshal shall not be required to enter upon the performance of the duties required of him un-

der this order, until the plaintiff, or some one for the plaintiff, has executed to him a satisfactory bond sufficient to cover the expenses to be incurred by him in the performance of his duties required herein, and a fair compensation for the services to be performed by said marshal and his deputies or shall have provided a sum of money sufficient to cover said expenses and compensation.

It is further ordered that all questions as to the expenses necessarily incurred in the execution of this order, including transportation and subsistence for the men and stock employed and compensation to the marshal and his deputies and as to whether said expenses shall be taxed as costs of collection of said tax is reserved for further order of the court.

Said collector E. M. and the said United States marshal are ordered to keep an account of moneys paid out on account of expenses in the execution of this order and to report the same to this court.

(1) This order was entered in the case of *Citizens' National Bank v. Muhlenberg County*, pending in the circuit court of the United States for the district of Kentucky at Louisville.

No. 288.

Petition for Writ of Mandamus to Require United States Auditor to Pay a Judge's Salary.

[Caption.]

To the Honorable, the Judge of the District Court of the Canal Zone, sitting in the Balboa Division:

The petition of William H. Jackson, of Ancon, Canal Zone, respectfully sheweth:

First. That your petitioner is the duly appointed, qualified and acting judge of the district court of the Canal Zone, having been appointed thereto for a term of four years by the

President of the United States, and having been confirmed by the Senate of the United States, and thereafter, to-wit, on the first day of May, 1914, was duly sworn and assumed the duties of his office.

Second. That pursuant to the Act of Congress, approved August 24, 1912, also known as the "Panama Canal Act," it was provided that the district judge of the Canal Zone "shall receive the same salary paid to the district judges of the United States;" that is to say, the sum of \$6,000, United States currency, per annum, payable in monthly installments of \$500 each.

Third. That the Congress of the United States has heretofore appropriated funds for the payment of the salary of your petitioner, and that the funds are now available for that purpose.

Fourth. That H. A. A. Smith, the above-named respondent, is now, and was at all times hereinafter mentioned, the duly appointed, qualified and acting auditor of the Panama Canal, and as such it was his duty, among other things, to audit, issue and deliver each month to your petitioner, the warrant, voucher or pay check for the payment of the monthly salary due to your petitioner, and to approve and audit the said warrant, voucher or pay check, in such form and manner that your petitioner may collect and receive the cash thereon from the paymaster of the Panama Canal from the funds appropriated by the Congress as aforesaid.

Fifth. That during the month of December, 1914, your petitioner well and truly performed his duties as judge of the said district court of the Canal Zone, and upon the termination of said month became entitled to receive his warrant, voucher or pay check for the payment of his monthly salary in the sum of \$500, and it became and was the legal duty of the said H. A. A. Smith, auditor of the Panama Canal, to audit, approve and issue said warrant, voucher or pay check, and cause the same to be delivered unto your petitioner.

Sixth. That notwithstanding the fact your petitioner was legally entitled to receive the said warrant, voucher or pay check for the full sum of \$500, United States currency, in payment of his monthly salary for the month of December, 1914, at the termination of said month, and that it is and was the legal duty of the said H. A. A. Smith, auditor of the Panama Canal, to audit, issue and deliver to your petitioner the said warrant, voucher or pay check, for the full sum of \$500, United States currency, the said H. A. A. Smith, auditor as aforesaid, failed and refused, and still fails and refuses, to audit, issue and deliver to your petitioner, the said warrant, voucher or pay check for the full amount of the monthly salary due him for the month of December, 1914, and has unlawfully withheld and still withholds from the amount due your petitioner, the sum of \$170.07, to secure the payment of an alleged indebtedness, which the said H. A. A. Smith, auditor as aforesaid, unlawfully and willfully pretended, and still pretends is due from your petitioner unto the Panama Canal or to the United States Government. That although your petitioner has demanded the issuance and delivery of the said warrant, voucher or pay check covering the sum of \$170.07, unlawfully withheld as aforesaid, the said H. A. A. Smith, auditor of the Panama Canal, has failed and refused and still fails and refuses so to do.

Seventh. That during the month of March, 1916, your petitioner well and truly performed his duties as judge of the district court of the Canal Zone, and upon the termination of said month became entitled to receive the warrant, voucher or pay check for the payment of his monthly salary in the full sum of \$500, United States currency, and it became and was the legal duty of the said H. A. A. Smith, auditor of the Panama Canal, to audit and issue said warrant, voucher or pay check and cause the same to be delivered to your petitioner. That notwithstanding the fact that your petitioner is legally entitled to receive the warrant, voucher or pay check for the full sum of

\$500, United States currency, in payment of his salary for the month of March, 1916, and that it is the legal duty of the said H. A. A. Smith, auditor of the Panama Canal, to audit, issue and deliver to your petitioner the said warrant, voucher or pay check for the full sum of \$500, United States currency, the said H. A. A. Smith, auditor as aforesaid, has failed and refused and still fails and refuses to audit, issue and deliver the said warrant, voucher or pay check for full amount of \$500, United States currency, and is unlawfully withholding the same from your petitioner to secure the payment of an alleged indebtedness, which the said H. A. A. Smith, as auditor of the Panama Canal, unlawfully claims and pretends is due from your petitioner unto the Panama Canal or to the United States Government, and although your petitioner has made due demand, the said H. A. A. Smith, auditor of the Panama Canal, has failed and refused, and still fails and refuses to issue and deliver said warrant, voucher or pay check, as is his legal duty so to do.

Eighth. That your petitioner is not indebted in any sum or sums whatsoever unto the Panama Canal or unto the United States Government, nor was he so indebted in the month of December, 1914, or in the month of March, 1916, and that there is no judgment, lien or lawful order whereby the said warrants, vouchers or pay checks may lawfully be withheld from your petitioner by the said H. A. A. Smith, auditor of the Panama Canal, to secure or satisfy any alleged or pretended indebtedness due from your petitioner unto the Panama Canal or the United States Government.

Ninth. That the action of the said H. A. A. Smith, auditor of the Panama Canal, in withholding the issuance and delivery to your petitioner of the warrants, vouchers or pay checks above mentioned, tends to and does deprive your petitioner of rights, privileges and immunities guaranteed and preserved to him under the Constitution of the United States, under the laws of the United States, and under the laws of the Canal Zone.

Tenth. Your petitioner further avers that the action of the said H. A. A. Smith, auditor of the Panama Canal, in failing and refusing to audit, issue and deliver to your petitioner, the warrants, vouchers and pay checks for services performed as hereinbefore set forth, tends to, and does deprive your petitioner of his property without due process of law.

Eleventh. Your petitioner further alleges that there is no other plain, speedy or adequate remedy by which his rights, privileges, immunities and property may be protected and preserved, save that a writ of mandamus issue out of this honorable court, directed to the said H. A. A. Smith, auditor of the Panama Canal, commanding him, the said H. A. A. Smith, auditor of the Panama Canal, to audit, issue and deliver unto your petitioner, the warrants, vouchers or pay checks in the sums of \$170.07 and \$500, United States currency, respectively, in payment for the services performed by your petitioner as judge of the district court of the Canal Zone, during the months of December, 1914, and March, 1916.

Wherefore, your petitioner being without remedy other than that sought herein, respectfully prays that a peremptory writ of mandamus issue out of this court directed to the said H. A. A. Smith, auditor of the Panama Canal, and commanding him as such auditor of the Panama Canal, to audit, draw, issue and deliver unto your petitioner, the warrants, vouchers or pay checks for the said amounts and sums of \$170.07 and \$500, United States currency, and to do and perform such other acts and things as may be necessary and proper in the premises.

And your petitioner further prays all such other and further, or different relief in the premises as may be deemed just and proper and as the exigencies of the case may require.

A. B. and C. D.,

Solicitors for Wm. H. Jackson, Relator.

[*Verification.*]

No. 289.**Peremptory Writ of Mandamus to United States Auditor.***[Caption.]*

To the Auditor of the Panama Canal,

H. A. A. Smith, Auditor of the Panama Canal, Greeting:

This cause coming on to be heard by the court, and without a jury by agreement of the parties, upon the petition for writ of mandamus, the amended petition for writ of mandamus, the answer of the respondent, the reply of the relator, the amended and supplemental petition for writ of mandamus, and the answer of the respondent thereto; and after argument of counsel, and the court being fully advised in the premises, it is considered, ordered and adjudged by the court, that the respondent, the auditor of the Panama Canal, has unlawfully withheld from the salary due to the relator as judge of the district court of the Canal Zone the follows sums:

| | |
|--------------------------------------|----------|
| For the month of December, 1914..... | \$107.07 |
| For the month of January, 1916..... | 66.66 |
| For the month of March, 1916..... | 500.00 |
| For the month of April, 1916. | 341.97 |
| For the month of May, 1916..... | 53.06 |

It is further considered, ordered and adjudged by the court that the total sum, \$1,131.76, above mentioned, is a part of the salary due to the relator as judge of the district court of the Canal Zone, hitherto appropriated under an Act of Congress, and that the relator is entitled to receive and be paid the full sum of the annual stipend appropriated by the Congress as aforesaid, in monthly installments of \$500, and that it was the legal duty of the auditor of the Panama Canal, the respondent herein, to issue, audit and deliver to the relator the warrant, voucher or pay check for the payment of the salary and the

above amount due to the relator, and to cause the said warrant, voucher or pay check to be paid by the paymaster of the Panama Canal to the relator, and to do and perform any and all other acts and things by law required of the said auditor of the Panama Canal the respondent herein, in the performance of this ministerial duty, to the end that the said William H. Jackson, judge of the district court of the Canal Zone, the relator herein, may receive and be paid the salary and the above amount to which he is legally entitled by reason of his office and the appropriation made by the Congress for the payment of the same.

And it is further considered, ordered and adjudged by the court that the funds appropriated by the Congress for the payment of the salary of the relator herein are now in the custody or under the control of the auditor of the Panama Canal, the respondent herein, and that the said auditor of the Panama Canal, the respondent, is charged with the duty of disbursing said funds in the manner required by law, and that the said auditor of the Panama Canal, the respondent, has neglected, failed and refused to perform his ministerial duty enjoined by law; and it is further considered, ordered and adjudged by the court, being of the opinion that the relator is entitled to the relief prayed for in his petition, and therefore you, the said auditor of the Panama Canal, the respondent herein, are hereby commanded and enjoined that immediately upon the receipt of this writ, and without delay, you audit, issue and deliver to the said William H. Jackson, as the judge of the district court of the Canal Zone, the relator herein, the warrant, voucher or pay check for the sum of \$1,131.76, unlawfully withheld by the auditor of the Panama Canal, the respondent herein, from the salary due to this relator, and to cause the same to be paid out of the funds appropriated by the Congress as aforesaid; and it is further considered, ordered and adjudged that you certify perfect obedience and due compliance with this judgment and

mandate to this court at its session to be held at the hour of 10 o'clock in the forenoon of Tuesday, the 18th day of July, A. D. 1916. And it is further ordered that the relator recover his costs in this behalf.

Herein fail not.

Witness the Honorable Henry D. Clayton, United States district judge for the middle and northern districts of Alabama, presiding in the district court of the Canal Zone by designation of the President under the Act of Congress approved August 24, 1912, this 11th day of July, A. D. 1916.

(Signed)

H. D. CLAYTON,
United States District Judge.

No. 290.

Marshal's Return of Writ of Mandamus.

[*Caption.*]

The within writ of mandamus was served by me at Balboa Heights, Canal Zone, on July 12, 1916, on Ad. Faure, the acting auditor of the Panama Canal, by delivering to him a true copy of the writ. H. A. A. Smith, the auditor of the Panama Canal, respondent above named, can not now be served with the writ by reason of his absence from the Canal Zone.

(Signed)

WM. H. MAY,
Marshal for the District of the Canal Zone.

(Signed)

By JOHN H. POOLE,
Deputy Marshal.

CONDEMNATION PROCEEDINGS.**No. 291.****Petition to Condemn Land for a Government Lighthouse.**

To the District Court of the United States for the ——— District of ———.

In the matter of the petition of the United States of America for the condemnation of lots 1 and 2, block 1 of C.'s first addition to M. City, situate in the village of ———, county of ———, state of ———, for the use of the petitioner for government lighthouse purposes.

The petitioners, the United States of America, by J. H., the attorney of the United States for the ——— district of ———, respectfully shows to the court that under the provisions of sections 4653 to 4680, inclusive, of the Revised Statutes of the United States and the amendments thereto, the said lighthouse board is required to perform all the administrative duties relating to the construction, illumination inspection and superintendence of lighthouses and their appendages, and keeping in good repair of the said lighthouses, under the superintendence of the secretary of the treasury of the United States, the ex-officio president of said board.

Your petitioners further show that negotiations were had in the year nineteen hundred and ——— under the direction and with the approval of the said lighthouse board to acquire by purchase the land hereinafter described, for the purpose and reasons hereinafter mentioned, and that the said negotiations proceeded to the execution of a deed of said land to the United States of America, but after an examination by the then attorney of the United States for the ——— district of

——, of the said deed and the papers relating to the title to the said land, the same were not approved, for the reason that the village of —— claimed the said lands as a park under the dedication made to said village by one E. C. in the year eighteen hundred and seventy, and your petitioner has been unable to obtain the title to said land by purchase.

Your petitioners further show that the land on which the Old Point light station now is, situate in the county of ——, in the —— division of the —— district of ——, is entirely inadequate for the purpose of the said lighthouse, and that the said secretary of the treasury has been authorized to procure real estate for public use as an addition to the said land now occupied by the Old Point light station aforesaid; that in the opinion of the said secretary of the treasury it is necessary and advantageous to the government that the land hereinafter described be immediately acquired for your petitioners, the United States of America, by condemnation under judicial proceedings, to be used with the land now occupied by the lighthouse aforesaid and to be used for lighthouse purposes in connection with and as a part thereof; that the said secretary of the treasury has made application to the attorney-general of the United States under and in accordance with the provisions of the Act of Congress of August 1, 1888, entitled, "An Act to authorize condemnation of land for sites of public buildings, and for other purposes," to cause proceedings to be commenced for the condemnation of the land hereinafter described, and that the said attorney-general has directed the said J. N., United States attorney aforesaid, to commence proceedings for the condemnation of said land hereinafter described, for the purpose aforesaid.

Your petitioners further show that the land it desires to acquire for the purposes aforesaid is described as follows, to wit: [*Here describe the property to be condemned.*]

Your petitioners further show that said land is now owned by one M. M., and that the village of ——, a municipal cor-

poration in the county of —, state of —, claims to have an interest therein by virtue of a conveyance made by one E. C. in the year eighteen hundred and seventy dedicating the said land to public uses as a park, and that the foregoing sets forth the condition of the title to said land so far as the same can be ascertained from the public records or can be ascertained from actual occupants, and enquiries made by officials of the petitioner.

Your petitioners further show that this petition is made and presented for the purpose of acquiring the title and ownership of the lands above described to and for the use of your petitioners, the United States of America, for lighthouse purposes as aforesaid, by condemnation under the process and proceedings of this court, as provided in the Act of Congress of August 1, 1888, entitled "An Act to authorize the condemnation of land for sites of public buildings, and for other purposes," and that an appropriation was made in the Sundry Civil Appropriation Act of March 3, 1891, for lighthouse station at the site aforesaid, and that sufficient of such funds are now available to pay a just and due compensation for the lands hereinbefore described and which your petitioner desires to acquire by this proceeding.

And your petitioners further show that the said secretary of treasury of the United States has in all respects complied with the Acts of Congress hereinbefore referred to, and with all other provisions of law in regard to the acquisition and condemnation by the United States of the land hereinbefore described for public uses aforesaid.

Your petitioner therefore prays that said lands may be condemned under the process and proceedings of this court for the public uses and purposes aforesaid, and that the title thereto may be confirmed in and to your petitioner, the United States of America, upon payment by your petitioners of a just and due compensation to the owner or owners thereof, and that the said M. M. and the said village of —,

and all other persons or corporations, municipal or otherwise interested in said land or any part thereof, may be summoned to appear before this honorable court and answer this petition and show cause, if any they have, against the same.

J. H.,

Attorney of the United States for the
—— district of ——, who appears for
the petitioner by direction of the At-
torney-General of the United States.

No. 282.

**Petition to Condemn Land by United States for a Public
Building.**

[Caption.]

Now comes the United States of America by J. H., United States attorney for the —— district of ——, and represents that, by an Act of Congress of the United States, approved March 3, 1899, entitled "An Act to provide for a public building at Cleveland, Ohio," the secretary of the treasury of the United States was authorized and directed to purchase, acquire by condemnation, or otherwise, the block of land located in the city of Cleveland, which is bounded by Rockwell street on the north, by Wood street on the east, by Superior street on the south, and on the west by land now owned by the United States, upon which the postoffice or government building is located, as and for a site for a new United States public building, including fire-proof vaults, heating and ventilating apparatus, elevators and approaches, for the use and accommodation of the United States post-office, custom house, internal revenue office, United States Circuit and District Courts, signal service, weather bureau, pension office and other government offices, in the city of Cleveland and state of Ohio, provided, that the secretary of the

treasury can purchase the said property at a reasonable price.

Plaintiff further represents that, in the opinion of the said secretary of the treasury of the United States, it has become necessary and advantageous to the government to acquire the said premises by condemnation, under judicial process; the said property to be used as a site upon which to erect a new government building, as set forth in the Act of March 3, 1899.

That on the 17th day of August, 1899, the secretary of the treasury of the United States made application to the attorney-general of the United States to commence proceedings for the condemnation of the said lands; and, on the 21st day of August, 1899, the attorney-general of the United States instructed the United States attorney for the northern district of Ohio to institute proceedings for the condemnation of the lands described in the Act of March 3, 1899, a copy of which letter is hereto attached, marked Exhibit "A"; and these proceedings are brought under instructions from the department of justice of the United States, and under the Act of Congress approved August 1, 1888, entitled "An Act to authorize condemnation of land for sites of public buildings, and for other purposes."

Plaintiff says that said land to be appropriated by the United States for the purposes aforesaid, is more particularly described as follows:

Parcel No. 1: Situated in the city of Cleveland, county of Cuyahoga and state of Ohio, and being a part of original two-acre lot No. 64, and bounded on the north by Rockwell street, on the east by Wood street, on the south by Superior street, and on the west by a street called Case Place, and being the property deeded to the Cleveland Library Association (now Case Library) by Leonard Case, July 1, 1876.

Parcel No. 2: Situated in the city of Cleveland, county of Cuyahoga and state of Ohio, and known as a part of original two-acre lots Nos. 63 and 64, and known as Case place, so-

called, bounded on the north by Rockwell street, on the east by the property above described, on the south by Superior street, and on the west by land deeded to the United States by Leonard Case, May 18, 1859.

A plat of said parcels of land is attached to this petition, marked Exhibit "B," and made a part hereof.

Plaintiff further says that the said first parcel has erected thereon a brick and stone structure, called the Case Library building, which building is owned by the Case library; and that the defendants, William Bingham, Henry C. Ranney, Samuel E. Williamson, James Barnett and Charles W. Bingham, are trustees of the said Case library.

That the defendants, The Citizens' Savings & Loan Association, Walton Bros., C. H. Estinghaisen, Francis J. Wing, C. B. Squire, The Savings Building & Loan Company, James J. Tracy, John Coon and Levi T. Scofield, have, or claim to have, some right, title or interest as lessees of portions of the said building, the exact nature of which is unknown to this plaintiff.

That the defendants, [*naming them*] are, so far as known to this plaintiff, the heirs at law of Leonard Case, and have, or claim to have, some right, title or interest in and to the land above described, the exact nature of which is unknown to this plaintiff.

That the defendant, the city of Cleveland, has, or claims to have, some right, title or interest in and to the property described as said second parcel, the same having been deeded to the city as and for a street.

Wherefore the said plaintiff, the United States of America, prays the court that a jury may be empaneled for an inquiry and assessment of the compensation to be paid by the said United States of America for the said property, as described and set forth in this petition, and that, upon payment into court, or to the proper owners, defendants herein, by the United States, of an amount of compensation equal to the

sum so assessed by the jury as the value of the land above described, with the buildings thereon, that possession may be awarded it by this court, according to law; and that the absolute title to the said property by, and thereby vest, in the said United States, for the purposes aforesaid, and that the court will divide the sum so paid, and order its distribution among the several claimants, as to their respective rights herein; and for such other and further orders as may be proper in proceedings for the condemnation of private property to the public use aforesaid.

And your petitioner further prays that process be duly issued by this honorable court requiring the said parties defendant to appear before this court on a day set by a judge thereof for the hearing of this petition, then and there to make answer to this petition, and to abide the further order and judgment of the court in the premises.

J. H.,

United States Attorney, Northern District of Ohio.
The United States of America, Northern District of Ohio, ss.

J. H., being duly sworn, says that he is the attorney of the United States for the Northern District of Ohio, duly authorized in the premises; that the facts set forth in said petition are within the personal knowledge of affiant; and that the facts and allegations therein stated are true, as he verily believes.

J. H.

Sworn to before me by the said J. H., and by him subscribed in my presence, this — day of —, A. D. —

B. R.,

Clerk U. S. Circuit Court.

(1) Taken from the record in *Avery v. U. S.* 104 Fed. 711, 44 C. C. A. 161.

As to the right to appropriate property for public uses subject to the constitutional limitations see *Kohl v. U. S.* 91 U. S. 367; *U. S. v. Jones*, 109 U. S. 513; *Shoemaker v. U. S.*, 147 U. S. 282; *U. S. v. Gettysburg*

Elec. Ry. Co., 160 U. S. 668; Cooley's Const. Limitation, 526; U. S. Const., Art. 5, last clause.

The proceedings are on the common law side of the court, and conform as near as may be to the practice, pleadings and forms of proceedings in the state court. Act of August 1, 1882, 21 Stat. L. 357, 1 Supp. 601. *In re Secretary of the Treasury*, 45 Fed. 397. Same case on appeal sub nom. *Carlisle v. Cooper*, 64 Fed. 472, 12 C. C. A. 235.

The proceedings are ordinarily had in the circuit court but the district court has jurisdiction to condemn lands for fortifications. Act of August 18, 1890, 26 Stat. L. 316; *U. S. v. Engeman*, 45 Fed. 546.

The petition should be in the name of the United States.

See *In re Rugheimer*, 36 Fed. 375, and by the direction of the attorney general upon the application of the secretary of the treasury. *U. S. v. Gettysburg Elec. Ry. Co.*, 160 U. S. 668.

Condemnation proceedings have been provided in rather recent times for the acquisition of various kinds of property deemed necessary for government purposes, military, naval, or other, such as:

For aviation purposes—Acts of Aug. 29, 1916, 39 Stat. L. 622; June 15, 1917, 40 Stat. L. 182; July 27, 1917, 40 Stat. L. 247.

For quarantine stations—Act of June 19, 1906, 36 Stat. L. 299.

For military purposes—Acts of July 2, 1917, 40 Stat. L. 241; April 11, 1918, chap. 51, 40 Stat. L. —; July 9, 1918, chap. 143, XV, 40 Stat. L. —.

Aircraft patents—Act May 4, 1917, 39 Stat. L. 1169.

Dams—Acts of June 21, 1906, 34 Stat. L. 386; June 23, 1910, 36 Stat. L. 595.

No. 293.

Petition to Condemn Land under a State Statute of Eminent Domain (1).

The District Court of the United States, District of Idaho.

Postal Telegraph-Cable Company of
Idaho (a Corporation), Plaintiff,
vs.

Oregon Short Line Railroad Company
(a Corporation), Defendant.

And now comes the said plaintiff, leave of court first having been had and obtained, and files this complaint in the consoli-

dated action of the Postal Telegraph-Cable Company of Idaho (a corporation), plaintiff, *vs.* Oregon Short Line Railroad Company (a corporation), defendant, removed to this court from the Fifth Judicial District Court of the county of Oneida, state of Idaho, and a like entitled cause removed to this court from the Fifth Judicial District Court of the county of Bannock, in the state of Idaho; and a like entitled cause removed to this court from the Fifth Judicial District Court of the county of Bingham, in the state of Idaho; and a like entitled cause removed to this court from the Fifth Judicial Court of the county of Fremont, in the state of Idaho, and alleges:

First. That the Postal Telegraph-Cable Company, plaintiff herein, is and at all times herein mentioned was a corporation duly incorporated under the laws of the state of Idaho, and doing business in the state of Idaho.

Second. That the said defendant, the Oregon Short Line Railroad Company, is and at all times herein mentioned was a corporation incorporated under and pursuant to the laws of the state of Utah, and doing business in the state of Idaho.

Third. That said defendant railroad company is the owner of its right of way, a portion of which is sought by this proceeding to be condemned for the use of plaintiff for the purpose of constructing, maintaining and operating a telegraph line thereon.

Fourth. That plaintiff claims the power to exercise the right of eminent domain in this proceeding by virtue of title 7, of special proceedings of a civil nature of the revised statutes of Idaho of 1887.

Fifth. Plaintiff desires the right to construct, maintain and operate a telegraph line on and upon the right of way of defendant from a point on the state line between the states of Utah and Idaho, called Cannon, running thence north through the counties of Oneida, Bannock, Bingham and Fremont, in the state of Idaho, to a point on the state line between the state

of Montana and the state of Idaho, known and called Monida Station, on the railroad of said defendant, a distance of about two hundred miles.

Sixth. Plaintiff proposes to construct and will construct a telegraph line as follows:

By the erection of poles thirty feet in length, planted firmly in the ground, at a depth of not less than five feet and thirty feet from the outer edge of the railroad bed, at or near the top of which will be fastened *across* arms eight feet in length, to which will be attached insulators, and upon which will be stretched, from pole to pole, a sufficient number of wires to transmit speedily and promptly all business entrusted to it for transmission by the government and the public; and where it becomes necessary to cross the track of said railroad, the poles will be of such height above the ground, and the wires will be strung so high as to prevent any interference with the operation or conduct of defendant's business, and so as not to endanger the life or limb of its employes. And if at any time defendant needs any portion of its right of way where said poles and line are constructed for its purposes, then, in such event, plaintiff will, upon reasonable notice, at its own expense, remove the same to such other point or points on said right of way as may be designated by defendant. The said poles will be erected at a distance of about one hundred and sixty-seven feet from each other on said right of way, as aforesaid, each of which poles will be one foot in diameter at the base and occupy only one square foot of ground.

Seventh. Defendant's railroad bed is located at or near the center of its right of way, which is not less than one hundred feet in width, and the track of said railroad is four feet, eight and one-half inch gauge along and upon the center of said railroad bed.

Eighth. Plaintiff further alleges that the location and general route and termini of said telegraph line are as described

aforesaid, and as outlined on a certain map attached hereto and marked Exhibit "A," and made a part of this complaint, the said route of said telegraph line, as outlined on said map, being designated thereon by heavy blue lines.

Ninth. The only land sought to be occupied will be one circular foot, five feet deep, in which the poles aforesaid will be planted, and does not include the whole, but only a very small fractional part of the entire right of way of said railroad company. The use to which this will be applied is a public use and is authorized by law, and that the taking by this proceeding is necessary to such use, and that the public use to which it is to be applied is a more necessary public use than that to which it has already been appropriated.

Tenth. Plaintiff does not by this proceeding seek to destroy or curtail or in any way interfere with the franchise and rights of the defendant company. That so much of the right of way of the defendant company which is sought to be appropriated to the use of plaintiff has not been appropriated, and is not likely in the future to be needed by the said defendant for railroad purposes, and is not reasonably essential to such use, and is liable under the law to condemnation proceedings for a different public use, as is sought for plaintiff by this proceeding.

Eleventh. That the taking sought in this proceeding will not destroy or curtail any franchises or any property essential to the full and complete enjoyment of said defendant company.

Twelfth. That such portion of the right of way of the defendant sought by plaintiff for the purpose aforesaid is not used, and is not essential to its enjoyment of its franchises and property, and the appropriation sought by plaintiff in this proceeding is for a more necessary public use than that to which it has already been appropriated.

Thirteenth. Plaintiff will not attach its wires or fixtures of any kind to any of the bridges or trestles, buildings or structures of the defendant railroad company, and will not erect any of its poles within any embankments of the defendant com-

pany, but as hereinbefore stated, will occupy only such portion of the right of way aforesaid as it is not necessary for the use of, or is being used by the said defendant company, and if at any time the said defendant company needs any portion of its right of way where the poles and lines of the plaintiff are upon said right of way, for the purposes of constructing an additional railroad track, sidetrack, switches, turnouts, turn-tables, water-tanks, warehouses, or any other use for railroad purposes, then in such event plaintiff will, upon reasonable notice, at its own expense, remove its poles and wires to such other part or parts of said right of way as may be designated by the defendant company, so as in no way to interfere with the use of any portion of the right of way of defendant for the purposes for which it has already been appropriated. That the construction, maintenance and operation of its telegraph line upon the right of way of the defendant railroad company as appropriated will be of no damage whatever to the said railroad company, and will not diminish in value the said right of way for railroad purposes. And the plaintiff's telegraph line will not come in contact or interfere with any telegraph line already constructed on said right of way, and will be constructed on the opposite side of the roadbed from that of the telegraph now on said right of way.

Fourteenth. Plaintiff further alleges that it has duly accepted the provisions of an act of Congress, approved July 24, 1866, entitled, "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes." Agreeing thereby that telegrams between the several departments of the government and their officers and agents shall at all times have priority over all other business in their transmission over the lines of said company, and that the charges for such telegrams shall not exceed the rates annually fixed by the postmaster-general.

Fifteenth. Plaintiff alleges that it has made a *bona fide* effort to agree with the defendant railroad company upon a just com-

pensation, that should and ought to be paid it, for the right and privilege sought in this proceeding, but has failed to make such agreement with said defendant company, said defendant declining and refusing to negotiate with plaintiff for such right and privilege.

Sixteenth. Plaintiff further alleges that all the preliminary steps required by law have been taken to entitle plaintiff to institute these proceedings.

Wherefore plaintiff prays judgment as follows: That it may be adjudged by the court that the use to which the property herein sought to be condemned is a use authorized by law; that the public use requires the condemnation of the real property herein described; that the public use to which said real estate is to be applied is more a necessary public use than that to which it is already appropriated; that the plaintiff is entitled to take and hold said property for the public use specified upon making compensation therefor, and that the court hear such legal testimony as may be offered by the parties and ascertain such just compensation as should be paid by the plaintiff to said defendant for such damages as defendant shall sustain by the construction of said telegraph line, and that plaintiff have such further and other relief as to the court shall seem just. (2)

O. W., Attorney,
Salt Lake City, Utah.
J. R., General Counsel.

State of Utah, County of Salt Lake, ss.

O. W., being duly sworn, deposes and says: That he has heard read the foregoing complaint and knows the contents thereof; that he is one of the attorneys of plaintiff in the above entitled cause, and makes this affidavit for and on plaintiff's behalf. He further says that the facts stated in the foregoing complaint are true according to his best information, knowledge and belief.

O. W.

Subscribed and sworn to before me this — day of —,
A. D. —.

D. W.,

Notary Public.

(1) Taken from record in *Oregon Short Line R. R. Co. v. Postal Telegraph Cable Co. of Idaho*, 111 Fed. 842.

(2) See also *Colorado E. Ry. Co. v. Union Pacific Ry. Co.*, 41 Fed. 293; affirmed in 94 Fed. 312, and see *Boom Co. v. Patterson*, 98 U. S. 403.

Where a railway company operates a telegraph line it has exclusive right to its right of way for that purpose so far as necessary, but a telegraph company has the right to condemn the unused portion for its own lines, and in such case the damages are those sustained by the railway in the operation of the railway, the value of the use taken for telegraph and railway use, and evidence to show the rental value is admissible on the question of damages. *N. P. Ry. Co. v. W. U. Tel. Co.*, 230 Fed. 347, 144 C. C. A. 489.

Condemnation proceedings are essentially in rem, and the owner is entitled only to notice of the proceeding to condemn, not of the subsequent steps. *In re Condemnation Suits by the United States*, 234 Fed. 443. This case also lays down some rules respecting notice in general.

Burden of showing value of easement of telegraph company over railway right of way and absence of damages to remaining property is determined by the state law. *Postal, etc., Co. v. N. P. R. Co.*, 211 Fed. 824, 128 C. C. A. 350.

Court of equity has no jurisdiction to condemn. *W. U. Tel. Co. v. Nashville, C. & St. L. R. Co.*, 250 Fed. 207.

For discussion of questions arising in a case where a telegraph company is attempting to condemn an easement over a railway right of way where the railway company is itself desirous of operating its own telegraph line, see *L. & N. Ry. Co. v. W. U. Tel. Co.*, 249 Fed. 385, — C. C. A. —.

As to condemnation for temporary use as a United States military camp under the act of July 2, 1917, some rules governing compensation are laid down in *In re Condemnation of Lands, etc.*, 250 Fed. 314.

Generally as to right of a private corporation to condemn, see *Walker v. Shasta Power Co.*, 160 Fed. 856, 87 C. C. A. 660.

No. 293a.

Petition for Condemnation of Easement over Railroad Property where Already Occupied under a Contract About to Expire.

[Caption.]

The petition of the Western Union Telegraph Company, a corporation organized and existing under the laws of the state of New York, domiciled in the city of New York, in said state,

and doing business in the state of Louisiana, having its principal office in the said state in the city of New Orleans, respectfully represents :

That petitioner is a corporation organized and existing under the laws of the state of New York, for the purpose of transmitting intelligence by magnetic telegraph, and has constructed and maintained, and is constructing and maintaining telegraph lines through the various states of the United States and in the state of Louisiana necessary to transmit intelligence along the highways and over the waters and through the parishes of the state of Louisiana, and more particularly the parishes of Orleans and St. Tammany.

The petitioner is duly qualified by law to institute these proceedings, and has filed in the office of the secretary of state of Louisiana all of the documents and instruments required by law for the purpose of authorizing it to do business in the state of Louisiana, and has named and appointed T. P. Cummings as its agent for the service of process in the state of Louisiana.

That the Louisville & Nashville Railroad Company is a corporation organized and existing under the laws of the state of Kentucky, domiciled in the city of Louisville, in the said state, and doing business in the said state in the city of New Orleans, and has named Charles Marshall and A. J. Jacobs its agent in said state for the service of process.

That the said Louisville & Nashville Railroad Company is engaged in and is carrying on the business of a common carrier by railroad of passengers and freight through various states and in and through the state of Louisiana, and more particularly in and through the parishes of Orleans and St. Tammany in said state:

That the said defendant, the Louisville & Nashville Railroad Company, in the operation of its railroad, has acquired and owns a strip of ground or right of way over which it operates its said railroad, varying in width from sixty to one hundred feet, beginning at a point in the city of New Orleans, at the

intersection of the property lines at the corner of Elysian Fields street and Laforce street (now North Tonti street), in square No. 1210, and running thence in an easterly direction and forming a continuous strip of ground through the parishes of Orleans and St. Tammany to the thread of the stream [stream] known as Pearl River, the dividing line between the states of Louisiana and Mississippi, a distance of 35.38 miles.

That the strip of ground or right of way 28.93 miles in length lines in the parish of Orleans and 6.45 miles lines in the parish of St. Tammany in this state.

That on said strip of ground or right of way said defendant has constructed and operates a railroad, and at various places thereon has constructed necessary appurtenances, consisting of sidetracks, station houses, depots and section houses, and where the line of said railroad crosses navigable streams or bodies of water, bridges have been constructed, notably where said railroad crosses the streams known as the "Little Rigolets" and "Rigolets."

That the locations of said right of way and of the said railroad constructed thereon, and of the improvements, structures and bridges thereon, are fully shown on the plat or plan filed herewith as a part hereof, and marked for identification "Exhibit A."

That may [many] years ago, with the consent of the defendant, the plaintiff constructed and has ever since maintained, and now maintains, a line of telegraph poles and wires and other appurtenances thereto over and along said strip of ground or right of way, and over and along the bridges of the said defendant crossing the streams as "Little Rigolets" and "Rigolets," respectively, as shown on the plan or plat marked "Exhibit A," as aforesaid, said poles being located at approximately a distance of 91.65 feet apart, and at a distance from the center of the main line of defendant's railroad as shown on the profile filed herewith as a part hereof and marked "Exhibit B."

That the right so to maintain the said line, with the consent of the defendant, will expire and terminate on the 17th day of August, 1912, and though the plaintiff endeavored and offered to agree with the defendant as to the value of the use or servitude enjoyed by the plaintiff on the said strip of ground or right of way and on the said bridges for the purpose of maintaining its said line of telegraph, the defendant has refused to agree with the plaintiff as to the terms and conditions upon which it may continue to enjoy the said use or servitude, and has refused to permit the enjoyment by the plaintiff of the use or servitude after the expiration of the license under which the said use has been heretofore enjoyed, to-wit, August 17, 1912.

That petitioner being a corporation organized for the purpose of transmitting intelligence by magnetic telegraph is, under and by virtue of the state of Louisiana, authorized and empowered to expropriate the right to construct and maintain its lines along and parallel to any railroad in the state, when such right is necessary for the construction, working, operating and maintaining of its telegraph line, and when it can not secure such right by consent, contract or agreement upon such reasonable terms, provided, that the ordinary use of such railroad be not thereby obstructed.

That it is necessary for the constructing, working, operating and maintaining of plaintiff's telegraph line that it should have the right to erect and maintain its telegraph poles, wires and appurtenances along and parallel to the line of railroad and upon the right of way and the bridges crossing the streams as "Little Rigolets" and "Rigolets" belonging to the defendant company, the location of the said poles, wires and appurtenances constituting plaintiff's telegraph line being fully shown on the map and profile heretofore referred to and filed herewith as a part hereof, marked "Exhibit A" and "Exhibit B," respectively.

That the ordinary use of the defendant's railroad will not be thereby obstructed.

That petitioner, therefore, desires to expropriate such right.

That petitioner does not seek to acquire the fee to any of the lands or bridges included in the right of way of the defendant, or the right to use the same for any other purpose than to erect poles with cross-arms thereon and to string wires for the use in transmission of intelligence be [by] magnetic telegraph as aforesaid, and petitioner proposes to maintain and repair the said poles, cross-arms, wires and appurtenances as may from time to time be necessary and to erect and maintain only one line of poles with cross-arms thereon for such purposes.

That said poles are to be not less than thirty feet long and not less than twenty inches in diameter at the base, and, except in the case of the poles on the bridges aforesaid, are to be set in the ground to a depth of not less than six feet in such manner as to hold firmly in position.

That on the bridges crossing the streams known as "Little Rigolets" and "Rigolets," respectively, the poles are to be fastened and attached as shown on the sketch filed herewith as part hereof and marked "Exhibit C."

That the number of the said poles is not to exceed forty (40) to the mile, and they all to be securely and properly braced, and the cross-arms are to be about eight or ten feet in length, extending from four to five feet on each side of the said poles near the top.

That all of the materials used by your petitioners are to be the best, and the said line is to be constructed upon the most approved plan known or used in this country.

Petitioner further stipulates and agrees that if at any time in the future, after the erection of its said poles, cross-arms and wires, or after its acquisition in these proceedings of the right to maintain its poles, cross-arms and wires as presently constructed, it should become reasonably necessary for the said defendant to change the location of its tracks or to construct new tracks or sidetracks where the same do not now exist, and for such purpose to use and occupy that portion of the said

right of way on which petitioner's poles are, or may be set, petitioner will, at its own expense, upon reasonable notice from the defendant, remove the said poles, cross-arms and wires to such other point or points on the said defendant's right of way as may be reasonably necessary in order not to obstruct the use by the said defendant of its property.

Petitioner recognizes fully the dominant right of the defendant in the said right of way and bridges, and seeks in this proceeding to condemn merely an easement or servitude over the same for the construction, operation, maintenance and repair of its telegraph lines, the said easement or servitude to be used now and in the future in such way as not to interfere with the proper and necessary use of the same by the said defendant for railroad purposes.

Wherefore, the premises considered, petitioner prays for an order directing the clerk of this honorable court to give notice to the said Louisville & Nashville Railroad Company, defendant, in accordance with law, and that a copy of this petition and the order rendered thereon, together with a notice of the time at which a jury shall be impaneled to assess the value of the right claimed in this petition, may be served on the Louisville & Nashville Railroad Company, and that thereafter a jury of freeholders may be impaneled in the manner provided by law to fix and assess the value of the said right sought to be expropriated herein and fully described in this petition and in the exhibits annexed hereto, and to determine the damage, if any, the railroad company will sustain in the premises and after due proceedings, for judgment expropriation in favor of petitioner and against the defendant the right of use for a telegraph line as aforesaid over the right of way, bridges and property of the defendant company in the form, to the extent and within the limitations described in the foregoing petition and the exhibits annexed thereto.

And that the sum due by petitioner to the said railroad company for the said right be determined and decreed to be paid to the said railroad company as pointed out by law.

And petitioner prays for all general and equitable relief.

A. B. and C. D.,

Attorneys for Petitioner.

No. 284.

Answer and Claim for Damages in Condemnation Proceedings.

[*Caption.*]

Cyrus Bosworth, a citizen of the state of Ohio, respectfully claims compensation herein, and says:

First. That for a long time, to-wit, more than three years prior to May 18, 1859, Leonard Case, a citizen of Ohio and a resident of Cleveland, owned the following lands, to-wit: Situated in the city of Cleveland, county of Cuyahoga and state of Ohio, and bounded as follows: (1) All that land fronting on Rockwell street, between the present east line of Park Place and the west line of Wood street; (2) All that parcel of land lying between the west line of Wood street and a line parallel with and distant easterly one hundred and five feet from the Public Square, and also lying within the north line of Superior street and the south line of Rockwell street; the said second parcel constituting the present site of Case library and the street known as Case Place; and that the said Leonard Case, for the purpose of accommodating and facilitating the use of his said property, on or about May 18, 1859, conveyed to the city of Cleveland the following parcel of land for street purposes, to-wit:

Situated in the city of Cleveland, county of Cuyahoga and state of Ohio, and bounded as follows:

Beginning at a point in the northerly line of Superior street; thence northerly parallel with the Public Square to Rockwell street, about two hundred feet; thence easterly with Rockwell street, thirty-five feet; thence southerly parallel with the Public Square about two hundred feet to Superior street; thence westerly with Superior street to the place of beginning. The said

- beginning point is one hundred and five feet easterly from the Public Square, and the westerly line of said thirty-five feet is one hundred and five feet easterly from the Public Square.

Second. That the said land conveyed to the city of Cleveland (being also described in plaintiff's application herein) was conveyed to the city of Cleveland as and for a public street in said city, and for no other purpose whatsoever.

Third. That on or about the 18th day of October, 1859, the city council of the city of Cleveland, by ordinance, accepted and confirmed the dedication of said parcel of land so conveyed as and for a public street, and for no other purpose whatsoever.

Fourth. Claimant further says that said Leonard Case died intestate on or about —, 1864, leaving a sister, Sarah Case Bosworth, and an only child named Leonard Case, Jr.; that said Leonard Case, Jr., on or about January 12, 1880, died intestate and without issue, and that claimant herein is the only child and heir-at-law of said Sarah Case Bosworth; that claimant is now, and has at all times hereinbefore mentioned, been satisfied with the use of said parcel of land (so conveyed, confirmed and accepted) as and for a public street, but that in the event said parcel of land (so conveyed, confirmed and accepted) is appropriated and taken by the United States government, applicant herein, for a postoffice site, then in that event the use of said parcel (being said parcel of land so conveyed, accepted and confirmed) as and for a public street, will cease; and claimant is owner in equity and at law of the fee simple and of the reversionary interest in and to the said parcel of land (so conveyed, accepted and confirmed) as and for a public street.

Wherefore, your claimant respectfully asks that his rights in the premises shall be wholly protected, and that upon final hearing full compensation herein shall be made to him.

CYRUS BOSWORTH,

By Y. & Y.,

Attorneys for Claimant.

State of Ohio,
County of Cuyahoga, ss.

R. Y., being duly sworn, deposes and says that the facts and allegations set forth in his foregoing claim for compensation and damages, are true to the best of his knowledge, information and belief. R. Y.

Sworn to and subscribed in my presence by the said R. Y.,
this — day of —, A. D. —

[Seal.]

H. J., Notary Public.

No. 295.

Another Form of Answer and Claim.

[Caption.]

Now come Annie E. Kerr and Frances M. Kerr, and for their answer to the petition, say that on or about the 1st day of January, 1880, Leonard Case died seized of an estate in fee simple in the premises described in plaintiff's petition as parcel No. 2; that the said Leonard Case died intestate and without issue; that on the 12th day of January, 1880, Levi Kerr was duly appointed administrator of said estate by the probate court of Cuyahoga county, Ohio, and that such proceedings were had that the said estate was fully settled and administered by the said Levi Kerr as such administrator; that as an heir-at-law of the said Leonard Case, the said Levi Kerr became seized of an undivided interest in said premises; that on or about the 18th day of March, 1885, the said Levi Kerr died testate, and on the 2d day of June, 1885, Henry G. Abbey and S. K. Gray were appointed as executors of said last will and testament, and that notice of said appointment was duly made and published; and that afterwards, to wit, on or about the 19th day of October, 1895, the said Abbey resigned said trust, and the said S. K. Gray became the sole executor of said estate.

That by said last will and testament, the said Levi Kerr devised unto the said Laura K. Axtell all of his right, title and interest in and to the premises described herein, and that as such residuary devisee and in her own right she became seized of an undivided interest in said premises hereinabove described.

That afterwards, to wit, on or about the — day of —, 1890, the said Laura K. Axtell died testate, and her last will and testament was duly probated in the probate court of Lake county, Ohio, on the 15th day of August, 1890, notice thereof being duly published as required by law; and S. K. Gray and Eckstein Case were appointed executors of the said last will and testament; that on the 11th day of November, 1895, the said S. K. Gray, as executor of the estate of the said Levi Kerr, made a full and final settlement of said estate of Levi Kerr, which settlement was approved by said probate court of Cuyahoga county; and on the 8th day of April, 1896, the said S. K. Gray and Eckstein Case filed their final accounts as executors of the estate of Laura K. Axtell, which said account was duly approved by the probate court of Lake county, Ohio, on the 18th day of August, 1896. And these defendants say that by said last will and testament the said Laura K. Axtell devised all her right, title and interest in and to the premises hereinabove described, share and share alike, unto Matilda C. Avery, Mary A. Stockwell, Annie E. Kerr, Frances M. Kerr and Cornelia H. M. Gray, defendants herein, and unto William S. Kerr, since deceased; Eunice K. Parmelee, since deceased, and unto S. K. Gray and Wilbur F. Kerr. They further say that for a long time prior to the 18th day of May, 1859, the above mentioned Leonard Case owned the following lands, to wit:

Situated in the city of Cleveland, county of Cuyahoga, and state of Ohio, and bounded as follows:

First. All that land fronting on the north side of Rockwell

street, between the present east line of Park Place and the west line of Wood street.

Second. All that parcel of land lying between the west line of Wood street and a line parallel with the distant easterly 105 feet from the Public Square, and also lying within the north line of Superior street and the south line of Rockwell street.

The said second parcel constituting the present site of Case library and the street known as Case Place; and that the said Leonard Case, for the purpose of accommodating and facilitating the use of the said above described property, on or about May 18, 1859, conveyed to the city of Cleveland, a municipal corporation, and defendant herein, the following described parcel of land, for street purposes, to wit:

Situated in the city of Cleveland, county of Cuyahoga, and state of Ohio, and bounded as follows, beginning at a point in the northerly line of Superior street; thence northerly parallel with the Public Square to Rockwell street, about 200 feet; thence easterly with Rockwell street 35 feet; thence southerly parallel with the Public Square about 200 feet to Superior street; thence westerly with Superior street to the place of beginning. The said beginning point is 105 feet easterly from the Public Square, and the west line of said 35 feet is 105 feet easterly from the Public Square.

That the said above described land so conveyed to the city of Cleveland, being the premises described in plaintiff's petition as parcel No. 2, was conveyed to the city of Cleveland as and for a public street, and for no other purpose whatsoever. That on or about the 18th day of October, 1859, the city council of the city of Cleveland, by an ordinance, accepted and confirmed the dedication of said parcel of land so conveyed as and for a public street, and for no other purpose whatsoever. Defendants say that they are now and have at all times heretofore been satisfied with the use of said parcel of land so conveyed and confirmed and accepted as and for a

public street, but that in the event said parcel of land so conveyed, confirmed and accepted is appropriated and taken by the United States government, the plaintiff herein, for a post-office site, then and in that event the use of said parcel of land, being the said parcel of land so conveyed, accepted and confirmed as and for a public street, will cease, and these defendants are the owners in equity and at law of the fee simple and of the reversionary interest in and to the said parcel of land so conveyed, accepted and confirmed as and for a public street.

Wherefore, these defendants pray that should the court find the appropriation of said second parcel of land to be necessary, that a jury may be empaneled to determine and assess the value of said premises described as parcel No. 2 in the petition; that the court may find and determine the right, title and interest which these answering defendants have or ought to have in said parcel of land, and that upon the payment of the value thereof into court the same may be ordered distributed to these defendants as their interests may appear, and for such other and further relief as they may be entitled to.

Y. & Y.,

[*Verification.*]

Attorneys for above Defendants.

No. 296.

Another Form of Answer and Claim.

[*Caption.*]

Now come Matilda C. Avery, Mary A. Stockwell, Cornelia H. M. Gray, Aaron M. Wilcox, Erastus Parmelee, Harley Barnes, as administrator of the estate of Eunice K. Parmelee, deceased; A. G. Reynolds, administrator of the estate of Wm. S. Kerr, deceased; Almira E. Kerr, B. F. Kerr, W. W. Kerr, Nettie K. Baxter and H. N. Munson, as administrator of the estate of Abner M. Parmelee, deceased, and for an-

swer to the petition say that on or about the 1st day of January, 1880, Leonard Case died seized of an estate in fee simple in the premises described in plaintiff's petition as parcel No. 2.

That the said Leonard Case died intestate and without issue; that on the 12th day of January, 1880, Levi Kerr was duly appointed administrator of the said estate by the probate court of Cuyahoga county, Ohio, and such proceedings were had that said estate was fully settled and administered by said Levi Kerr as such administrator. That as heirs-at-law of the said Leonard Case, said Levi Kerr became seized of the undivided one-tenth interest in said premises; that on or about the 18th day of March, 1885, the said Levi Kerr died, testate, and on the 2d day of June, 1885, Henry G. Abbey and S. K. Gray were appointed as executors of said last will and testament, and that notice of said appointment was duly made and published; that afterward, to wit, on or about the 19th day of October, 1895, the said Abbey resigned said trust, and the said S. K. Gray became the sole executor of said estate; that by said last will and testament the said Levi Kerr devised unto the said Laura K. Axtell all of his right, title and interest in and to the premises described herein, and that as such residuary devisee and in her own right she became seized of an undivided one-fifth interest in said premises hereinbefore described; that afterward, to wit, on or about the — day of —, 1890, the said Laura K. Axtell died, testate, and her last will and testament was duly probated in the probate court, Lake county, Ohio, on the 15th day of August, 1890, notice thereof being duly published as required by law, and S. K. Gray and Eckstein Case were appointed executors of the said last will and testament; that on the 4th day of November, 1895, the said S. K. Gray, as executor of the estate of the said Levi Kerr, made a full and final settlement of said estate of Levi Kerr, which settlement was approved by the said probate court of Cuyahoga county, and on the 8th day of April, 1896, the said S. K. Gray and Eck-

stein Case filed their final account as executors of the estate of Laura K. Axtell, which said account was duly approved by the probate court of Lake County, Ohio, on the 18th day of August, 1896.

And these defendants say that by said last will and testament, the said Laura K. Axtell devised all of her right, title and interest in and to the premises hereinbefore described, share and share alike, unto the said Matilda C. Avery, Mary A. Stockwell, Annie E. Kerr, Frances M. Kerr, Cornelia H. M. Gray, defendants herein, and unto William S. Kerr, since deceased; Margaret K. Parmelee, since deceased; Eunice K. Parmelee, since deceased, and unto S. K. Gray and Wilbur F. Kerr.

Afterwards, to wit, on or about the 25th day of January, 1896, the said Wilbur F. Kerr and S. K. Gray, by mesne covenants and conveyances, duly sold, assigned, transferred and conveyed all their right, title and interest as such residuary devisees in said premises and for a valuable consideration to the defendant, Aaron M. Wilcox; that he is now seized of and entitled to all their right, title and interest in and to the same.

That the said William S. Kerr died on or about the —— day of —— intestate, leaving the defendant, Almira E. Kerr, his widow, and the defendants, B. F. Kerr, W. W. Kerr and Nettie K. Baxter, his heirs-at-law; that they are now seized in fee simple of all the right, title and interest of the said Wm. S. Kerr in and to said premises hereinbefore described; the said Margaret K. Parmelee died testate in the year 1894, and on the 26th day of May, 1894, her said last will and testament was duly probated in the probate court of Lake county, Ohio, and the said Erastus Parmelee was appointed executor of said last will and testament, and that by said last will and testament the said Margaret K. Parmelee, deceased, devised unto the said Erastus Parmelee all her right, title and interest in said premises described herein.

That after the death of the said Laura K. Axtell, the said Eunice K. Parmelee died, intestate, a resident of Lake county, Ohio, and by proper proceedings had in the probate court of said county, Harley Barnes was appointed administrator of her said estate. That the said Eunice K. Parmelee died without issue, leaving her husband, Abner M. Parmelee, her sole heir-at-law, who afterwards died, testate.

That at the time of his said death, he was a resident of Lake county, Ohio, and that by proper proceedings in said probate court, his last will and testament was duly probated, and the defendant, H. N. Munson, was appointed executor of his said estate.

That thereafter an agreement was entered into by the heirs by blood of Eunice K. Parmelee, to wit, the said William S. Kerr, deceased; Caroline A. Murray, Erastus Parmelee, heir-at-law, residuary devisee and executor of the estate of Margaret Parmelee, deceased; Christopher Canfield, Anna Patchen, and Anna Patchen as guardian for Retta Canfield, and the residuary devisees of the said last will and testament of the said Abner M. Parmelee, deceased, to wit: Erastus Parmelee, Philander Parmelee, P. Wick Parmelee, F. A. Parmelee, Fred J. Parmelee, Orlando M. Barber, Caroline M. Hamson, Jennie A. Bartholomew, R. M. Murray, W. P. Murray, Edgar D. Barber and Robert Barber, whereby it was agreed that the said Harley Barnes, as administrator of the estate of Eunice K. Parmelee, deceased, should convert into money all of the estate, real and personal, of the said Laura K. Axtell, deceased, of the said parties thereto, to which they or any of them might be entitled as heirs-at-law of the said Eunice K. Parmelee, deceased, or the residuary devisees of the said Abner M. Parmelee, deceased, and should pay to the said H. N. Munson, as executor of the estate of the said Abner M. Parmelee, one-half of the amount so obtained, the said sum so received by the said Munson as executor to be distributed as the residuary devisees might be entitled to receive the same,

and the remaining one-half of said fund so realized to be distributed by the said Harley Barnes, as administrator, among the heirs of the said Eunice K. Parmelee, deceased, as they may be entitled to receive the same.

Wherefore, these answering defendants pray that should the court find the appropriation of the said second parcel to be necessary that a jury may be impaneled to determine and assess the value of said premises described as parcel No. 2 in the petition; that the court may find and determine the right, title and interest which these defendants have or ought to have in said parcel, and that upon the payment of the value thereof into court, that the same may be ordered distributed to these defendants as their interest may appear, and for such other and further relief as they may be entitled to.

Y. & Y.,

[*Verification.*]

Attorneys for Defendant.

No. 297.

Answer to Petition to Condemn under a State Statute (1).

[*Caption.*]

And now comes the defendant and for answer to the plaintiff's complaint in the consolidated action herein, denies that the said plaintiff is, or at all or any of the times mentioned in said complaint was, a corporation duly or otherwise incorporated under the laws of the said state.

Denies that the said plaintiff has the power to exercise the right of eminent domain in this proceeding by virtue of the authority of title seven of special proceedings of a civil nature of the revised statutes of Idaho of 1887, or otherwise.

Denies that the plaintiff will construct a telegraph line as described and set forth upon the route or plan or in the manner or form set forth in said complaint or otherwise; and

the said defendant further denies that its said right of way is not at any places or portions thereof less than one hundred feet in width, but, on the contrary, avers that in some portions thereof it does not exceed fifty feet in width and varies from fifty to two hundred feet in width on different portions of its said route and right of way.

And the defendant denies that the only land sought to be occupied if the plaintiff were permitted to construct said telegraph line as proposed will be one circular foot, five feet in depth, in which the poles for said line will be planted, or that the portion of said right of way proposed to be taken will be only a very small fractional part of the entire right of way of this defendant, and denies that the use to which it is proposed to be and would be applied if so taken is a public use, or is authorized by law, or that the taking proposed by this proceeding is necessary for such use, or that the public or any use to which it is to be applied as proposed by said complaint is a more necessary public use than that to which it has already been appropriated.

Defendant denies that by this proceeding the plaintiff does not seek to destroy or curtail or in any way interfere with the franchises or rights of this defendant. Denies that so much of the right of way of defendant company as is sought to be appropriated to the use of the plaintiff has not been appropriated, or is not likely in the future to be needed by this defendant for railroad purposes, or that the same is not reasonably essential to such use, or is liable under the law to condemnation proceedings for a different public use as is sought by the plaintiff in this proceeding or otherwise.

Denies that the taking sought in this proceeding will not destroy or curtail any franchise or property essential to the full or complete enjoyment by this defendant of its franchise, right of way, and property.

And the defendant further denies that such portion of the right of way of this defendant as is sought by the plain-

tiff for the purposes aforesaid is not used, or that the same or any portion thereof is not essential to its enjoyment of its franchises or property, or that the appropriation sought by the plaintiff in this proceeding is for a more necessary public use than that to which it has already been appropriated.

Further answering, the defendant denies that the said plaintiff will occupy only such portion of the right of way of this defendant as is not necessary for the use or which is not being used by this defendant, or that at any time this defendant needs any portion of its right of way where the said poles and lines of the plaintiff are permitted to be placed upon said right of way, for any railroad use, the plaintiff will upon reasonable or any notice, or at its own expense, remove its poles or wires to such or other parts of said right of way as may be designated by the defendant company, or so as to in no way interfere with the use of any portions of the right of way of this defendant for the purposes for which it has already been appropriated.

Denies that the construction, maintenance, or operation of its telegraph line upon the right of way of the defendant railroad company as appropriated will be of no damage to the defendant, or will not diminish in value said right of way for railroad purposes; and defendant denies that plaintiff's telegraph line will not come in contact or interfere with any telegraph lien already constructed on said right of way.

Further answering, this defendant says that it has no information or belief sufficient to enable it to answer the allegation in said complaint with reference to the acceptance by the plaintiff of the provisions of the said Act of Congress, and upon that ground it denies that the said plaintiff has duly or otherwise accepted the provisions, or any of them, of the said Act of Congress approved July 24, 1866, or agreeing thereby that telegrams between the said departments of the government or their officers or agents shall at all or any times have priority over all other business in their transmission over the

lines of said company, or that the charges for such telegrams shall not exceed the rates annually fixed by the postmaster-general. And the defendant denies that all or any of the preliminary steps required by law have been taken to entitle the plaintiff to institute these proceedings.

Further answering, the defendant alleges that it is the successor in interest of the rights of way and property of the Utah Northern Railroad Company, and the Oregon Short Line and Utah Northern Railway Company; that the said rights of way secured by the said companies, the predecessors in interest of this defendant, were secured in part by negotiation and purchase from private parties owning the lands over and across which the said railroad was located and constructed, and as to other and the principal portions of the said right of way, the same was secured by special grants made by various Acts of Congress to the defendant's said predecessors in interest; and other portions of said right of way were secured by compliance, on the part of the defendant's predecessors in interest, with the provisions of the Act of Congress of the United States, entitled "An Act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875.

That this defendant and its predecessors in interest in said right of way, however the same may have been acquired, have, ever since the same was so acquired, held, owned, used, and possessed the same for the purposes of the construction, maintenance, and operation of said line of railway, and that the same and the whole thereof is necessary for such use. That the predecessors in interest of this defendant, up to the time that the said property and right of way was transferred to and became the property of this defendant, and this defendant since that time, has had and now has the full dominion, possession, and undivided control over every portion of its said right of way, so that at all times it could exclude therefrom all persons not in its employ or under its control,

and that such possession and control has been and is necessary to enable this defendant to safely, properly, and adequately discharge its obligations as a common carrier, and that such obligations could not be properly and adequately discharged if this defendant by the proceedings herein should be compelled to share with any other person or corporation the dominion, possession, and control over its said right of way or any portion or part thereof, or in the event any other person or corporation should acquire the right of ingress and egress at all times over, along, and upon its said right of way or any portion of the same.

And the defendant avers that no power or authority has been given the plaintiff or any other person or corporation to wrest from this defendant the exclusive dominion and control over, and use of its right of way and every part thereof, or to compel the defendant to share the same with any other person or corporation whatsoever.

Defendant further avers that the erection, maintenance, and operation of a line of telegraph on the right of way of said defendant as proposed by the said plaintiff will greatly interfere with, harass, and annoy the said defendant in the conduct of its business, and will materially impair and interfere with the use and occupation by said railroad company of its said right of way, and of its rights of property thereunder and possession thereof, and will increase the hazards of railway operation by it, and will endanger the lives and property of the traveling public and the numerous employees of this defendant. And the defendant denies that it is necessary for the said plaintiff to take or acquire the right of way along or upon the right of way of this defendant described and referred to in the complaint herein, and alleges that to create in plaintiff the right to erect and maintain such line of telegraph along and upon the right of way of this defendant at all times and with authority and power to enter thereon for the purpose of maintaining, repairing, and operating such

telegraph line, will destroy the franchise and rights of the defendant company, and deprive it of the right to properly and safely operate its said railroad, and prevent it from discharging the obligations in that behalf imposed by law.

Further answering the said complaint this defendant avers that the laws of the state of Idaho have conferred upon domestic telegraph corporations only the right and power of eminent domain, and have not conferred such power upon foreign corporations, but, on the contrary, it is the policy of the said state of Idaho to deny to foreign corporations such power and authority. And the defendant alleges that the Postal Telegraph-Cable Company of New York, a corporation organized and existing by virtue of the laws of said state, well knowing the policy of the state of Idaho, as above declared, and well knowing the inhibitions of the law of said state denying to foreign corporations the right to exercise eminent domain, in order, nevertheless to circumvent the said policy of said state and render nugatory the laws thereof in that behalf, did recently, to wit, on or about the — day of July, 1899, cause certain of its employees and other persons to organize a nominal and pretended corporation under the laws of Idaho, called the Postal Telegraph-Cable Company of Idaho, and being the pretended plaintiff herein; but the defendant avers that said corporation has in reality no separate existence from the Postal Telegraph-Cable Company of New York; that all its income, from whatever source, is forthwith remitted to said New York company and all its expenses borne and defrayed by said company, its charges, rates, and business policy dictated by said company, and that the sole and only purpose of said organization under the laws of Idaho was and is to enable the said Postal Telegraph-Cable Company of New York, by means of said pretended and alleged corporation of Idaho, to exercise within the limits of said last-named state the right and power of eminent domain, and to wrest from the citizens of said State, against their

will and consent, whatever property the said Postal Telegraph-Cable Company of New York deems necessary or convenient to the conduct of its business.

And the defendant submits that the said foreign corporation, to-wit, the said Postal Telegraph-Cable Company of New York, ought not to be permitted to accomplish by indirection what the laws of the state of Idaho prohibit it from doing and accomplishing in its own name and directly.

Wherefore, the defendant prays to be hence dismissed, with its costs.

Y. & Y.,

[*Verification.*]

Attorneys for the above Defendants.

(1) Taken from record in Oregon Short Line R. R. Co. v. Postal Telegraph Cable Co. of Idaho, 111 Fed. 842.

See also Colorado E. Ry. Co. v. Union Pacific Ry. Co., 41 Fed. 293; affirmed in 94 Fed. 312; and see Boom Co. v. Patterson, 98 U. S. 403.

See note (2) under No. 293.

No. 298.

Reply to Answer in Condemnation Proceedings.

[*Caption.*]

And now comes The United States, by J. H., United States Attorney for the ——— district of ———, and for reply to the answer of F. K. to the petition filed herein, says that it denies that the defendant has any interest whatever in the premises known as Case Place, and described as Parcel No. 2 in plaintiff's petition, either as owner, in equity or at law of the fee simple or reversionary interest in and to the said parcel of land, which was conveyed by Leonard Case to the city of Cleveland as described in defendant's answer.

J. H.,

United States Attorney,

——— District of ———.

The United States of America,

—— District of ——, ss.

J. H., being first duly sworn, says that he is the United States attorney for the —— district of ——, and that the statements and allegations contained in the foregoing reply are true, as he verily believes. J. H.

Sworn to before me, and subscribed in my presence, by the said J. H., this —— day of ——, A. D. ——.

B. B.,

Clerk District Court of United States.

No. 299.

Judgment of Condemnation and Order Appointing Commissioners to Assess Damages.

In the matter of the petition of the United States of America for condemnation, for the use of petitioner for government lighthouse purposes.

Whereas, it has been made to appear to this court that a petition has been made and filed in this court for condemnation of the above described property and land, and that the petition was filed for the purpose of acquiring the title and ownership of the said land for the United States of America for lighthouse purposes as more particularly set forth in said petition, and that a summons was issued in accordance with prayer of said petition summoning the village of ——, a municipal corporation in the county of ——, in the state of ——, and —— district thereof, and one M. M., of ——, in said district, who were stated in said petition to be the persons interested in said lands and premises and who were cited by said summons to show cause, if any they had, against the said petition, and whereas it appears by the return of the marshal of said —— district of ——, now on file in this

cause, that due and personal service of said summons was had upon the president of said village of —, and upon the said M. M., and that said service was according to law and the practice of this court, and whereas, the said village of — has this day appeared in said cause, by T. F., of —, as its attorney, and the said M. M. has this day appeared in said cause, by J. C., of — aforesaid, as her attorney; and whereas, the said village of — and the said M. M. were duly notified by J. N., United States Attorney for the — district of —, that this case could be brought on for hearing before this court this day, and that certain action particularly set forth in said notice would be taken therein, due proof of said notice now being on file in said cause, and the court being fully informed in the premises, on motion of said J. N., United States Attorney aforesaid, the court did proceed to hear the said petition and all persons interested therein, and to decide the question raised therein, and after an examination of the petition and other papers in said proceedings and hearing all parties interested, on motion of J. N., United States Attorney for the — district of —, the said T. F., attorney for the said village of —, and the said J. C., attorney for the said M. M., consenting thereto, the said petition and proceedings in this cause are sustained, and E. F., G. H., and J. S., residents and freeholders within the said county of —, neither of whom is interested or of kin to any person interested in the said land or any part thereof, as commissioners to ascertain and determine the necessity for taking said land and property more particularly described in said petition, and also to ascertain and determine the compensation or damages or both which ought to be paid by the United States of America to each of the owners and persons interested in said land and premises as and for his, her, its or their just compensation for the said land and premises, and also to ascertain the separate interest of each person or municipal corporation owning or interested in the said lands

and premises, or any part thereof, and the description of his, her, its or their separate interest in the said land and premises or any part or parcel thereof. It is further ordered that said commissioners and each of them shall be sworn to faithfully and justly discharge their duties in the premises according to their best ability, and that they and each of them shall visit the said land and premises, and shall hear in the presence and under the direction of said court evidence touching the matters they are to find brought forward by any persons or corporations having an interest in said land and premises, and shall find all necessary facts to possess the court of the truth and right of the matter, but shall not be required to find what evidence was offered or given, and shall report to the court, in writing, their findings. And it is further ordered that all testimony that shall be adduced on such hearing to be had before said commissioners shall be given under oath, which shall be administered by the clerk of said court or by any one of said commissioners in the manner and form prescribed by the laws of the state of Michigan in and for similar cases.

No. 300.

Report of Commissioners of Damages.

The District Court of the United States for the ———
District of ———, ——— Division.

In the matter of the petition of the United States of America
for condemnation, for the use of the petition for light-
house purposes.

To the Hon. H. S., District Judge:

The undersigned, commissioners appointed by order of this
court in said matter on the ——— day of ———, requiring them
to determine the necessity for taking the land described in

the above title, also the compensation or damages which ought to be paid by the United States to each of the owners and persons interested in said land for his, its or their compensation for said land, and the separate interest of each person or corporation interested in said land, and the description of each of their separate interest therein, beg leave to report that pursuant to the mandates of said order, they

First. Were duly and severally sworn by a United States commissioner to faithfully and justly discharge their duties in the premises according to their best ability, which said oaths are in writing and hereto attached.

Second. After due and lawful notice to each of the persons and corporations appearing in this cause, viz.: the United States of America, village of —, and M. M., through their several attorneys, they did proceed to and did visit and examine the said land and premises, and after the service of notice aforesaid to each of the interested parties, did, under the direction of said court, hear evidence produced by the United States of America, village of — and M. M. touching the said matters, the witnesses produced aforesaid being first duly sworn by E. F., one of said commissioners, in the manner and form prescribed by the laws of the state of — in and for similar cases.

Third. Your commissioners determined from the examination and testimony aforesaid that there is a necessity for taking by the United States of the land and property described in said petition — namely [*here describe the property as in a deed*], for the use of the said United States government for lighthouse purposes.

Fourth. We find that, aside from the municipal corporation of —, no person or corporation has any interest of any kind in said property, and that the village of — is the sole owner in fee of the said above-described premises.

Fifth. Your commissioners assess and determine the value

of the aforesaid and above-described premises at the sum of — dollars.

Sixth. Your commissioners further determine that by the taking of the premises described above the maintaining a fog horn thereon, other property, to wit: a park belonging to said respondent, —, is damaged to the amount of — dollars.

E. F.,
G. H.,
J. S.,
Commissioners.

Dated —.

No. 301.

Judgment for Condemnation and for Damages (Jury Waived)
(1).

[Caption.]

This cause having come on regularly to be heard before the court and without a jury, a jury having been expressly waived by both parties, plaintiffs appearing by J. R. McIntosh, Esq., and O. W. Powers, Esq., and the defendant appearing by P. L. Williams, Esq., and F. S. Dietrich, Esq., and the court having heard read the pleadings and having heard the proofs and arguments of counsel, and having duly considered the pleadings, proofs, and arguments of counsel, and having made and filed its findings of fact and conclusions of law, and being fully advised in the premises, doth order and adjudge:

That the use to which the property which plaintiff seeks to condemn for a telegraph line is a public use authorized by law, and that the public use requires the condemnation of the easement sought by plaintiff of the property described in plaintiff's complaint, the taking of which is necessary to such use, the same being a more necessary public use than that to which it is already appropriated, namely, a right of way

for defendant's railroad line; that the property sought to be condemned by plaintiff constitutes only a very small part of a large parcel; that no damage will accrue to that portion not sought to be condemned by reason of its severance from the portion condemned, and the construction of the telegraph line of plaintiff as the same is to be constructed by plaintiff; that in the taking of the property to be condemned the damages, including the value of the property to be taken, will not exceed five hundred dollars; that the portion of the land not sought to be condemned will neither be benefited nor damaged by the construction of the telegraph line as proposed by plaintiff, and that the sum of five hundred dollars will remunerate the defendant for all damages suffered by it and for the value of the property taken by these proceedings.

Therefore, the court doth further order and adjudge that five hundred dollars is just and full compensation to be paid and made the defendant, the Oregon Short Line Railroad Company; that upon the payment by plaintiff to defendant of the sum of five hundred dollars within thirty days from the date hereof said plaintiff, the Postal Telegraph-Cable Company of Idaho be let into possession, operation, and control of the proposed right of way for telegraph purposes and the construction and operation of a telegraph line as set out in plaintiff's complaint, from Cannon Station on the state line between the state of Utah and the state of Idaho, northerly and across the state of Idaho to Monida, upon the state line between the state of Montana and the state of Idaho, upon and along the right of way of defendant. That plaintiff may enter upon the right of way of defendant to construct, maintain, and operate said telegraph line to be constructed, commencing at said Cannon Station upon the right of way of defendant, and running thence northerly to the county of Oneida upon defendant's right of way; thence northerly along the right of way of defendant through the county of Bannock; thence northerly along the right of way of defendant

through the county of Bingham; thence northerly along the right of way of defendant through the county of Fremont to Monida, situate on the state line between the state of Idaho and the state of Montana; that the poles for the line of telegraph to be erected by plaintiff upon the right of way of defendant be thirty (30) feet in length, planted firmly in the ground at a depth of not less than five (5) feet, and not nearer than thirty (30) from the outer edge of the railroad bed of the defendant, or at such points as may be agreed upon by said plaintiff and said defendant; that at or near the top of said poles there be fastened crossarms eight (8) feet in length, with insulators attached, upon which there be stretched from pole to pole a sufficient number of wires to transmit, speedily and promptly, all business entrusted to said plaintiff for transmission by the government and the public; that where it becomes necessary to cross the track of said railroad of said defendant, said poles of said plaintiff be of such height above the ground and the wires strung so high as to prevent interference with the operation or conduct of defendant's business, and so as not to endanger the life or limb of defendant's employees; that if at any time defendant needs any portion of its right of way where said poles and telegraph line are constructed for railroad purposes, then, in such event, the plaintiff shall, upon reasonable notice, and at its own expense, remove said poles and telegraph line to such other point or points on said right of way as may be designated by plaintiff; that said telegraph poles be erected at a distance of about one hundred and sixty-seven feet from each other, and consists of a single line of poles, the line of telegraph to be constructed of good material and upon the most improved plan; said poles to be one foot in diameter at the base and so erected as to be held firmly in position; that plaintiff shall not attach its wires or fixtures of any kind to the buildings, trestles, bridges, or structures of the defendant railroad company, and shall not erect any of its poles upon any embankment of the defendant company,

that the telegraph line of plaintiff shall be constructed so that it will not come in contact with or interfere with any telegraph line already constructed on said right of way of defendant.

It is further ordered and adjudged that plaintiff, Postal Telegraph-Cable Company of Idaho, shall in all manner comply with the statutes of the state of Idaho in the construction of its line of telegraph aforesaid, and with its representations in its complaint, and upon the payment of the compensation aforesaid, within the time aforesaid, the Postal Telegraph-Cable Company of Idaho is hereby authorized to enter upon the right of way aforesaid of the Oregon Short Line Railroad Company and construct its line of telegraph as above set forth.

It is further ordered and adjudged that plaintiff pay the costs of this proceeding.

(1) Taken from record in Oregon Short Line R. R. v. Postal Telegraph Cable Co. of Idaho, 111 Fed. 842.

See also Colorado E. Ry. Co. v. Union Pacific Ry. Co., 41 Fed. 293; affirmed in 94 Fed. 312; and see Boom Co. v. Patterson, 98 U. S. 403.

No. 302.

Order Directing that a Jury be Empanelled to Assess Compensation for Property to be Condemned.

[Caption.]

This cause coming on for hearing, and being submitted to the court upon the evidence produced, the court find that the defendants have been duly served with process and are properly before the court, and further find that the plaintiff has the legal right to make the appropriation prayed for in the petition, and that the same is necessary, and that plaintiff is unable to agree with the defendants as to the compensation to be paid for the property sought to be appropriated herein, to all of which the defendants, each and all, except.

It is therefore ordered that to assess compensation for said property, herein sought to be appropriated, a jury be impaneled according to law, and that said jury come on the —— day of ——, at —— o'clock a. m., which time is hereby fixed for the impaneling of the same.

No. 303.

Order Empanelling Jury to Assess Damages in Condemnation Proceedings

[*Caption.*]

This cause came on this day to be heard and the parties and their attorneys appeared and also the following named jurors, heretofore summoned herein, viz.: [*name all the jurors*], and the panel not being complete, it was ordered that the marshal fill the vacancy with talesman and therefore S. D. was called and the panel was complete. And each juror being interrogated as to whether he was in any way interested, either as owner or agent or otherwise, in the property sought to be condemned and appropriated, and each answering in the negative, and neither party excepting thereto, the said jurors were duly sworn according to law.

And on motion of J. H., United States Attorney for the —— district of ——, a writ was issued to the marshal for a view by the jurors in the presence of J. D., of the premises sought to be appropriated, returnable according to law at two o'clock p. m., and thereupon said jury having heard the testimony adduced on behalf of the defendant, Case Library, in part, and the hour of adjournment having arrived, this cause was continued until tomorrow morning at 9:30 o'clock.

No. 304.**Writ to Conduct Jury to View Premises in Condemnation Proceedings.**

The United States of America,
 — District of —, ss.

The President of the United States of America, to H. R.
 —, U. S. Deputy Marshal for the — District of
 —, — Greeting:

You are hereby commanded to conduct the twelve jurors herein named, to-wit: [*naming them*], to view the property or premises sought to be appropriated by the United States of America and owned by R. S., *et al.*, then and there to view the premises and property aforesaid, in the presence of J. D., on the part of the plaintiff and the defendants; and you make return of the manner in which you have executed this writ, to this court, forthwith upon its execution.

Witness the Honorable Melville W. Fuller, chief justice of the United States, this — day of —, A. D. —, and in the — year of the Independence of the United States of America.
 B. R.,

[*Seal.*] Clerk of the District Court of the United States
 for the — District of —

No. 305.**U. S. Marshal's Return to Said Writ.**

The United States of America,
 — District of —, ss.

Received this writ on the 27th day of November, 1899, at 11:30 a. m., and upon the same day between the hours of 11:30 a. m. and 12:30 p. m., I personally conducted the within named jurors through the Case building and in the presence of J. D., appointed by the court for that pur-

pose, said jury viewed the exterior of said building, also the interior and the various office rooms located upon the several floors of said Case building, together with the basement of said building, also the interior of the Citizens' Saving and Loan Association, including the basement; also the office of the Savings Building and Loan Company including the basement; also the room occupied by The Electric Supply Construction Company, including the basement. Also the several rooms located on three separate floors used and occupied by the Case Library Association for its library, including the basement.

Thereupon this writ is returned, fully executed.

H. R.,

Deputy U. S. Marshal ——— district of ———.

Fees:

| | |
|---------------|--------|
| Service | \$2 00 |
| Travel | 12 |
| | ————— |
| Total | \$2 12 |

No. 308.

Judgment of no Damages in Condemnation Proceedings (1).

[Caption.]

This cause came on to be heard before the court and jury, duly impaneled, as recited above, to try the issues joined on the pleadings, the petition herein, the answer of certain of the heirs of Leonard Case, and the reply of The United States thereto, and, at the close of all the evidence, by direction of the court, the jury returned the following verdict:

"We, the jury in this cause, being duly impaneled and sworn, do find for the plaintiff upon the issues joined between The United States and the heirs of Leonard Case.

[Signed]

"John F. Blake, Foreman."

Whereupon it is considered and adjudged that the heirs of Loenard Case, made parties herein, have no interest in the premises known as Case Place, herein appropriated, and are entitled to no compensation therefor.

(1) Costs can not be taxed against the United States in condemnation proceedings. *Carlisle v. Cooper*, 64 Fed. 472, 12 C. C. A. 235; *In re Post Office, etc.*, 210 Fed. 832, 127 C. C. A. 382.

No. 307.

Verdict for Damages Condemnation Proceedings (1).

[*Caption.*]

This day again came the parties, by their attorneys, and also came the jury heretofore impaneled and sworn herein, and the jury retired to their room in charge of an officer of this court for further deliberation. And after due deliberation, they returned their verdict in writing to the court as follows, to-wit: "United States of America *vs.* Case Library, *et al.* Verdict. We, the jurors in this cause, duly impaneled and sworn, do assess to the several defendants hereto as the actual damages which will be caused to the property owned by them, or the interest in the property described in the petition filed herein, by reason of the appropriation of the same to the use of the government, as follows:

1. To Case Library the full market value of the property owned by it, the sum of.....\$510,000 00
Less amt. allowed L. Scofield, *et al.*..... 6,064 29

\$503,935 71
2. To Case Library for the cost of removing its books and furniture, and for damages to its books caused by such removal, the sum of..... \$3,170 00
3. To the Citizens Saving & Loan Association for loss and damage to its improvements and fixtures, including cost of moving, the sum of..... \$17,464 50

4. To the Citizens Saving & Loan Association for the loss which it will sustain by the appropriation of its leasehold estate to April 1st, 1914, the sum of\$20,342 50

5. To the Savings Building & Loan Company for loss and damage to its improvements and fixtures, the sum of..... \$1,645 00

6. To the Savings Building & Loan Company for the loss which it will sustain by the appropriation of its leasehold estate to March 31, 1901, the sum of \$800 00

7. To the Savings Building & Loan Company for the loss which it will sustain by the appropriation of its option for a leasehold estate from March 31, 1901, to March 31, 1906, the sum of \$1,700 00

8. To C. H. Estinghausen for the loss and damage which he will sustain by the appropriation of his leasehold estate to April 1, 1901, the sum of \$580 00

9. To Levi T. Scofield, *et al.*, for the loss and damage which they will sustain by the appropriation of their leasehold estate in said Case Library property, the sum of.....

John Coon.....\$1,376 79

L. T. Scofield..... 4,687 50

————— \$6,064 29

10. To F. J. Wing for the loss and damage which he will sustain by the appropriation of his leasehold estate, the sum of..... \$220 00

11. To the City of Cleveland for the loss and damage which it will sustain by the appropriation of the street known as Case Place, the sum of.... \$1 00

JOHN F. BLAKE, Foreman."

Cleveland, Ohio, Dec. 6th, 1899.

And said verdict was read in open court, in the presence of said jurors when to which they gave their assent.

(1) Taken from the record in *Avery vs. U. S.* 104 Fed. Rep. 711, 44 C. C. A. 161.

DEPORTATION OF CHINESE.**No. 308.****Complaint for Deportation of a Chinese Person (1).**

United States of America,

—— District of ——, City of —— and County of ——, ss.

Before me, E. H., a United States Commissioner for the —— district of ——, at ——, personally appeared this day, S. R., who, being first duly sworn, deposes and says, that he is an officer of the United States, to wit, Chinese Inspector and Interpreter; that one Florence Doe is a Chinese manual laborer and is now within the limits of the —— district of —— aforesaid, without the certificate of residence required by the Act of Congress entitled "An Act to prohibit the coming of Chinese persons into the United States," approved May 5th, 1892 and the Act amendatory thereof, approved November 3d, 1893.

Wherefore, deponent prays that a warrant for the arrest of the said Florence Doe be issued, and that she be arrested and brought before the said United States Commissioner, and upon a hearing being had, that she be duly adjudged to be illegally in the United States, and that the proper order for the deportation of the said Florence Doe be made and entered.

S. R.

Subscribed and sworn to before me, this —— day of ——,
A. D. ——.

E. H.,

United States Commissioner as aforesaid.

(1) A complaint under oath to a United States commissioner is the proper method of instituting proceedings for deportation of a Chinese person. *Chin Bak Kan vs. U. S.* 186 U. S., 193; *U. S. vs. Lee Yen Tai*, 185 U. S., 213. Act of Sept. 13, 1888, Sec. 13, 25 Stat. at L. 476.

As to procedure under this act and earlier acts, see *U. S. v. Long Hop*, 55 Fed. 58.

As to the amount of evidence necessary, see *U. S. v. Williams*, 83 Fed. 997, and *U. S. v. Pin Kwan*, 100 Fed. 609, 40 C. C. A. 618.

The proceeding is not criminal in character. In *re Tsu Tse Mee*, 81 Fed. 562; *U. S. v. Hing Quong Chow*, 53 Fed. 233; *Ex parte Sing*, 82 Fed. 22.

The laws and decisions relating to Chinese immigration are elaborately reviewed in a note to act of May 5, 1892, 2 Supp. U. S. statutes 14, and in note to act Nov. 3, 1893, 2 Supp. U. S. statutes 153; see also act of July 7, 1898, 30 Stat. L. 750, and the act of April 29, 1902, 57th Cong. session 1, chap. 641.

Under the Chinese exclusion acts, a proceeding for deportation is civil and the constitutional provisions constituting safeguards for persons accused of crime have no application, hence admissions and statements made by the accused before or after his arrest may be used against him, and the government may call him as a witness. *U. S. v. Hung Chang*, 134 Fed. 19, 67 C. C. A. 93; *U. S. v. Hom Lim*, 214 Fed. 456.

Defendant claiming to be a citizen of the United States may take and use depositions *de bene esse*. In *re Lam Jung Sing*, 150 Fed. 608.

Process may be issued returnable to any other district of the United States. *U. S. v. Long Hop*, 55 Fed. 58.

As to the functions of the United States commissioners in such proceedings, see *Ex parte Lung Wing Wun*, 161 Fed. 211.

A hearing *de novo* is permitted before the United States district judge by these acts. *U. S. v. Louie Lee*, 184 Fed. 951.

The Chinese exclusion laws are not in any manner affected by the immigration act of February 20, 1907, 34 Stat. L. 898, per Sec. 43 of said act, and a Chinese laborer still is entitled to all the judicial proceedings preserved to him by the exclusion acts where such acts apply; if his presence in the United States is also a violation of the immigration act he may be dealt with in the summary manner prescribed by that act, but not in other cases, and the diversity and conflict among holdings in the district courts are hereby cleared up. *United States v. Woo Jan*, 245 U. S. 552, 62 L. Ed. 466; *U. S. v. Wong You*, 223 U. S. 67, 56 L. Ed. 354, is distinguished in the last case.

A Chinese who has had a full hearing before a commissioner and has been found to be properly in the United States and discharged from custody, can not be again apprehended on the same charge. *U. S. v. Young Chu Keng*, 140 Fed. 748.

Sundry civil appropriation act of August 24, 1912, chap. 355 and also of June 23, 1913, chap. 3 provide for the maintenance or return of Chinese applying for admission and refused, and for the deportation of such as come under the exclusion acts.

Various questions relating to evidence and procedure in Chinese exclusion proceedings are discussed in *U. S. v. Chin Sing Quong*, 224 Fed. 752, affirmed in 231 Fed. 948, 146 C. C. A. 144.

The constitutionality of these acts is again asserted in *Louie Lit v. U. S.*, 238 Fed. 75, 151 C. C. A. 151. And that the facts will be taken as found by the commissioner except in a perfectly clear case is also again laid down in *Yee Et (Ep) v. U. S.*, 222 Fed. 66, 137 C. C. A. 537.

The elaborate immigration act of February 5, 1917, expressly repealed the act of February 20, 1907, but did not in any manner effect the Chinese exclusion acts, 1918 supplement of Fed. Stat. Ann., page 211.

No. 309.

(Another form.)

United States Commissioner's Affidavit, Complaint or Information for Warrant.

United States of America,

Northern District of Ohio, Eastern Division, ss.

Before me Frederick P. Walther, a United States commissioner for the Northern District of Ohio, Eastern Division, personally appeared this day J. A. Fluckey, Imm. Insp., who, being first duly sworn, deposes and says that on or about the 30th day of April, A. D. 1914, at Cleveland, in said district, Lew Loy in violation of Chinese Exclusion Act of the revised statutes of the United States, being then and there a Chinese person and a person of Chinese descent was then and there unlawfully in the United States and not entitled to remain therein, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Deponent further says that he has reason to believe and does believe that — are material witnesses to the subject-matter of this complaint.

[Deponent's Signature.]

J. A. FLUCKEY,
Immigrant Inspector in Charge.

Sworn to before me, and subscribed in my presence, this 30th day of April, A. D. 1914.

[*Seal of Commissioner.*] FREDERICK P. WALTHER,
United States Commissioner as aforesaid.

No. 310.

Order Designating U. S. Commissioner to Try Chinese Person (1).

I hereby designate E. H., United States Commissioner for the — district of —, at —, before whom Yee Ngoi, the Chinese person named in the foregoing complaint shall be taken for hearing. J. H.,

United States Attorney for the — District of —.

(1) This designation is usually endorsed on complaint made before the U. S. commissioner. No order of a judge is necessary to authorize commissioner to act. U. S. v. Lee Lip, 100 Fed. Rep. 842.

No. 311.

Warrant of Arrest and Marshal's Return.

Before E. H., United States Commissioner for — District of —, at —.

The President of the United States of America, to the Marshal of the United States for the — District of —, and His Deputies, or any or either of Them, Greeting:

Whereas, complaint on oath of J. E., Chinese Inspector of the United States, has been made before me, that one Mary Doe, a Chinese manual laborer, was on the — day of —, A. D., —, found unlawfully within the limits of the United States, to-wit, within the — district of —;

Now, therefore, you are hereby commanded to arrest the said Mary Doe and bring her before me, at my office, in room 87, in the United States Appraisers' Building, in the city of — and county of —, that she may then and there be dealt with according to law.

Witness my hand at my office aforesaid this — day of
 —, A. D. —, E. H.,
 United States Commissioner for the — District of —,
 at —.

United States of America,
 — District of —.

In obedience to the within warrant of arrest, I have the body
 of the within named Mary Doe, whose true name is Lee Ah
 Yin, before E. H., the United States Commissioner, who issued
 the same this — day of —, A. D. —. Arrested at —
 this — day of —.

H. S.,
 United States Marshal.
 By H. B.,
 Office Deputy Marshal.

No. 312.

(Another form.)

United States Commissioner's Warrant to Apprehend.

The President of the United States of America,
 To the Marshal of the United States for the Northern District
 of Ohio, and to His Deputies, or any or either of Them:

Whereas, J. A. Fluckey, Imm. Insp., has made complaint in
 writing under oath before me, the undersigned, a United States
 Commissioner for the Northern District of Ohio, Eastern
 Division, charging that Lew Loy, late of Cuyahoga county in
 the state of Ohio on or about the 30th day of April, A. D.
 1914, at Cleveland, in said district, in violation of Chinese
 Exclusion Act, of the revised statutes of the United States,
 being then and there a Chinese person and a person of Chinese
 descent was unlawfully in the United States, and not entitled
 to remain therein, contrary to the form of the statute in such
 cases made and provided, and against the peace and dignity of
 the United States of America.

Now, therefore, you are hereby commanded, in the name
 of the President of the United States of America, to apprehend

the said Lew Loy wherever found in your district, and bring his body forthwith before me or any other commissioner having jurisdiction of said matter to answer the said complaint, that he may then and there be dealt with according to law for the said offense.

[*Seal of Commissioner.*] FREDERICK P. WALTHER,

Given under my hand and seal this 30th day of April,
A. D. 1914.

[*Seal of Commissioner.*] Frederick P. Walther,
United States Commissioner as aforesaid.

Endorsement When Returned.

Received this warrant on the 30th day of April, 1914, at Cleveland, Ohio, and executed the same by arresting the within named Lew Loy, at Cleveland, Ohio, on the 30th day of April, 1914, and have his body now in court, as within I am commanded.

CHARLES W. LAPP,
U. S. Marshal, Northern District of Ohio.
Per W. F. Gauchat, Deputy.

22nd day of June, 1914.

Marshal's fees—

| | |
|-------------------|--------|
| Service | \$7.00 |
| Travel | .26 |
| | <hr/> |
| | \$7.26 |

No. 313.

United States Commissioner's Subpoena.

Issued May 21, 1915.

United States of America,

Northern District of Ohio, Eastern Division, ss.

The President of the United States of America,

To the Marshal of the Northern District of Ohio,
Greeting:

You are hereby commanded to summon Frank M. Potter,
10633 Euclid; John Harris, 10628 Euclid; William Graham,

10628 Euclid; W. J. Rich, 10628 Euclid; Franklin J. Zavesky, 10616 Euclid; G. F. Wilson, letter carrier No. 174, P. O. Station E. E., 105th street, if they be found in your bailiwick, to be and appear before me Frederick P. Walther, a United States Commissioner for the Northern District of Ohio, Eastern Division aforesaid, at my office, Federal Building, Cleveland, on the 22nd day of May, 1914, at 2 o'clock p. m., to give testimony, and the truth to say, in a cause pending before me, wherein the United States is complainant and Lew Loy defendant.

In behalf of complainant.

Hereof fail not, under the penalty of the law, and have you then and there this writ.

Given under my hand and seal this 21st day of May, A. D. 1914.

[Seal of Commissioner.] FREDERICK P. WALTHER,
United States Commissioner as aforesaid.

Endorsement When Returned.

Marshal's Return. No. 8918.

Received this writ May 22, 1914, and on the same day I served the same on the within named Frank M. Potter, and John Harris, William Graham, N. J. Rich, Franklin J. Zavinsky and G. F. Wilson, by leaving a certified copy thereof with each of them personally with all endorsements thereon.

CHAS. W. LAPP, U. S. Marshal,
Northern District of Ohio.

By AL. P. KELLEY, Deputy.

| | |
|-------------------|--------|
| Service | \$3.00 |
| Travel | .60 |
| | <hr/> |
| | \$3.60 |

Marshal's fees and costs on this writ, \$3.60.

No. 314.**United States Commissioner's Temporary Recognizance for
Appearance before Commissioner.**

United States of America,

Northern District of Ohio, Eastern Division, ss.

Be it remembered, that on this 30th day of April, A. D. 1914, before me, a United States Commissioner for the said Northern District of Ohio, Eastern Division, personally came Lew Loy, principal, and James W. Stewart, as sureties and jointly and several acknowledged themselves to owe the United States of America the sum of two thousand dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to-wit:

The condition of this recognizance is such, that if the said Lew Loy shall personally appear before me, Frederick P. Walther, a United States Commissioner as aforesaid, at my office, Federal Building, in the city of Cleveland and district aforesaid, on the 6th day of May, A. D. 1914, at 11 o'clock a. m. and from time to time thereafter, to which the case may be continued then and there to answer the charge of having on or about the 30th day of April, A. D. 1914, within said district, in violation of Chinese Exclusion Act of the revised statutes of the United States, unlawfully being a Chinese person and a person of Chinese descent and was unlawfully in the United States and not entitled to remain therein, and then and there abide the order of said commissioner, and not depart from said district without leave, then this recognizance to be void, otherwise to remain in full force and virtue.

LEW LOY,

JAS. W. STEWART.

Taken and acknowledged before me on the day and year first above written.

[*Seal of Commissioner.*] FREDERICK P. WALTHER,
United States Commissioner as aforesaid.

United States of America,

Northern District of Ohio, Eastern Division, ss.

J. W. Stewart, a surety on the annexed recognizance being duly sworn, deposes and says that he resides at Stop 3¾ Euclid road, in the city of Cleveland, in said district, that he is a freeholder in the county of Cuyahoga, that he is worth the sum of four thousand dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of real estate at Wade Park and Lake View avenue, in the city of Cleveland.

[Affiant's Signature.]

JAS. W. STEWART.

Sworn to and subscribed before me this 30th day of April, A. D. 1914.

[Seal of Commissioner.]

FREDERICK P. WALTHER,

United States Commissioner as aforesaid.

No. 315.

Findings, Judgment, and Order of Deportation (1).

Before E. H., United States Commissioner for the —
District of —, at —.

| | | |
|---------------------------|---|--------|
| United States of America, | } | No. —. |
| vs. | | |
| Lee Ah Yin (A Female). | | |

A complaint verified by the oath of J. E., a United States officer, to-wit, a Chinese inspector and interpreter, having been filed before me, the undersigned United States Commissioner, charging the said Lee Ah Yin with a violation of the Act of Congress of the United States, entitled, "An Act to Prohibit the Coming of Chinese Persons into the United States," approved May 5, 1892, and of the act amendatory thereof, approved November 3, 1893, and a warrant for the arrest of the said Lee Ah Yin having been issued by me thereon, and the said Lee Ah Yin having been duly apprehended upon the said warrant by the United States Marshal for the — dis-

trict of —, and brought before me for hearing upon said charge [the United States Attorney for the northern district of California having duly designated me as the United States Commissioner before whom said Lee Ah Yin should be taken for hearing] and the said Lee Ah Yin, having been duly informed by me of the charge against her and of her right to the aid of counsel, on the — day of —, A. D. —, the said Lee Ah Yin being present in person and her attorneys, L. P. and S. M., esquires, and United States Attorney M. B., esquire, appearing for the United States, this cause came on regularly for hearing, and the same having been duly heard and submitted, and due consideration having been thereon had, I do find as follows: That the said Lee Ah Yin is a Chinese manual laborer, and was born in and is a subject of the Empire of China; that she was found within the limits of the United States, to-wit, in the city and county of San Francisco, in the — district of —, on the — day of —, A. D. —, and that when she was so found as aforesaid, she was without the certificate of residence required by said acts; and she has not clearly established, that by reason of accident, sickness, or other unavoidable cause, she has been unable to procure such certificate.

Now, therefore, in consideration of the premises aforesaid, it is ordered, adjudged, and decreed that the said Lee Ah Yin be deported from the United States to the country from whence she came, to-wit, China. And it is further ordered that such deportation of the said Lee Ah Yin be made from the port of —, in the — district of —, and that she be hereby committed to the custody of the United States Marshal for the — district of —, to carry this order into effect.

Witness my hand at my office, in the city and county of —, in the district aforesaid, this — day of —, A. D. —.

E. H.,

United States Commissioner for the
— District of —, at —.

(1) The order of deportation need only show that the person to be deported is adjudged to be unlawfully in the United States. In *re* Wong Fock, 81 Fed. 558; In *re* Gut Lun, 83 Fed. 141.

As to the effect of finding of a commissioner, see *U. S. v. Chung Fung Sun*, 63 Fed. 261.

No. 316.

(Another form.)

Entry of Deportation.

Whereas, on the 30th day of April, 1914, complaint on oath and in writing was made by J. A. Fluckey, United States Immigration Inspector in Charge, before me, Frederick P. Walther, a United States Commissioner for the northern district of Ohio, designated to hear and determine Chinese Deportation cases, wherein Lew Loy was charged with being a Chinese person and a person of Chinese descent unlawfully within the United States, in violation of the Act of Congress of May 5, 1892, as amended, the said defendant being on the warrant issued by me arrested and arraigned before me charged as aforesaid, on the 30th day of April, 1914; and,

Whereas, on the 22nd day of June, 1914, this case came on for trial before me, the said United States Commissioner, at my office in the city of Cleveland, in said district, and after hearing and considering the evidence in said case, it appearing to me, the United States Commissioner as aforesaid, and it being hereby found, that the said defendant is a Chinese person and a person of Chinese descent and a laborer within the United States, and that the said defendant has failed to establish by affirmative proof to my satisfaction his lawful right to remain in the United States.

Now, therefore, it is hereby adjudged and decreed that the said Lew Loy is a Chinese person and a person of Chinese descent and is a laborer unlawfully within the United States, as charged in the complaint, and that he is not lawfully entitled to be or remain in the United States; and it is accordingly

Ordered that said Lew Loy be forthwith removed from the United States to the Republic of China, and that until such time as this judgment can be executed, the said Lew Loy be committed to the jail of the county of Cuyahoga, in said district. And it is further

Ordered, that the United States Marshal for this district shall carry this order into effect.

Witness my hand and official seal this 22nd day of June, A. D. 1914.

[*Seal of Commissioner.*] FREDERICK P. WALTHER,
United States Commissioner, Northern District of Ohio,
Eastern Division.

No. 317.

(Another form.)

Order by Judge on Appeal.

And now, to-wit, April 26th, 1917, the defendant, Young Ti, alias, etc., having filed his appeal in this court from the order of Roger Knox, United States Commissioner, convicting the said defendant of being a Chinese person unlawfully in this country in violation of the Chinese Exclusion Acts and ordering his deportation to the country from whence he came, to-wit, the Republic of China, and the said case having come on to be heard in this court on the said appeal and the court having heard the same and having this day filed an opinion affirming the judgment and order of the said United States Commissioner, it is now ordered, adjudged and decreed in conformity with said opinion that an alien order of deportation issue for the removal of the said defendant Young Ti, alias Yok Ti, alias Lee Yok Ti, ascertained to be Lee Young Dye, to the country from whence he came, viz., the Republic of China, and the clerk of the district court is hereby directed to issue such order.

CHAS. P. ORR,
U. S. District Judge.

Filed April 20, 1917.

No. 318.**Petition for Appeal from Commissioner (1).**

United States of America,

— District of —.

Before the Honorable E. H., United States Commissioner.

The United States of America, Plaintiff.

vs.

Lee Ah Yin, Defendant.

The above named defendant, Lee Ah Yin, conceiving herself aggrieved by the order of deportation entered on the — day of —, in the above entitled proceeding, by Honorable E. H., United States Commissioner aforesaid, which order of said commissioner does direct and provide that said defendant shall be deported to China, on the ground of her being now unlawfully within the United States, does hereby appeal from said order to the district judge of the United States for the — district of —, and she prays that this, her appeal, may be allowed; and said defendant does hereby give notice to the plaintiff herein of such appeal, and that the same is now and hereby taken upon questions of both law and fact, and said defendant further prays that a transcript of the record and proceedings, papers and exhibits, upon which the said order was made, duly authenticated, may be sent to the district judge of the United States of the — district of —, in due course of procedure.

Dated —.

Lee Ah Yin,

Defendant and Appellant.

R. Y.,

Attorney for Defendant and Appellant.

(1) The appeal from a commissioner is to the district judge and not court, see *Chow Loy v. U. S.*, 112 Fed. 354, and must be taken within ten days from the conviction. Sec. 13 of the act of September 13, 1888, 25 Stat. L. 476; *U. S. v. See Ho How*, 100 Fed. 730.

The right of appeal is not taken away by subsequent legislation. U. S. v. Wong Dep. Ken, 57 Fed. 203, and is expressly granted to the United States district court in the Judicial Code, Sec. 25.

No. 319.

Assignment of Errors on Appeal to District Judge (1).

Before E. H., United States Commissioner for the —
District of —, at —.

United States of America, }
 vs. } No. —.
Yee Ngoi (A Female). }

First. E. H., United States Commissioner for the — district of —, at —, California, had no power or authority to make, render or enter the judgment and order of deportation herein.

Second. Said judgment and order of deportation are void for want of jurisdiction.

Third. The findings of said United States Commissioner that said defendant was a Chinese manual laborer and was born in, and is a subject of, the Empire of China, are contrary to and not justified by the evidence in this: (1) That there is no evidence that the defendant was born in China; (2) That the evidence showed that the defendant was born in the city and county of San Francisco, state of California, United States of America, and that she is a citizen of the United States of America.

Fourth. The judgment and order of deportation herein are contrary to and not justified by the evidence for the reasons assigned in the last foregoing assignment of errors.

Fifth. The judgment and order of deportation are contrary to law.

Sixth. Said United States Commissioner erred in rendering and entering the judgment and order of deportation herein.

Seventh. Said United States Commissioner erred in not ordering a dismissal herein.

R. Y.,

Attorney for Defendant.

(1) The language of Sec. 13 of the act of September 13, 1888, 25 Stat. L. 476, is misleading in that both the terms, judge of a United States court, and a United States court, are used as if they were independent; consequently there was a contrariety of practice in the different districts in the matter of appeal from the United States commissioner to the district court, questioning the order of the commissioner. The uncertainty was removed by the supreme court in U. S., Petitioner, 194 U. S. 194, in which it was held, in accordance with decisions in cases where the same general question was raised in other connections, that the appeal here was to the district court. In the Judicial Code, Sec. 25, 36 Stat. L. 1094, it is provided that in Chinese exclusion cases the appeal from the commissioner is to the district court.

No. 320.

Assignment of Errors on Appeal to District Court.

Before Honorable E. H., United States Commissioner for the
— District of —, at —.

| | |
|--|----------|
| The United States, Plaintiff and Respondent, | } No. —. |
| vs. | |
| Lee Ah Yin, Defendant and Appellant. | |

Now comes the defendant and appellant above named and makes and presents the following assignment of errors, of and concerning the proceedings had and taken against said defendant, before the above named commissioner, on the — and — day of —, in the year—, at —, and thereupon defendant and appellant shows as follows:

First. The said commissioner was and is without power, authority, or jurisdiction to hear and determine the said proceedings, involving the right of the appellant herein to be and remain in the United States, and that said commissioner had not power and authority to make, render, and enter the judgment and order of deportation against the defendant herein, and that said judgment and order are null and void.

Second. That the Acts of Congress, known as the "Chinese Restriction and Exclusion Acts," of May 6th, 1882, July 15, 1884, September 13th, 1888, October 1st, 1888, May 5th, 1892, and November 3d, 1893, in so far as they vest in a United States Commissioner any power or jurisdiction to hear and determine the right of a Chinese person, or a person of Chinese descent, to be and remain in the United States are unconstitutional and void.

Third. That said Acts of Congress, in so far as they vest in a United States Commissioner the power and jurisdiction to hear or determine by summary proceedings, the right of a Chinese person, or a person of Chinese descent, who is a natural born citizen and inhabitant of the United States, and claims and asserts and sets up such citizenship as a matter of right under the constitution and laws of the United States; or in so far as said Acts of Congress purport to or do confer upon such commissioner, the power or jurisdiction to deport or send out from the territory or jurisdiction of the United States, such person by any order or writ of deportation or other process whatever, are contrary to fundamental right and natural justice, and are in violation of the Constitution and laws of the United States, guaranteeing the civil rights of citizens and persons within the jurisdiction thereof, and particularly are in violation of Sections 9 and 10 of Article I., and Sections 1 and 2 of Article III., of the Constitution of the United States, and of Articles V., VI., and VIII. of the amendments to the Constitution of the United States.

Fourth. The said Acts of Congress, in so far as they vest in a United States Commissioner, or purport to or do grant to such commissioner, the power or jurisdiction to punish a Chinese person, or a person of Chinese descent, for being unlawfully in the United States, by summary proceedings, in which proceedings such person avers *bona fide*, and sets up in good faith, the fact and claim that he is a natural born citizen of the United States, and entitled to the rights of such citizen under its Constitution and laws, are unconstitutional and void and contrary to the provisions and articles of the Constitution of the United States above enumerated, and are in violation of the civil rights guaranteed by the Constitution and laws of the United States to citizens thereof residing therein.

Fifth. The said Acts of Congress in so far as they vest in a United States Commissioner the power to hear and determine by summary proceedings the right of a Chinese person, or a person of Chinese descent, claiming in good faith and in point of fact to be a natural born citizen of the United States, to be and remain in the United States, and to convict such Chinese person, or person of Chinese descent, of being not lawfully entitled to remain in the United States, and to sentence such Chinese person, or person of Chinese descent, to imprisonment, detention, or restraint, or to deportation, or to both, are unconstitutional and void, and violate the provisions of the Constitution and laws of the United States above referred to.

Sixth. The said Acts of Congress, in so far as they vest in a United States Commissioner, or grant to a United States Commissioner the power, authority or jurisdiction to hear and determine the right of a Chinese person, or a person of Chinese descent, to be and remain in the United States by summary proceedings, in which such person sets up and claims under the constitutional laws of the United States, to be a natural born citizen of the United States, and entitled as such

to reside and remain therein, and in so far as said Acts of Congress purport to authorize said commissioner to adjudge such Chinese person, or person of Chinese descent, to be not lawfully entitled to remain in the United States, and to order such Chinese person, or person of Chinese descent, to be imprisoned or to be deported or both, are unconstitutional and void, and violate articles and provisions and sections of the Constitution and laws of the United States above enumerated and referred to.

Seventh. That the said commissioner erred in overruling and denying the objection of the defendant herein, duly made at the inception of said proceedings, to the insufficiency of the complaint filed herein, as the basis of said proceedings, in that said complaint and the facts therein alleged were laid against a fictitious person, and against some person under a fictitious name, and not against the defendant herein, and that therefore said complaint was and is null and void.

Eighth. That the said commissioner erred in overruling and denying the objection of the defendant herein, duly made at the inception of said proceedings, to the insufficiency of the warrant of arrest in this proceeding, in that the same was issued against a fictitious person, and against some person under a fictitious name, and not against the defendant herein, and that therefore the said warrant was and is null and void.

Ninth. The said commissioner erred in overruling and denying the objection of the defendant and appellant herein, taken prior to any proceedings before said commissioner, that the said complaint and warrant, and the filing and issuance thereof, had not been previously approved in writing by the United States attorney for the northern district of California, as required by law, and that therefore the said complaint and warrant were insufficient, and not in the form of law, and null and void.

Tenth. The said commissioner erred in refusing to grant and allow the continuance asked for by defendant, upon the

affidavit of counsel duly filed herein, prior to any proceedings taken or testimony heard by said commissioner, and the ruling of said commissioner in this respect is here assigned as error.

Eleventh. The said commissioner erred in refusing to grant the continuance asked for by counsel for the defendant in order to obtain evidence of the citizenship and nativity of said defendant, as appears on page 44 of the transcript of proceedings on file herein, and which ruling of said commissioner, defendant now assigns as error.

Twelfth. The said commissioner erred in decisions of questions of law arising upon the evidence heard and taken before said commissioner herein, and erred in decisions of law arising upon the proceedings had and taken against said defendant affecting the material rights and interests of said defendant, as involved in said proceedings, to which said decisions and rulings of said commissioner the said defendant duly excepted, and here assigns as error.

Thirteenth. The finding of said commissioner that said defendant, Lee Ah Yin, is a Chinese manual laborer, and was born in and is a subject of the empire of China, is contrary to and not justified by the evidence herein; in this, that there is no evidence that the defendant is a Chinese person; that there is no evidence that the said defendant is a skilled manual laborer; that there is no evidence herein that said defendant is an unskilled manual laborer; that there is no evidence herein that said defendant is or was employed in mining, fishing, huckstering, or peddling; that there is no evidence that said defendant is or was a laundress; that there is no evidence herein that said defendant was engaged in taking and drying or otherwise preserving shellfish for home consumption or exportation; that the evidence herein clearly shows that the said defendant was born in the city and county of San Francisco, state of California, United States of America, and that she is a citizen of the United States of America, and that any

finding to the contrary by said commissioner upon said proceedings is unwarranted in point of fact, and unauthorized and unjustified in point of law.

Fourteenth. That the judgment and order of deportation of said commissioner herein made are contrary to and not justified by the evidence, for the same reasons as are specified in the last assignment of error herein.

Fifteenth. That said judgment and order of deportation made and entered herein by said commissioner are contrary to law.

Sixteenth. That said judgment and order of deportation made and entered herein are in violation of the provisions of Sections 1 and 2 of Article III. of the Constitution of the United States and of Articles V. and VI. of the amendments thereof.

Seventeenth. That for the reasons herein stated the said commissioner erred in making and entering judgment and order of deportation herein.

Eighteenth. That for the reasons herein stated the said commissioner erred in not making and entering a judgment and order of dismissal herein.

Wherefore, defendant and appellant prays:

First. That said judgment and order of deportation of said commissioner be vacated and set aside, and that said defendant and appellant be hence dismissed.

Second. That said matter and proceedings against said defendant and appellant be referred to said commissioner, or to a master in chancery of this court, for the purpose of taking further evidence on behalf of said defendant and appellant.

Third. That said matter and charge against said defendant and appellant be heard and tried *de novo* in this the district court of the United States for the northern district of California.

Fourth. That said defendant and appellant have such other and further or different relief as may be proper.

Dated ———.

Respectfully submitted,

R. Y.,

Attorney for Defendant and Appellant.

No. 321.

Citation on Appeal from Commissioner.

Before Hon. E. H., United States Commissioner.

| | |
|-------------------------------|---|
| The United States of America, | } |
| Plaintiffs and Respondent, | |
| vs. | |
| Lee Ah Yin, Defendant and | |
| Appellant. | } |

To the United States of America, Plaintiffs, and to Hon. J. H.,
United States Attorney for the ——— District of ———,
Greeting:

You are hereby cited and admonished to be and appear at and before the district court of the United States for the ——— district of ———, on the ——— day of ———, nineteen hundred and ———, pursuant to an appeal filed in my office in the above entitled matter, wherein Lee Ah Yin is appellant and the United States is respondent, to show cause, if any there may be, why the order mentioned in said appeal should not be corrected, and speedy justice should not be done to the appellant in that behalf.

Witness, the Hon. G. R., judge of the district court of the United States for the ——— district of ———, this ——— day of ———, in the year of our Lord nineteen hundred and ———.

E. H.,

United States Commissioner.

Due service by copy of the within citation is hereby admitted
this ——— day of ———.

J. H.,

United States Attorney.

No. 322.**United States Commissioner's Transcript of Proceedings in Criminal Case.**

United States of America,

Northern District of Ohio, Eastern Division, ss.

Before me, Frederick P. Walther, a United States Commissioner for said district, complaint and affidavit was made on this 30th day of April, 1914, by J. A. Fluckey, Imm. Insp., charging in substance that on or about the 30th day of April, 1914, at Cleveland, in said district, the defendant, Lew Loy, in violation of Chinese Exclusion Act of the revised statutes of the United States Penal Code, was a Chinese person unlawfully in the United States.

On April 30, 1914, issued warrant to Chas. W. Lapp, U. S. Marshal.

On June 22, 1914, warrant returned, indorsed as follows: "Received this warrant on the 30th day of April, 1914, at Cleveland, Ohio, and executed the same by arresting the within named Lew Loy, at Cleveland, Ohio, on the 30th day of April, 1914, and have his body now in court, as within I am commanded.

CHAS. W. LAPP,

U. S. Marshal, Northern District of Ohio,

By W. F. Gauchat, Deputy."

On May 21, 1914, issued subpoena for the following witnesses in behalf of the United States: Frank M. Potter, John Harris, William Graham, N. J. Rich, Franklin J. Zavesky, G. F. Wilson.

On May 22, 1914, said subpoena was returned, indorsed as follows: "Received this writ May 22, 1914, and on the same day, served the same on the within named Frank M. Potter, John Harris, William Graham, N. J. Rich, Franklin J. Zavesky, and G. F. Wilson, by leaving a certified copy thereof with each of them personally.

CHAS. W. LAPP,

U. S. Marshal, Northern District of Ohio,

By Al. P. Kelley, Deputy."

On April 30, 1914, defendant was brought before me, the said United States Commissioner at my office, in the — in said district, by W. F. Gauchat, Deputy U. S. Marshal; and the complaint was then and there fully read and explained to the said defendant, who thereupon, for plea, said he is "not guilty" as charged in said complaint.

J. B. Waterworth appeared for the United States.

Stewart and Spieth appeared for defendant.

And thereupon, on motion to that effect made by the plaintiff and defendant, the hearing was continued until the 6th day of May, 1914, at 10 o'clock a. m., and the defendant was required to give bond in the sum of two thousand dollars to personally appear before me at the said time at my office in the —, in the city of Cleveland, and district aforesaid, and from time to time thereafter to which the case may be continued, which he did do, with J. W. Stewart as surety; May 6, 1914, case continued to May 22, 1914; May 22, 1914, case continued to June 22, 1914.

On June 22, 1914, at 9:30 o'clock a. m., pursuant to the continuance of May 22, 1914, defendant appeared before me, the said commissioner, at my office in said district. The United States was represented by C. R. Alburn, U. S. attorney, and the defendant, being present in person, was also represented by Stewart and Spieth, his attorneys; and the following witnesses were sworn and examined on the part of the United States: J. A. Fluckey.

On June 22, 1914, from the evidence of the witnesses, it appearing to me, the said commissioner, that the laws of the United States have been violated, as charged in the complaint, and that there is probable cause shown to believe the defendant guilty of the alleged offense, it was ordered that he be deported to China, and that he give bond in the sum of two thousand dollars for his appearance before the United States District Court, in and for the Northern District of Ohio, Eastern Division, pending and to abide his appeal to said court, and from

time to time thereafter to which the case may be continued, to answer said charge, and that in default of same he stand committed.

And thereupon on the 22d day of June, 1914, the said defendant gave bond in the sum of two thousand dollars for his appearance at the said time and place, with J. W. Stewart as surety thereon.

June 22, 1914, defendant gave oral notice, and filed written application and petition for appeal to the United States District Court for said district:

| | |
|---|-----------------|
| All services in Chinese deportation case..... | \$ 5.00 |
| Marshal's fees on warrant..... | \$7.26 |
| On subpoena | 3.60 10.86 |
| | <hr/> |
| | \$15.86 |

No. 322a.

Endorsement and Certificate.

No. 8918 U. S. Commissioner's Transcript; The United States of America vs. Lew Loy; Transcript of Proceedings, before Frederick P. Walther, United States Commissioner for the Northern District of Ohio, Eastern Division; Certificate. The United States of America, Northern District of Ohio, ss., Eastern Division. I, the undersigned, a United States commissioner for said district, do hereby certify that the within is a full and true transcript of the proceedings had by and before me in the above named cause, and costs therein as recorded in my docket 2, page 151; and that the papers numbered 1 to 7, inclusive, accompanying this transcript, are the original papers in said cause; all of which are herewith transmitted into the district court of the United States, within and for said district.

Witness my hand and seal on the 22d day of June, 1914

[Seal of Commissioner.] FREDERICK P. WALTHER,
U. S. Commissioner as aforesaid.

No. 323.

(Another form.)

Certificate to Record by U. S. Commissioner.

United States of America,

— District of —, ss.

I hereby certify that attached hereto are the following original papers filed in the case entitled in the caption hereof, viz.: Complaint, warrant of arrest, affidavits for continuance filed the — day of — and —, respectively, notice of appeal and order allowing the same, citation on appeal to the United States attorney, stipulation relative to filing upon appeal the original papers in the cause, stipulation relative to time of transcribing the papers on appeal; also, a full, true and correct transcript of the proceedings and testimony had and taken before me upon the hearing thereof; also, a full, true and correct copy of the findings, judgment and order of deportation.

Witness my hand at my office this — day of —.

E. H.,

United States Commissioner for the —

District of —, at —.

No. 324.**Order Affirming U. S. Commissioner.**

Entered June 15, 1915, by Judge Clarke.

This day came the United States attorney, on behalf of the United States, and came also the defendant, Lew Loy, accompanied by counsel, at the bar of court, and this case came on to be heard upon the appeal of said defendant, Lew Loy, from the decision of Frederick P. Walther, United States commissioner, ordering the said defendant, Lew Loy, to be deported from the United States to the country from whence he came, to-wit, the republic of China.

Testimony of the parties and arguments of counsel were concluded and the case submitted to the court for consideration and decision.

Wherefore, after due consideration had thereon, the court finds that said defendant is a person of Chinese descent and is unlawfully within the United States, whereupon it is ordered by the court that the decision of the United States commissioner be and the same is hereby sustained and said order of deportation be and the same is hereby affirmed, and that the defendant forthwith be deported to the republic of China in accordance with the prior order of deportation of said United States commissioner, and that the costs of these proceedings, taxed at \$——, be paid by said defendant.

It is further ordered that the United States marshal of this district carry into effect the provisions of this order in regard to such deportation in conformity with the regulations of the Bureau of Immigration of the United States. To which ruling and judgment of the court the defendant then and there excepted and in open court gave notice of his intention to appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and it is thereupon ordered that said defendant enter into a recognizance in the sum of two thousand dollars (\$2,000) to the approval of the clerk of this court for his appearance in this court from day to day during the pendency of said appeal in answer to the charge therein pending against him, and thereupon came the defendant, Lew Loy, as principal, and Jas. W. Stewart, as surety, and entered into the required recognizance.

No. 325.

Decree Affirming or Reversing Order of Deportation (1).

[Caption.]

In this case, the appeal from the order of deportation made by the United States commissioner, E. H., having been heretofore submitted to the court for consideration and decision,

now, after due consideration had thereon, it is by the court ordered that said order of deportation be, and the same is hereby, affirmed [*or*, reversed, and it is further ordered that the defendant be discharged].

(1) Where a person has been ordered to be deported in one district, can not be tried again in another district. *U. S. v. Lucy Guey Auck*, 115 Fed. 252.

It is entirely for the commissioner to determine the credibility of the witnesses and the sufficiency and weight of their testimony, and it is uniformly held that his finding will not be disturbed unless clearly against the weight of evidence. *Quock Ting v. U. S.*, 140 U. S. 417, 11 Sup. Ct. 733, 35 L. Ed. 501; *Elwood v. Telegraph Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *Kavanaugh v. Wilson*, 70 N. Y. 177; *Gee Fook Sing v. U. S.*, 1 C. C. A. 211, 49 Fed. 147; *In re Jew Wong Loy* (D. C.), 91 Fed. 240; *U. S. v. Chung Fung Son* (D. C.), 63 Fed. 261; *Lee Sing Far v. U. S.*, 35 C. C. A. 327, 94 Fed. 834; *In re Louie You* (D. C.), 97 Fed. 580.

No. 326.

Order to Remand a Chinese Person on Petition for Writ of Habeas Corpus.

In the District Court of the United States, — District of —,

In the Matter of Lee Ah Chin, }
on *Habeas Corpus*. } No. —.

This matter having been regularly brought on for hearing upon the report of the special referee and examiner, it is by the court now here ordered and adjudged:

That said report be, and the same is hereby confirmed, and it is adjudged and found that Lee Ah Chin, the person in whose behalf the writ of *habeas corpus* herein was issued, came from China by the steamship Barton, and is a Chinese person forbidden by law to land within the United States, and has no right to be or remain therein.

It is therefore ordered that the said above named person be remanded by the United States marshal for the — district of —, to the custody whence he was taken, to-wit: On board the said steamship to the custody of the master thereof, whoever he may be at the time of the order of remand, or to place the said above named person in the hands and charge of any party on board said steamship for the time being representing the master, or then in charge of said steamship in the absence of the master, or for the time exercising control or authority thereon; this order to be executed as to said steamship, whether still in port not having departed therefrom, or having departed and returned since the proceedings herein were instituted. And in case said steamship has departed and not returned, or for any other reason the said above named person can not be placed on said steamship, that the said marshal place him upon any other vessel available for the purpose, for the purpose of deporting him out of the United States and transporting him to the port of Hong Kong whence he came. And for the purpose of carrying this order into effect, it is further ordered that the said marshal take the said named person into custody and him safely keep till said order shall be fully executed.

Entered this — day of —, 190—.

G. R.,
Judge.

Office of the United States Marshal,
— District of —.

I hereby return that I executed the within order of remand on the — day of —, 190—, by placing the within named Lee Ah Chin in the custody of G. R., from whose custody he was taken under and by virtue of a writ of *habeas corpus* heretofore issued by this honorable court in the within entitled matter, as I am commanded to do in said within order of remand.

S. M., United States Marshal.

Dated at —, — day of —, 190—.

No. 327.**Writ of Deportation of Chinese (1).**

United States of America.

In the District Court of the United States for — District
of —.

United States of America.

vs.

Wah Jim.

} No. —. Writ of Deportation.

The President of the United States of America to the Marshal
of the United States for the — District of —, Greet-
ing:

Whereas, at the July term of said court, held at the city of
—, in said district, on the — day of —, A. D. —,
Wah Jim was convicted of being a Chinese laborer unlawfully
within the United States without a certificate of registration,
committed within the jurisdiction of said court, contrary to the
form of the statute of the United States in such case made and
provided, and against the peace and dignity of the United
States.

And whereas, on the — day of —, A. D. —, being a
day in the said term of said court, the said Wah Jim was, for
said offense of which he stands convicted as aforesaid, by the
judgment of said court, ordered to be deported to the empire
of China, the country from which he came.

And this is to command you, the said marshal, to take, keep
and safely deport the said Wah Jim to the republic of China by
the usual route of travel without unnecessary delay, and make
due return of your service of this writ. Herein fail not at
your peril.

Witness, the Hon. C. H., judge of the said district court,
and the seal thereof, at the city of —, the — day of —,
A. D. —.

[Seal.]

R. M.,

Clerk.

(1) Usually a certified copy of the judgment is used as a process upon which the removal is made. Sec. 13 of the act of September 13, 1888, 25 Stat. L. 476.

In some districts, however, the foregoing form of writ has been used.

No. 328.

Warrant for Arrest of Alien (1) under Immigration Act of 1907.

United States of America,
U. S. Department of Labor,
Washington.

To J. A. Fluckey, Inspector in Charge, Cleveland, Ohio, or to any Immigrant Inspector in the Service of the United States:

Whereas, from evidence submitted to me, it appears that the alien, Chan Foo Lin, alias Frank Chan, who landed at an unknown port on or subsequent to the 1st day of July, 1911, has been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910, for the following among other reasons:

That the said alien is unlawfully within the United States in that he has been found therein in violation of the Chinese exclusion laws, and is, therefore, subject to deportation under the provisions of Section 21 of the above mentioned act, and that he entered in violation of Section 36 of the above mentioned act, thereby entering without inspection.

I, Louis F. Post, acting secretary of labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law.

The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1914." Pending disposition of his case,

the alien may be released from custody upon furnishing satisfactory bond in the sum of \$2,000.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 19th day of June, 1914.

(Signed) LOUIS F. POST,
Acting Secretary of Labor.

[Seal.]

(1) Although the immigration act of 1907 was repealed by the act of February 5, 1917, yet the provisions respecting deportation of aliens are retained in their essentials as they were in the earlier act; section 19 of the later act provides for taking into custody of mentioned persons and their deportation upon warrant of the secretary of labor, and section 25 confers full jurisdiction of proceedings upon the district court. Apparently the procedure is the same as under the earlier act of 1907, namely, arrest, hearing and order of deportation by the secretary of labor, and application for writ of habeas corpus to the district court, as seen in *Ex parte Hill*, 245 Fed. 687, and also in *Ex parte Mitchell*, 256 Fed. 229. In the latter case it was held that "a finding by immigration officers or the secretary of labor that an alien is subject to deportation, is not conclusive, and may be reviewed on habeas corpus, and the findings of fact by the secretary of labor are subject to the decision of the court as to whether they are sustained by the evidence, or whether they support the order of deportation."

Accordingly some forms of the procedure prevailing under the act of 1907 are herewith submitted.

No. 329.

Order of Deportation of Alien.

Washington, D. C., November 2, 1914.

Immigration Service, Cleveland, Ohio:

Hearing having been granted the following named alien, Chan Foo Lin, who has been found within the United States in violation of Section 6, Chinese exclusion act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence, and who entered the United States in violation of Section 7, Chinese exclusion act of September 13, 1888, and Rule 1, Chinese rules, you are authorized to convey the following named alien, Chan

Foo Lin, to the port of New York for deportation, expenses being payable from the appropriation "Expenses of Regulating Immigration." Authority granted for employment of attendant, if necessary, at compensation of one dollar and expenses both ways. Join Weiss party.

J. B. DENSMORE,
Acting Secretary.

No. 330.

Application for Writ of Habeas Corpus.

Filed Nov. 5, 1914.

Now comes Chan Foo Lin, alias Frank Chan, and respectfully represents to this honorable court that he is unlawfully deprived of his liberty by J. Arthur Fluckey, inspector in charge of the immigration department of Cleveland district; that said imprisonment and detention are without any legal authority whatsoever.

Wherefore your petitioner prays that a writ of *habeas corpus* may be issued to the said J. Arthur Fluckey, and that your petitioner may be discharged from such illegal restraint.

J. A. CLINE and
E. P. STRONG,
Attorneys for Petitioner.

The State of Ohio, Cuyahoga County, ss.

Chan Foo Lin, being first duly sworn, says that the statements made and allegations contained in the foregoing application are true.

CHAN FOO LIN.

Sworn to before me and subscribed in my presence this 5th day of November, 1914.

E. P. STRONG,
Notary Public.

[Seal.]

No. 331.

Order Allowing Writ of Habeas Corpus.

This day came J. Arthur Fluckey, inspector in charge of the immigration department of Cleveland, Ohio, district, with the petitioner, Chan Foo Lin, alias Frank Chan, at the bar of court,

and the application for writ of *habeas corpus* having been duly considered, it is ordered by the court that said application be, and the same is hereby allowed, and that a writ issue, returnable on the 7th day of November, A. D. 1914, at 11 o'clock in the forenoon of said day.

No. 331a.

Demurrer to Petition for Writ of Habeas Corpus.

(Venue.)

In the Matter of Wong Quen Luck, on Habeas Corpus.

Now comes the respondent, Samuel W. Backus, commissioner of immigration at the port of San Francisco, in the state and northern district of California, and demurs to the petition for a writ of *habeas corpus* in the above entitled matter and for grounds of demurrer alleges:

1. That said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of *habeas corpus* or any relief thereon.

2. That said petition is insufficient in that the statements in the petition relative to the record of the testimony taken on the trial of the applicant, are statements of conclusions of law.

Wherefore, respondent prays that the writ of *habeas corpus* be denied.

A. B.,

Attorney for Respondent.

No. 331b.

Order Overruling Demurrer and Ordering Writ to Issue.

(Venue.)

In the Matter of Wong Quen Luck on Habeas Corpus. A. B.,
Attorney for Respondent; C. D., Attorney for Petitioner.

The demurrer to the petition for a writ of *habeas corpus* herein is overruled, and said writ will issue returnable November 6, 1915, at 10 o'clock a. m.

M. T. DOOLING,

October 26, 1915.

Judge.

No. 331c.**Stipulation that Immigration Record and Exhibits be Filed
and Considered Part of the Petition for Writ of
Habeas Corpus.**

(Venue.)

In the Matter of Wong Quen Luck on Habeas Corpus.

It is hereby stipulated and agreed by and between J. P. Fallon, of counsel for applicant in the above entitled matter, and Samuel W. Backus, commissioner of immigration at the port of San Francisco, in the state and northern district of California, and John W. Preston, United States attorney in and for the said district, that the records and exhibits of Samuel W. Backus, commissioner of immigration at the port of San Francisco, California, in the matter of the application of said Wong Quen Luck for admission into the United States, be filed and considered a part of the petition for a writ of *habeas corpus* in said matter.

JOHN W. PRESTON, U. S. Atty.,
Attorney for Respondent.

JOSEPH P. FALLON,
Attorney for Petitioner.

No. 332.**Writ of Habeas Corpus.**

The United States of America,

Northern District of Ohio, Eastern Division, ss.

The President of the United States of America to J. Arthur Fluckey, Inspector in Charge of the Immigration Department of Cleveland District.

You are hereby commanded that the body of Chan Foo Lin, alias Frank Chan, who is by you held and restrained of his liberty, as it is said, together with the day and cause of his caption and detention, by whatever name the said Chan Foo Lin, alias Frank Chan, may be known or called, you safely

have before the Honorable John H. Clarke, judge of the United States district court, within and for the district and division aforesaid, on the 7th day of November, A. D. 1914, at 11 o'clock in the forenoon of said day, at Cleveland, to do and receive all and singular those things which the said judge shall then and there consider of you in this behalf, and have you then and there this writ.

Witness, the Honorable John H. Clarke, judge of said court, at Cleveland, in said district, this 5th day of November, A. D. 1914, and in the 139th year of the independence of the United States of America.

B. C. MILLER, Clerk.

[Seal.]

By R. C. DEAN, Deputy.

U. S. Marshal's Return.

U. S. Marshal's No. 6982.

The United States of America, Northern District of Ohio, ss.

Received this writ at Cleveland, Ohio, November 6, 1914, and on the same day, at the same place, I served the same on the within named J. Arthur Fluckey, United States immigration inspector, by delivering to him personally a true and certified copy hereof with all endorsements thereon.

Marshal's fees—

Service..\$2.00

Travel... .06

\$2.06

CHARLES W. LAPP, U. S. Marshal.

By W. F. GAUCHAT, Deputy.

No. 333.

Return to Writ of Habeas Corpus.

To the Honorable District Court of the United States for the Northern District of Ohio.

Your respondent, J. A. Fluckey, respectfully represents to the court that he is inspector in charge at Cleveland, Ohio, of

the immigration service of the Department of Labor of the United States, and that as such officer in his official capacity he is holding the petitioner, Chan Foo Lin, alias Frank Chan, in the above entitled case, under and by virtue of a certain warrant for the arrest of said petitioner, duly issued to said J. A. Fluckey, inspector in charge, at Cleveland, Ohio, by Louis F. Post, acting secretary of labor, a copy of which said warrant is attached hereto and marked "Exhibit A"; that said petitioner has been granted a fair and full hearing upon the matters and things involved in said warrant of arrest heretofore referred to; that said hearing was had in accordance with law, and in accordance with the regulations of the secretary of labor, and that thereupon, upon full and due consideration thereof, Acting Secretary of Labor J. B. Densmore, by virtue of the authority vested in him by law, instructed said J. A. Fluckey by wire, as more fully set out in the telegram attached hereto and marked "Exhibit B," to convey said Chan Foo Lin, alias Frank Chan, to New York for deportation; that said petitioner is now held in the lawful custody of your respondent, J. A. Fluckey, under and by virtue of said warrant and instructions.

And your respondent further says that he denies each and every allegation and averment in the application of the petitioner filed herein, which is not herein expressly admitted.

Wherefore your respondent prays that he may be allowed to go hence with the body of the petitioner.

J. A. FLUCKEY,
Inspector in Charge.

State of Ohio, Cuyahoga County, ss.

J. A. Fluckey, being first duly sworn, deposes and says that he is the respondent in the above entitled cause, and that the facts and allegations contained in the foregoing return are true as he verily believes.

J. A. FLUCKEY.

Sworn to before me and subscribed in my presence this 7th day of November, 1914.

CARY R. ALBURN,
Notary Public.

[Seal.]

No. 334.**Hearing on Writ of Habeas Corpus, Recognizance Fixed,
Order.**

This day came the United States attorney, on behalf of the United States, and also came J. A. Fluckey, immigration inspector, defendant herein, with the petitioner, Chan Foo Lin, alias Frank Chan, in open court, and thereupon it is ordered that the hearing on petitioner's application be, and the same is hereby assigned for Friday, November 13, 1914, at 9:30 o'clock a. m.; that during the pendency of the above application said petitioner enter into a recognizance in the sum of two thousand (\$2,000) dollars for his appearance here in this court to answer to the charge pending therein against him. Thereupon came the said Chan Foo Lin, alias Frank Chan, as principal, and Herman Laronge and E. P. Strong as sureties, and entered into the required recognizance.

No. 335.**Recognizance.**

The United States of America, Northern District of Ohio,
Eastern Division, ss.

Be it remembered, that on this 7th day of November, A. D. 1914, before me, B. C. Miller, clerk of the United States district court of the district and division aforesaid, personally came Chan Foo Lin, alias Frank Chan, as principal, and Herman Laronge and E. P. Strong as sureties, and jointly and severally acknowledged themselves to owe to the United States of America the sum of two thousand dollars (\$2,000), to be levied of their goods and chattels, lands and tenements, to and for the use of the United States aforesaid, in case default be made in the condition of this recognizance, which is: that if the said Chan Foo Lin, alias Frank Chan, shall personally be and appear here in this court from day to day during the present term thereof, and from term to term of this court there-

after, then and there to answer to a petition therein pending against him for writ of *habeas corpus*, and shall then and there abide the order and judgment of this court and not depart the court without leave thereof, then this recognizance to be void; otherwise to remain in full force and effect.

CHAN FOO LIN,
HERMAN LARONGE,
E. P. STRONG.

Taken and acknowledged before me this 7th day of November, A. D. 1914.

B. C. MILLER,
Clerk U. S. District Court, N. D. O.,
By F. J. DENZLER, Deputy Clerk.

No. 336.

Leave given to File Reply—Order.

In this cause on application of petitioner leave is granted him to file a reply to the return of J. A. Fluckey, immigration inspector, instanter.

No. 337.

Reply to Writ of Habeas Corpus.

To the Honorable District Court of the United States, for the Northern District of Ohio:

Now comes Chan Foo Lin, the petitioner in the above entitled matter, and replying to the return of J. A. Fluckey, admits that said J. A. Fluckey is inspector in charge at Cleveland, Ohio, of the immigration service of the Department of Labor of the United States, and denies that said J. A. Fluckey is holding said Chan Foo Lin by virtue of a warrant for the arrest of said petitioner, which warrant was signed by Louis F. Post, acting secretary of labor. Said petitioner further denies that he has been granted a fair and full hearing in the matters and things involved in said warrant of arrest; he denies that said hearing was had in accordance with law and in

accordance with the regulations of the secretary of labor; and denies that said J. A. Fluckey has any right to hold or detain said Chan Foo Lin in custody.

This petitioner avers that he, the said Chan Foo Lin, was arrested in June, 1914, by Immigrant Inspector Joseph Francis, at the port of Cleveland, after an investigation by said Inspector Francis, and a report by him to the Department of Labor that said Chan Foo Lin, in the opinion of said Joseph Francis, was unlawfully within the United States; that thereafter the acting secretary of labor, Louis F. Post, issued an order for the arrest of Chan Foo Lin and ordered that he be given a hearing in accordance with the regulations of the Department of Labor; that said J. A. Fluckey, on June 25, 1914, assigned said Joseph Francis as the examining officer to inquire into the fact as to whether or not said Chan Foo Lin was lawfully within the United States; that said Chan Foo Lin objected and protested against the said Joseph Francis holding said hearing, for the reason that said Joseph Francis is the person who made the examination and investigation of the presence of Chan Foo Lin in the United States and his report and opinion to the Department of Labor caused said Department of Labor to issue instructions for the arrest of said Chan Foo Lin.

The petitioner avers that at the time of said hearing, said Inspector Francis had formed an opinion upon examination of the facts, that said Chan Foo Lin was unlawfully within the United States, and that it was impossible to have a fair hearing before said Joseph Francis for the reason that he was prejudiced and biased against said Chan Foo Lin, and had reported to the department previous to said hearing that said Chan Foo Lin was not within this country lawfully.

The petitioner was ordered to proceed to hearing over his objection and no evidence was introduced by the government against said Chan Foo Lin except a statement signed by one Alfred C. Chadfield, who was alleged to be an immigrant in-

spector stationed at Detroit, Michigan. In said statement, so presented, said Chadfield said he had seen a photograph of a certain Chinese person who gave his name as Chan Foo Lin or Frank Chan, and stated that he had seen the original of the photograph at about 9:25 p. m. on May 16, 1914, in Windsor, Ontario. Said Chan Foo Lin was given no opportunity to see the photograph or to cross-examine said Chadfield, but said statement was accepted as evidence, and the only evidence that said Chan Foo Lin had come to the United States of America within three years.

This petitioner further avers that at such hearing he produced as a witness Miss Mary F. Trapp, who has been employed as a teacher in the public schools for more than twenty years, and that said witness testified that said Chan Foo Lin was known to her by reason of having attended a Sunday-school at the Old Stone Church in Cleveland in which said Mary F. Trapp was a teacher, and that said Chan Foo Lin had been a regular attendant at said Sunday-school class, taught by said Mary F. Trapp, since the first Sunday in April, 1914, and up to the time of his arrest, which was in June. Said Mary F. Trapp likewise presented the original record of the Old Stone Church Sunday-school, showing that said Chan Foo Lin had attended Sunday-school as testified to by said Mary F. Trapp, and identified this petitioner as the person described as Chan Foo Lin on the record of said Sunday-school.

This petitioner further avers that during said hearing said Chan Foo Lin presented many witnesses who testified to his birth in the United States, gave a full and free account of himself from birth until the date of his arrest, said witnesses being both Chinese and English.

Notwithstanding the clear and complete defense of said Chan Foo Lin, the government of the United States, after said hearing had closed, and without notice to this petitioner (knowing that the statement of said Alfred C. Chadfield had been discredited and disproved by the records and testimony of said Mary F. Trapp), procured one Jose Salazar, who lives at

Juarez, Mexico, to make a statement that he had seen a picture which was marked "Chan Foo Lin, alias Frank Chan, Cleveland, Ohio," and had seen the original of said picture in Juarez and in Chihuahua, some time a little less than a year, being unable to state exactly.

This petitioner avers that said Jose Salazar has not seen this petitioner in Mexico at any time or place; that if any picture was presented to him which he really recognized, it was not the picture of this petitioner; that this petitioner was not given the opportunity of examining the photograph or of cross-examining said Jose Salazar; nor had this petitioner any opportunity to go to Mexico, nor would the law permit him to go to Mexico and return to this country, for the purpose of examining said Jose Salazar.

This petitioner further avers that without notice or warning to him after said hearing by said Joseph Francis had been completed, the government procured affidavits and statements of persons to the effect that they had been shown a picture or photograph and the original was unknown to them.

This petitioner avers that the government did not present nor furnish to this petitioner the photograph alleged to have been shown to the various persons who made statements as hereinbefore alleged, and that this petitioner was unable thereby to refute the statements of said persons that the original of the photograph shown to them was this petitioner.

This petitioner further avers that he is an American citizen; that he was born in the United States; that the action taken by the Department of Labor is arbitrary and unjust and unfair in the manner hereinbefore set forth, and that he was denied a hearing upon the question of his citizenship or the right to remain in the United States, and having fully answered, prays that he may be given a hearing upon his right to remain in this country and an opportunity to fairly determine his American citizenship; that upon hearing he be discharged from custody.

E. P. STRONG,
CLINE & MINSHALL.

State of Ohio, Cuyahoga County, ss.

Chan Foo Lin, being first duly sworn, on oath deposes and says that he is the petitioner in the above entitled cause and that the facts and allegations contained in the above reply are true as he verily believes.

CHAN FOO LIN.

Sworn to before me and subscribed in my presence this 21st day of November, 1914.

W. R. RYAN, JR.,
Notary Public.

[Seal.]

Tax fee, 40c.

No. 338.

Hearing on Application.

This cause came on to be heard upon the application for writ of *habeas corpus* and upon the return of J. A. Fluckey, immigration inspector in charge at Cleveland, Ohio, respondent herein, arguments of counsel were begun, but not concluded, when the hour for adjournment arrived, whereupon further proceedings were continued until Wednesday, November 18, 1914, at 9:30 o'clock.

No. 339.

Decree Dismissing Application and Remanding Alien.

This day came again the United States attorney on behalf of the United States and also came J. A. Fluckey, immigration inspector, with the petitioner at the bar of court. And the court having heretofore taken the matter under advisement, it is now,

Ordered that the application herein be and the same is hereby, dismissed and the said alien remanded into the custody of J. A. Fluckey, immigration inspector, for deportation to the republic of China under the warrant of deportation issued by J. B. Densmore, acting secretary of labor. To which judgment and order of the court the said alien then and there excepted and gave notice of his intention in open court to appeal this cause

to the United States circuit court of appeals for the sixth circuit. And it is further ordered that said alien during the pendency of appeal shall be remanded to the custody of the United States marshal.

No. 340.

Order of Discharge (1).

(Venue.)

In the Matter of Wong Quen Luck on Habeas Corpus.

This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been had thereon, it is by the court now here ordered, that the said named person in whose behalf the writ of *habeas corpus* herein was sued out, is illegally restrained of his liberty, as alleged in the petition herein, and that he be, and he is hereby discharged from the custody from which he has been produced, and that he go hence without day.

Entered this — day of —, 1915.

A. B. C., Clerk,

By E. F. G., Deputy Clerk.

(1) Exception to the order of discharge may be made by the respondent.

DEPOSITION IN SUITS AT LAW AND IN EQUITY.**No. 341.****Notice of Deposition de bene esse.****[Caption.]****Y. & Y.,****Solicitors for Defendant.**

Please take notice that the plaintiff herein will take the testimony of E. F., G. H. and I. J., all of whom reside at the city of —, and state of —, and others, each and all of whom reside more than one hundred (100) miles from the place of trial herein, and more than one hundred (100) miles from any place at which a circuit court of the United States for the — district of — is appointed to be held by law, at the final hearing for use on behalf of the plaintiff, before J. N., Esq., a notary public in and for the county of —, who is not of counsel nor interested in this cause, at the office of X. & X., at No. — — street, in the city of —, and state of —, on the — day of —, at 11 o'clock a. m., and thereafter from day to day as the taking of the depositions may be adjourned; and such testimony will be so taken in accordance with the provisions of sections 863, 864 and 865 of the revised statutes of the United States and the equity rules. X. & X.,

Solicitors for Plaintiff.**Dated at —.****No. — — St., —.**

(1) See R. S., Secs 863, 864 and 865; Desty's Fed. Proc., Secs. 382, 383 and 384, and cases there cited; 47th Rule in Equity; see also 5th ed. Foster's Fed. Proc., Secs. 354, 355.

R. S., Sec. 861 requires the proof in actions at common law to be taken by oral testimony and examination of witnesses in open court, except as elsewhere by statute provided; hence authority to take testimony by deposition must be found in the statutes. *Compania Azucarera Cubana v. Ingraham*, 180 Fed. 516; in this case it was held that no federal law permits taking the deposition of foreign witnesses, but if the federal court is sitting in a state which authorizes the taking of the depositions of foreign witnesses, the federal court may issue a *dedimus potestatem* to take testimony in Cuba.

Where federal statutes permit the taking of depositions the mode of doing so may be according to federal or state provisions. *McLennan v. Kansas City*, 22 Fed. 198. act of March 9, 1892, 27 Stat. L. 17.

R. S., Sec. 863 is not affected by the conformity act, R. S., Sec. 914, the latter having no application to the taking of depositions in federal courts. *Sage v. Tauszky*, Fed. Cas. No. 12214.

A judge or court can not deprive a party of the privilege extended by R. S., Sec. 863. In *re National Equipment Co.*, 195 Fed. 488, 115 C. C. A. 398. Nor does equity rule 47 (new rules) vary or limit the provisions of R. S., Sec. 863. *Iowa Washing Machine Co. v. Ward*, 227 Fed. 1004, affirmed in 234 Fed. 88, 148 C. C. A. 104; although the time limit prescribed in rule 47 is said to have been made with section 863 in contemplation, in *Victor Talking Machine Co. v. Sonora Phonograph Corporation*, 221 Fed. 676.

R. S., Sec. 863, permits the taking of the deposition of a plaintiff. *Blood v. Morrin*, 140 Fed. 918. Or of a defendant. *Hartman v. Feenaughty*, 139 Fed. 887. But does not apply to a foreign witness. 180 Fed. 516, *supra*.

That a court order is not necessary in order to take deposition under section 863, see *Henning v. Boyle*, 112 Fed. 397; it is also laid down therein that it is good practice to issue subpoena for witness from the clerk's office in district of witness's residence, filing in said office an affidavit that the cause in which the deposition is sought is pending and notice of the examination has been given; the court further observes that a commission to take testimony will not be granted by a federal court when the more convenient mode of section 863 is available, the right under said section being absolute.

If deposition is objected to the proper practice is to make motion to suppress, but in some cases a motion to vacate the notice to take has been allowed to save parties the expense incident to the taking of depositions which will be defective. *Audriffen Refrigerating Machine Co. v. General Electric Co.*, 245 Fed. 783, declining to follow *Kline v. Liverpool*, 184 Fed. 969, and producing convincing reasons why the latter case should not rule the question.

A deposition can not be used when witness is available at the trial although not called. *Vagaszki v. Consol. Coal Co.*, 225 Fed. 913, 141 C. C. A. 37; as to the manner of using a deposition at trial this case holds that it is proper for the court to permit counsel for one of the parties to take a stand at the bar and read the questions, and counsel for the other party to take the chair of the witness and read the replies, commending that manner as being especially helpful to the jury in making a clear separation between question and answer.

The power of a court to order a subpoena duces tecum under section 863 is not doubted since the decision in *U. S. v. Tilden*, Fed. Cas. No. 16522 (1879); *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. 753; *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241.

Authority for *dedimus potestatem* and in *perpetuam rei memoriam* is conferred by R. S., Sec. 866, which expressly provides against the application thereto of R. S., Secs. 863, 864 and 865; as to grounds upon which the *dedimus potestatem* will issue, see *Zych v. Amer. Car, etc., Co.*, 127 Fed. 723, holding that the application or petition to take must be verified and must state a well-grounded apprehension of failure

or delay of justice. As to in perpetuam rei memoriam, see *Ohio Copper Mining Co. v. Hutchings*, 172 Fed. 201, 96 C. C. A. 653.

Other provisions regarding the taking of depositions are contained in R. S., Secs. 868 to 874.

No. 342.

Subpoena of Witness *de bene esse*.

[Caption.]

To G. H.

Please take notice that you are required to appear before me at my office, number —, — street, in the city of —, on the — day of —, at 10 o'clock in the forenoon of that day, and there to be examined *de bene esse* on the part of the — in the above entitled cause. You are required to be present to testify at the time and place above mentioned.

Witness my hand and official seal at —, this — day of —.

[Seal.]

J. N.

[Official Title.]

No. 343.

Caption for Depositions *de bene esse*.

The United States of America,

— District of —,

State of —, County of —, ss.

The examination of witnesses *de bene esse* beginning on the — day of —, on behalf of the —, before me, J. N. [official title], at my office at number —, — street, in the city of —, in the said district of —, in the state aforesaid, in a certain suit now pending and undetermined in the district court of the United States for the — district of — [state place the court is held], in the district aforesaid, wherein A. B. is plaintiff, and C. D. is defendant.

G. H., a witness produced on behalf of the plaintiff [or, defendant], being first duly sworn, deposes and says as follows:

My name is G. H., age —, and I reside at and am employed, etc. [Continue with the deposition, which the witness must sign.]

No. 344.**Certificate at Close of Depositions de bene esse.**

State of ———,

County of ———, ss.

I, J. N., a notary public in and for said county and state [*or*, United States commissioner, *or as may be*], duly commissioned and qualified, and authorized to administer oaths, and to take and certify depositions, do hereby certify that, pursuant to the annexed notice issued and served in the civil cause depending in the circuit court of the United States for the ——— district of ———, wherein A. B. is plaintiff, and C. D. defendant, I was attended at my office, No. ———, ——— street, in ———, by R. X., counsel for said plaintiff, as also by R. Y., counsel for defendant, on the several days and dates hereinbefore stated; that the aforementioned witnesses, E. F., G. H. and J. S., who were of sound mind and lawful age, and were by me first carefully examined and cautioned and duly sworn to testify the truth, the whole truth, and nothing but the truth; and they thereupon testified as is above shown, and that the depositions by them subscribed, as above set forth, were reduced to writing by me (1) [*or*, by the deponent in my presence] in the presence of the witnesses themselves, and from the statements of them, and were subscribed by the said witnesses in my presence, and were taken at the place in the annexed notice specified and at the times as set forth, adjournments being had or taken from day to day as provided for in said notice, and that all was so done, written and signed in the presence of said counsel for said plaintiff and defendant. I further certify that the reason for taking said depositions was, and is, and the fact was, and is, that all of the deponents live at ———, more than one hundred miles from the place where the said civil issue is appointed by law to be tried; that I am neither of counsel nor attorney to either of the parties to said suit, nor interested in the event of said cause, (2) and that it being impracticable for me to de-

liver said depositions and the exhibits thereto attached with my own hand into the court for which they were taken, I have retained the same for the purpose of being sealed up and directed with my own hand, and speedily and safely transmitted to the said court for which it was taken, and to remain under my seal until there opened. (3)

As witness my hand and seal as such examiner [*or as may be*] at —, on this — day of —, 1894. J. N.

[*Seal.*]

[*Official Title.*]

(1) Where depositions are taken *de bene esse* the certificate should state they were reduced to writing by the magistrate or by the deponent in his presence. *Bell v. Morrison*, 1 Pet. 355; *Cook v. Burnley*, 11 Wall. 663; *Donahue v. Roberts*, 19 Fed. 863; *In re Thomas*, 35 Fed. 822; *Moller v. U. S.*, 57 Fed. 494, 6 C. C. A. 459; R. S., Secs. 863-4-5.

(2) *Am. Natl. Ech. Bk. v. Natl. Bk.*, 82 Fed. 961, 27 C. C. A. 74; *Donahue v. Roberts*, 19 Fed. 863; *Stewart v. Townsend*, 41 Fed. 121.

(3) *Stewart v. Townsend*, 41 Fed. 121; *Egbert v. Citz. Ins. Co.*, 7 Fed. 47.

No. 345.

Letters Rogatory (1).

The United States of America,
— District of —, ss.

The President of the United States to any Judge or Tribunal
having jurisdiction of civil causes at Havana, Greeting:

Whereas, a certain suit is pending before us in which L. M. and J. T. are the claimants of the schooner P. and cargo, and the United States of America are the defendants; and it has been suggested to us that there are witnesses residing within your jurisdiction without whose testimony justice can not completely be done between the said parties:

We therefore request you that in furtherance of justice you will, by the proper and usual process of your court, cause such witness or witnesses as shall be named or pointed out to you

by the said parties, or either of them, to appear before you, or some competent person by you for that purpose to be appointed and authorized, at a precise time and place by you to be fixed, and there to answer on their oaths and affirmations to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing and returned to us under cover, duly closed and sealed up together with these presents; and we shall be ready and willing to do the same for you in a similar case when required.

[*Add teste.*]

(1) See R. S., Secs. 875, 4071-4074; Desty's Fed. Proc., Sec. 394. *Stein v. Bowman*, 13 Pet. 218; *Holliday v. Schultzeberge*, 57 Fed. 660; *Nelson v. U. S.*, No. 10116 Fed. Cas.; Pet. C. C. 235; *Bouvier's Law Dic.* Title "Letters Rogatory;" 1 *Greenleaf on Evidence* 320. See also, *In re Letters Rogatory*, 36 Fed. 306, explaining the scope of the statutes above mentioned. *DeVilleneuve v. Morning Journal Association*, 206 Fed. 70, to the effect that a federal court has inherent power to issue letters rogatory, and discussing power conferred by R. S. U. S., Sec. 875.

No. 346.

Letters Rogatory.

The United States of America,

— District of —, ss.

The President of the United States of America to the President of the Court at —, in the Kingdom of —, Greeting:

Whereas, a certain suit is pending in our circuit court for the — district of —, in which A. B., as administrator of the estate of A. N., deceased, is plaintiff, and the C. D. Railroad Company is defendant, and it has been suggested to us that justice can not completely be done between the said parties without the testimony of E. F., G. H. and I. J., all of whom reside at —, within your jurisdiction:

We therefore request you that in furtherance of justice you will, by the proper and usual process of your court, cause said E. F., G. H. and I. J. to appear before you, or some competent

person by you for that purpose to be appointed and authorized, at a precise time and place by you to be fixed, then and there to make answer on their oaths and affirmations to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing and to be returned to us under cover, addressed to the clerk of the circuit of the United States for the — district of —, at the city of —, and state of —, in the United States of America, duly closed and sealed up together with these presents; and we shall be ready and willing to do the same for you in a similar case when required.

[Add teste.]

No. 347.

Order for Dedimus Potestatem.

[Caption.]

On reading and filing affidavit of plaintiff's attorney and notice of motion, with proof of due service thereof on attorneys for the defendant, A. R., who only has appeared herein, J. H., Esq., appearing for the plaintiff, and R. Y., Esq., for the defendant, A. R.:

It is on motion of J. H., Esq., United States attorney, ordered that a *dedimus potestatem* be issued in this cause out of this court, directed to the United States consul, and to such deputy or representative of said consul as may be authorized by him to act in his place and stead, at the following named places, respectively, viz.: [*name them as*] To E. P., United States consul at Aix-la-Chapelle (Aachen), Germany, and his deputy or representative; to examine the following named persons under oath as witnesses herein, viz. [*name them*].

It is further ordered that the examination above provided for shall take place during the months of — and —, and at such times within said months as is hereinafter designated.

It is further ordered that either party to this action shall have liberty to examine not only the witnesses herein named, but any other witnesses that either party may desire to examine at the aforesaid places of [*name them*], before either of the persons herein authorized to take testimony; provided, however, that the names of said witnesses and their places of residence shall be given to the attorney of the opposite side in —, before the — day of —, or such notice be given in Europe to the opposite counsel acting there for either party to this action in either of the aforesaid places of [*name them*], where such other witnesses are to be examined, two days before such examination.

It is further ordered that prior to —, the attorneys for the respective parties shall give notice in —, each to the other, of the names and European address for the last week in —, of the counsel for the respective parties, who are to take testimony under this commission.

It is further ordered that the examination of witnesses shall be had at the following places in the following order, and not otherwise, viz.: First at —, next at —, next at —, etc.; that the examination shall commence at — on the — day of —, or within two days thereafter; and that no examination shall be made of witnesses at any place after the examination has been finished at that place, or the examination of witnesses commenced at another place.

It is further ordered that the counsel for the plaintiff shall have with him, at any and all said examinations of said witnesses, or either of them, all the original invoices mentioned in the declaration herein, or copies or duplicates thereof, and which are in the possession of the plaintiff, and that counsel for defendant shall have full and free inspection thereof, and liberty to take copies of the same.

It is further ordered that all directions herein contained as to time, place, order and manner of examination of said witnesses may be changed or modified by the written consent of the counsel for the respective parties in Europe or in —.

It is further ordered that the examination of all witnesses under this commission shall be oral, or taken by question and answer in the usual manner of taking oral depositions by examination, cross-examination, and redirect examination; that the testimony given under such examination shall be reduced to writing, signed by the witnesses and certified by the commissioners respectively, and by them transmitted by mail to the clerk of this court at the city of —, unless otherwise mutually agreed upon by said counsel for both parties.

It is further ordered that all testimony taken under the commission provided for herein shall be taken subject to all legal objections at the trial of this action. G. W.,

Judge of the District Court for the — District of —.

No. 348.

Dedimus Potestatem (1).

The United States of America,

— District of —, ss.

The President of the United States of America to J. N.,
Greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you commissioner, and by these presents do give you [*or, any two or more of you*] full power and authority diligently to examine upon his [*or, their respective*] corporal oath [*or, affirmation*] before you to be taken, G. H. as witness on the part of plaintiff [*or, defendant*] in a certain cause now pending undetermined in the circuit court of the United States of America for the — district of — in the — circuit, wherein A. B. is plaintiff, and C. D. is defendant, touching the premises [*or, if interrogatories are annexed, on the interrogatories hereunto annexed*].

And we do further empower you [*or, any two or more of you*] to examine on the same behalf, and in like manner, any other person or persons who may be produced as witnesses before you.

And we do hereby require you [and any two or more of you] before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal, directed to B. R., clerk of the circuit court of the United States, — district of —, city of —; and that you return the same when executed as above directed, annexed to this writ, with the title of the cause indorsed on the envelope of the commission, into the said circuit court, before the judge [or, judges] thereof, with all convenient speed.

[*Add testc.*]

(1) See R. S., Sec. 866; Desty's Fed. Proc., Sec. 385. As to taking depositions under a commission, see *Giles v. Paxson*, 36 Fed. 882.

No. 349.

Commissioner's Return.

[*Caption.*]

United States of America,

— District of —, ss.

I, E. M., commissioner of the circuit court of the United States for the — district of —, named in the commission hereto annexed, do hereby certify that on the — day of —, at the city of —, I was attended by R. X., counsel for A. B., and R. Y., counsel for E. F., opposing intervenor, and by the witnesses, W. S. and W. T., and the said witnesses, who were of sound mind and lawful age, having been by me first carefully examined and cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the within entitled cause, gave their testimony, which by consent of counsel for the respective parties was taken down by a stenographer appointed by me for that purpose, in the presence of the witnesses and from their statements, and the said stenographic notes were afterward reduced to writing by a typewriter, and the signatures of the witnesses to the same being waived by consent of counsel for the respective parties.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said commission named, nor in any way interested in the event of the cause named therein.

In testimony whereof I have hereunto set my hand and seal this — day of —, A. D. 19—.

E. M.,
Commissioner.

No. 350.

Order to Show Cause why the Time for Taking Testimony should not be Extended (1).

[Caption.]

On reading the affidavits of S. D. and E. M., and on motion of R. Y., solicitor for defendant in the above entitled suit, it is hereby ordered that copies of the same, with a copy of this order, be served on the solicitor for the plaintiff in the above suit on or before the — day of —, 1894, and that the said plaintiff show cause, if any he have, at —, in the city of —, on the — day of —, 1894, at 10 o'clock a. m., why the time allowed for taking testimony on behalf of the defendant in the said cause should not be extended to and including the — day of —, 1894.

(1) See 47th rule in equity.

No. 351.

Order Extending the Time for Taking Testimony.

[Caption.]

On reading and filing the defendant's order to show cause, and the affidavits of S. D. and E. M. thereto annexed, and after hearing R. X., Esq., for the plaintiff, and R. Y., Esq., for the defendant, it is ordered that the time allowed for taking testimony on behalf of the defendant in the above entitled cause be extended to and including the — day of —, 1894, and that the plaintiff have — days thereafter within which to take testimony in rebuttal.

No. 352.**Notice of Motion for Appointment of Special Examiner (1).**

[*Caption.*]

R. Y.,

Solicitor for Defendant.

Please take notice that at a stated [*or, special*] term of this court, to be held on the —— day of ——, 1894, at —— [*place of holding court*], the plaintiff in this cause will move at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order that J. N., Esq., of ——, be appointed special examiner herein, under the 67th rule as amended, to take the deposition of witnesses in behalf of said plaintiff.

Z. & X.,

Dated ——.

Solicitors for Plaintiff.

Service accepted, etc.

(1) See 67th rule in equity, as amended May 3, 1892. Notaries public are authorized by statute to take depositions to be used in the courts of the United States. See 19 Stat. L. 206; Desty's Fed. Proc., Secs. 381 and 381a; but there is some doubt whether a notary is authorized to take depositions under the 67th rule in equity unless by consent of counsel or appointment of court he is made a special examiner.

Former equity rule 67 is now superseded by new equity rules Nos. 46 to 54, which should be consulted for changes.

No. 353.**Order Appointing Special Examiner.**

[*Caption.*]

Upon reading and filing notice of motion, with admission of service, and on motion of R. X., solicitor for plaintiff [*or, defendant*], no one opposing, it is ordered that J. N., Esq., of ——, be and is hereby appointed special examiner, under the 47th rule, to take the depositions of witnesses on the part of the plaintiff [*or, defendant*] in this cause.

No. 354.**Consent Order to Appoint Examiner to Take Deposition.**

[Caption.]

In this case, by consent, Miss Clara Emanuel is hereby appointed commissioner to take the deposition of Mrs. T. M. Davis, of McDowell County, North Carolina, instanter, and return the same to this court. Said deposition shall be taken at the home of Mrs. T. M. Davis, near Old Fort, or at some other convenient place to be agreed upon, and shall be taken on September 7, 1905, and may be used by either party as evidence in the trial of this case. All formalities are waived.

A. B.,

Attorney for Plaintiff.

C. D.,

Attorney for Defendant.

No. 355.**Order Appointing Special Examiner, under Equity Rule 47.**

[Caption.]

Upon reading and filing notice of motion for the appointment of a special examiner herein with admission of service, it is ordered by the court that J. N., on account of his experience in such matters, be and he is hereby appointed special examiner herein under the 47th rule. The said special examiner shall take the testimony in behalf of both complainant and respondent and is authorized to take the same in the ——— district of ———, or elsewhere according to the convenience and requirements of parties. Said testimony shall be given orally by witnesses and be taken down stenographically by a skilled stenographer approved by the parties or appointed by the court, and thereafter reduced to typewriting and when subscribed by the witnesses and duly certified the same shall be admitted in evidence.

Done at chambers in the city of ———, this ——— day of ———.

E. S., Judge.

No. 356.**Subpoena for Witness.**

The United States of America,

— District of —, ss.

The President of the United States of America to the Marshal
of the — District of —, Greeting:

We command you to summon G. H., of —, county of —, district and state aforesaid, if he be found in your bailiwick, to be and appear before [*name of court or examiner, or as many as may be*], at —, on the — day of —, 1894, at 10 o'clock a. m., to give evidence on behalf of the plaintiff [*or, defendant*] in a suit pending in the district court of the United States for the — district of —, wherein A. B. is plaintiff, and C. D. is defendant.

Hereof fail not; and of this writ make legal service and due return.

[*Add teste according to the court issuing the writ.*]

No. 357.**Subpoena Duces Tecum.**

The United States of America,

— District of —, ss.

The President of the United States of America to E. F. and
G. H., Greeting:

We command and strictly enjoin you and each of you, that, laying aside all manner of business and excuses whatsoever, you and each of you be and appear in your proper person before our district court [*or such officer as may be named here*], on the — day of — next, at 10 o'clock a. m., and also that you bring with you and produce at the time and place aforesaid [*name papers or books or whatever is to be produced by witness*] then and there to testify, what you and each of you may know, in a certain action, pending in said court, wherein

A. B. is plaintiff, and C. D. is defendant [*or*, before J. N., U. S. commissioner, *etc.*, *or as may be*], and this you do under penalty of the law.

[Add teste according to the court issuing the writ.]

No. 358.

Writ of Attachment against Witness for Disobeying Subpoena (1).

The President of the United States of America to the Marshal of the ——— district of ———.

You are hereby commanded to attach G. H., if he may be found in your district, and bring him on the ——— day of ——— [*or*, forthwith] personally before the judge of the district [*or*, circuit] court of the United States for the ——— district of ———, held at the United States court-rooms in the city of ———, in the said district, to answer for certain trespasses and contempts in not obeying our writ of subpoena directed to him and duly served on him, commanding him to appear before the said district [*or*, circuit] court at ———, on ———, to testify all and singular those things which he knows in a certain cause depending in the said court between A. B., plaintiff, and C. D., defendant; and you are further commanded to detain him in your custody until he shall be discharged by the said court, and have you then and there this writ.

[Add teste according to the court issuing the writ.]

As to compelling the attendance of witnesses, see *In re Allis*, 44 Fed. 216; *Hake v. Brown*, 44 Fed. 734.

No. 359.

Notice to Take Depositions under 47th Rule in Equity.

[Caption.]

The plaintiff [*or*, defendant] will take notice that the defendant [*or*, plaintiff] will examine witnesses in the above entitled cause, under the 47th Rule in Equity, before J. W.,

esq., [*official title*, as special examiner, *or as may be*], at his office at — street, in —, on —, the — day of —, 18—, beginning said examination at 10 o'clock a. m. of said day, and continuing from day to day until completed.

R. X.,

Solicitor for Plaintiff [*or*, Defendant].

Service accepted this — day of —, 1894.

R. Y.,

Solicitor for Defendant [*or*, Plaintiff].

No. 360.

Affidavit of Service of Notice (1).

State of —, County of —, ss.

On the — day of —, 1894, I served the within notice on R. Y. by handing a copy of the same to him [*or say*, by leaving a copy of the same at his residence *or*, place of business, *as may be*], at No. —, — street, in the city of —.

S. D.

Subscribed and sworn to before me this — day of —, 1894.

J. N.

[*Seal.*]

[*Official Title.*]

(1) This affidavit may be indorsed on any notice, but it is not often necessary to make affidavit of service, as counsel usually will admit service of notice.

No. 361.

Commencement for Depositions under 47th Equity Rule (1).

District Court of the United States, for the
— District of —.

| | | |
|-------------------|---|-------------------|
| A. B., Plaintiff, | } | In Equity, No. —. |
| vs. | | |
| C. D., Defendant. | | |

Examination of witnesses, beginning —, 1894, at No. — street, in —, before J. N. [*official title*, as, notary

public in and for —— county, state of ——, special examiner by agreement of counsel] on behalf of the plaintiff [or, defendant], under the 47th Rule of Equity, pursuant to notice.

Present R. X., esq., counsel for the plaintiff, and R. Y., esq., counsel for the defendant.

By request of parties, it is ordered that these depositions be taken by question and answer.

G. H., a witness produced on behalf of the ——, being first duly sworn, deposes and says, in answer to interrogatories propounded to him by Mr. X., of counsel for the ——, as follows:

Question 1. State your name, age, residence, and occupation.

Answer, etc.

(1) As to taking depositions under the 67th rule of equity, see *Ballard v. McCloskey*, 52 Fed. 677; *Mott Iron Works v. Standard Mfg. Co.*, 48 Fed. 345. The 67th rule in equity is now superseded by the 47th and other rules, and the cases must be read with the changes in mind.

No. 362.

Certificate at Close of Depositions under 47th Equity Rule.

[The United States of America, for the
—— District of ——,] or,

State of ——, County of ——, ss.

I, J. N., [official title], hereby certify that the above witnesses, G. H., S. L., and A. H., were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that their depositions were reduced to writing by Miss A. M. in the presence of the said witnesses respectively, and when completed read over to said witnesses respectively, and subscribed by them in my presence and in the presence of such of the parties and counsel as attended; that said depositions were taken pursuant to the annexed notice, at the office

of J. N., at —, beginning on the — day of —, 1894, and continuing from day to day as set forth; that the parties were represented at the taking of said deposition by their respective counsel as set forth; that the several exhibits recited were offered in evidence and marked as specially noted in the foregoing depositions; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal, this — day of —, 1894. J. N.

[Official Title.]

FEES.

Notary, — folios at 20c., \$—; paid by —.

Witnesses, —.

Mileage, —; paid by —.

No. 363.

Transmission of Depositions (1).

The depositions should be sealed and transmitted by the officer taking them to the clerk of the court in which the suit is pending. The following form may be used to indorse the enclosure within which the depositions are transmitted to the clerk:

| | |
|---|--|
| <p>In the — Court of the United States for the — District of —.</p> <p>A. B., Plaintiff,</p> <p>vs.</p> <p>C. D., Defendant.</p> <p>Depositions of G. H., I. J., and L. M., witnesses on behalf of the — in the above entitled cause, taken before me, and by me sealed and transmitted to the clerk of the above named court.</p> <p>J. N. [Official Title.]</p> | <p>To the Clerk of the District Court, Cincinnati, Ohio.</p> |
|---|--|

(1) This form may be used for any depositions whether taken *de bene esse*, under a commission, under a state statute or under the 47th rule in equity.

As to transmission of depositions, see *Stewart v. Townsend*, 41 Fed. 121; *Egbert v. Citiz. Ins. Co.*, 7 Fed. 47; *U. S. v. 50 Boxes, etc.*, 92 Fed. 601.

No. 364.

Motion for Leave to Withdraw Depositions.

[*Caption.*]

Now comes the plaintiff and moves the court for leave to withdraw the deposition of [*naming them*], and for ground of said motion says that the matter contained in said depositions is wholly irrelevant to the issue. The plaintiff desires to withdraw the same in order to save the defendant any trouble or expense in taking testimony in answer to the matter contained in said depositions.

R. X.,

Solicitor for Plaintiff.

No. 365.

Order to Withdraw Depositions.

[*Caption.*]

On hearing in open court and good cause having been shown after notice to the defendant, leave is granted to the plaintiff on its motion to withdraw the depositions of [*naming them*], taken on its behalf at ———.

No. 366.

Stipulation as to Taking Proofs (1).

[*Caption.*]

In this cause it is hereby stipulated between the respective parties, by their solicitors, that the testimony therein shall be taken orally, and that it shall be taken down stenographically and then transcribed in longhand, and the signatures of the

witnesses to such transcribed testimony are waived. The testimony shall be taken before J. N., special examiner, or some person deputed by him. The taking of the testimony shall begin at —, on the — day of —, at 11 o'clock a. m., and shall continue from time to time as suits the convenience of the parties, within the time allowed for taking testimony.

R. X.,

Attorney for Plaintiff.

R. Y.,

Attorney for Defendant.

(1) But in a suit in equity new rules 46 and 47 must be followed.

No. 367.

Motion to Strike Out Parts of a Deposition.

[*Caption.*]

Plaintiff moves to strike from the deposition of A. B., filed in the above cause the following questions and answers on direct examination [*here enumerate*], and the following questions and answers on cross-examination [*here enumerate*], for the reason that in making those replies the witness was laboring under a misapprehension as to the place inquired about, and therefore the said testimony is not applicable to the issue involved.

X. Y.,

Attorney for Plaintiff.

No. 368.

Motion to Suppress Deposition.

[*Caption.*]

Now come the plaintiffs herein by their attorneys, M. N. and O. P., and move the honorable court for an order suppressing the deposition of T. R., a witness herein for the defendants, said deposition having been taken in the city of Detroit on the 27th day of June, 1918, before R. Z., a notary

public in and for the county of —, in the state of Michigan, and on file in this cause in this court of date June 30, 1918, for the reasons following:

1. That the time allowed in the notice for taking said deposition was too short to permit the plaintiffs' attorneys to journey to the said place.

2. That the person before whom said deposition was taken was not a notary public and had no power or authority to act as such or to preside at the taking of the deposition mentioned.

M. N. and O. P.,
Attorneys for Plaintiffs.

IN EQUITY

FORMAL PARTS OF A BILL

No. 389.

Averring Citizenship Where Numerous and Diverse Parties.

[*Caption.*]

The plaintiffs above named file this their amended bill of complaint herein, and for their cause of action respectfully show to your Honor:

First. That the plaintiffs A. E. Caldwell, W. F. Mikesell, V. E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn and Harold W. Sims, were at the time of the commencement of this action and still are residents and citizens of the state of Idaho.

Second. That the defendant, Twin Falls Salmon River Land and Water Company, was at all the times in this complaint mentioned and still is a corporation organized and existing under and by virtue of the laws and statutes of the state of Delaware and a citizen of said state, and as such corporation engaged in the building, construction and maintenance of a certain irrigation system and the sale of water rights therein for the reclamation of lands in the county of Twin Falls, state of Idaho, including the lands of the plaintiffs hereinafter described.

Third. That the defendant, Salmon River Land Company, Limited, was at the time of the commencement of this action and still is a corporation organized and existing under and by virtue of the laws and statutes of the state of Idaho and is a citizen of said state and is the corporation designated and provided for in the contract between the state of Idaho and the defendant, Twin Falls Salmon River Land and Water Company, and intended by such contract to operate the irri-

gation works to be constructed by the defendant, the Twin Falls Salmon River Land and Water Company.

Fourth. That the defendants, John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson and Fred. L. Huston, are respectively the legally elected, qualified and acting Governor, Secretary of State, Superintendent of Public Instruction, Attorney General and Auditor of the state of Idaho, and they are and ever since on or about the first day of January, A. D. 1913, have been and do constitute the State Board of Land Commissioners of the state of Idaho, and each and every one of the defendants in this paragraph of the bill of complaint named were, at the time of the commencement of this action, and still are, residents and citizens of the state of Idaho.

Fifth. That the defendant, Commonwealth Trust Company of Pittsburg, was at the time of the commencement of this action and still is a corporation organized and existing under and by virtue of the laws of the state of Pennsylvania and a citizen of said state.

Sixth. That the defendant, A. C. Robinson, was at the time of the commencement of this action and still is a resident and citizen of the state of Pennsylvania.

(1) The forms on this and the immediately succeeding pages are in addition to those found herein above, beginning page 1, and are of course applicable in appropriate cases whether the suit is at law or in equity.

No. 370.

Allegations of Citizenship of State Public Service Commission.

The defendants, Charles A. Reynolds, Frank R. Spinning and Arthur A. Lewis, are now, and for six months last past have been, the duly appointed, qualified and acting public service commissioners of the state of Washington, constituting the public service commission of the state of Washington; and the defendant, W. V. Tanner, is now, and for more than six months last past has been, the duly elected, qualified and acting

attorney general of the state of Washington. Each of said defendants is a citizen of the United States and a citizen and resident of the state of Washington. The defendant, Arthur A. Lewis, is a resident of the eastern district of Washington, and the other defendants are residents of the western district of Washington.

No. 371.

'Allegation of Citizenship and Amount Involved in Suit to Enjoin Municipality from Collecting Taxes.

[Caption.]

Edwin H. Abbot, Jr., who is a resident of Cambridge, Massachusetts, and a citizen of the state of Massachusetts, brings this his complaint against the city of Milwaukee, which is a municipal corporation, organized under and by virtue of the laws of Wisconsin, and located within the eastern district thereof, and against Joseph P. Carney, as treasurer of the city of Milwaukee, who is a resident of the city of Milwaukee aforesaid and a citizen of the state of Wisconsin, and an inhabitant of the eastern district thereof, and against John H. Donahue, who is a resident of the city of Milwaukee aforesaid, a citizen of the state of Wisconsin, and an inhabitant of the eastern district thereof, and thereupon the plaintiff complains and shows:

I. That the full name, citizenship and residence of each of the parties to this action is as above set forth.

II. That the grounds upon which the jurisdiction of this court in this action depends are that the plaintiff is a resident and citizen of the state of Massachusetts; that the defendants and each and every of them are citizens of the state of Wisconsin and residents of the eastern district thereof; that the defendant, city of Milwaukee, has levied and assessed against certain lands in the city of Milwaukee owned by the plaintiff, pretended taxes to the amount of upwards of \$8,000; that such taxes and each of them are wholly illegal and void, but that notwithstanding the said defendant, the city of Milwaukee,

through the said defendant, Carney, its treasurer, threatens and is about to sell the said lands of this plaintiff for the non-payment of said pretended, illegal and void taxes, and will do so and thus create a cloud upon the title of this plaintiff to said lands unless enjoined and restrained by order of this court herein; that the said defendant, John H. Donahue, is the owner and holder of certain certificates issued by the commissioner of public works of the city of Milwaukee, evidencing the said illegal and void taxes, and entitling him to receive the amounts thereof when collected.

No. 372.

Allegation of State Suing as *Parens Patriae*.

* * * In consideration whereof, and forasmuch as complainant and its citizens and residents, who except through representation by complainant, have no remedy and can have adequate relief only in this honorable court, complainant on its own behalf and also as *parens patriae*, trustee, guardian and representative of that great proportion of its citizens, who are directly affected by the provisions of said law (of another state, defendant) as aforesaid, prays this honorable court to take cognizance of the several charges set forth in the premises.

No. 373.

Averments of Citizenship, Complainants, Citizens and Aliens.

[Caption.]

The complainants above named, Knauth, Nachod & Kuhne, make this their amended bill of complaint (or whatever it should be denominated) against the defendants above named and allege, on information and belief:

Part I—Parties.

1. The complainants are co-partners in business, doing business as international bankers and maintaining a banking house

at New York, N. Y., and at Leipzig, Germany, under the firm name and style of Knauth, Nachod & Kuhne. Said Max Jaffe and August Stern are citizens or subjects of Germany and reside at Leipzig, Germany. Said William Knauth is a citizen or subject of Germany and resides at Arrochar, county of Richmond, city and state of New York. Said Arend H. Weingardt is a citizen or subject of Germany and resides at Montclair, Essex county, New Jersey. Said Oscar L. Gubelman is a citizen of the state of New Jersey and resides at West Orange, Essex county, New Jersey. Said Rollin C. Newton is a citizen of the state of New York and resides at Scarsdale, Westchester county, New York. Said Mary W. Knauth and Percival Kuhne are citizens of the state of New York and reside in the county, city and state of New York.

No. 374.

Averments of Citizenship of Defendants, Trustee in Bankruptcy, Foreign Corporations and Alien.

[Caption.]

The defendant, J. A. E. Pyle (whose first name is unknown to the complainants), as trustee in bankruptcy of Steele, Miller & Company, is a citizen of the state of Mississippi and resides at Iuka, Tishomingo county, Mississippi, and was duly elected and appointed trustee in bankruptcy of said Steele, Miller & Company by the United States district court for the northern district of Mississippi, eastern division, and duly qualified as such trustee, by giving the prescribed bond, and is still acting as such trustee. The defendant, the Texas Transport & Terminal Company, is a corporation organized under the laws of the state of New Jersey, but doing business at New Orleans, Louisiana, and elsewhere. The defendant, the Campagnie Generale Transatlantique, is a corporation organized under the laws of the French republic and has its home office and principal place of business at Paris, France, but is also doing business at New Orleans, Louisiana. The defendant, the Bank of

Mulhouse, is a corporation organized under the laws of the French republic and has its home office and principal place of business at Havre, France. The defendant, Paul Chardin, is a citizen of the French republic and resides at Paris, France, but is also engaged in business at Havre, France. The defendant, Credit Havrais, is a corporation organized under the laws of the French republic and has its home office and principal place of business at Havre, France. The defendant, the American Surety Company, of New York, is a corporation organized under the laws of the state of New York, and has its home office and principal place of business at New York, New York, but is also doing business at New Orleans, Louisiana.

No. 375.**Allegations of Capacity to Sue for Indian Tribes.****[Caption.]**

The United States of America by D. H. Linebaugh, United States attorney for the eastern district of Oklahoma, by direction of the Honorable James C. McReynolds, attorney general of the United States, presents this its bill in its own behalf and for and on behalf of the Creek nation of Indians in the state of Oklahoma, against the Cimarron River Bed Oil & Gas Company, the Cimarron River Oil & Gas Company, the Number One Oil Company, and John Henry, W. T. Barrett and J. C. Elliot, as defendants, each of the said defendants, Cimarron River Bed Oil & Gas Company, Cimarron River Oil & Gas Company and Number One Oil Company, being a corporation duly organized and existing under and by virtue of the laws of the state of Oklahoma, and being a citizen of said state and being an inhabitant of and having its principal place of business within the eastern judicial district thereof; and the defendants, John Henry and W. T. Barrett, being residents and citizens of the state of Oklahoma and of the western judicial district thereof, and the defendant, J. C. Elliott, being a resident and citizen of the state of Oklahoma and of the eastern judicial

district thereof, and thereupon plaintiff complains and says:

I. That the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations of Indians have for more than seventy-five years last past occupied that portion of the territory now embraced in the eastern judicial district of the state of Oklahoma and which formerly comprised what was known as Indian Territory; that said above named tribes or nations of Indians form and constitute a particular and distinct class of Indians known and designated as the five civilized tribes, and are distinguished from the other tribes or nations of Indians within the jurisdiction and under the care, protection and control of the United States; that said above named tribes or nations of Indians are referred to and designated as the "Five Civilized Tribes" in many of the acts of Congress passed in relation thereto; and that each, every and all of said tribes or nations, when so designated and referred to, are included in the provisions of said acts of Congress as though each, every and all of said tribes or nations were separately and particularly named therein.

II. That plaintiff under and by virtue of the several acts of Congress passed in relation to the affairs and property of the said above-named tribes has always assumed the relation of guardian and trustee of the tribal property of said nations of Indians; that under and by virtue of the several acts of Congress above referred to and particularly of the Act of March 1, 1901 (31 Stat. L. 861); the Act of June 30, 1902 (32 Stat. L. 500); the Act of April 26, 1906 (34 Stat. L. 137), and the Act of May 27, 1908 (35 Stat. L. 312), complainant is charged with the duty of exercising and has always exercised supervision and control over the tribal property and unallotted lands of said Creek nation of Indians in Oklahoma, and that at all times herein mentioned your orator has maintained and still maintains a United States Indian superintendent and a commissioner to said five civilized tribes at Muskogee, Oklahoma, for the purpose of exercising supervision and control over the tribal property and unallotted lands of said Creek nation of Indians in Oklahoma.

III. That all of the lands hereinafter described and referred to lie within the territorial limits of the Creek nation of Indians in what is now Creek county in the state of Oklahoma and in the eastern judicial district of said state, and lie between the meander lines and between and below the high-water marks of, and form a portion of the bed of, the Cimar-ron river, which is a meandered and non-tidal stream; that said lands were a part of the lands conveyed to the Creek nation of Indians by the United States of America, as evidenced by a certain patent of August 11, 1852, a copy of which is hereto attached and made a part hereof, marked Exhibit A; and the said Creek nation is the owner of the said lands under and by virtue of the said grant from the United States of America and the several treaties theretofore and thereafter concluded between that government and the said Creek nation; that the said lands are and have been at all the times herein mentioned a part of the unallotted lands of the said Creek nation and were not surveyed or allotted in severalty to the members of said nation under the act of Congress above referred to; and that the said lands are owned in common by the citizens of said Creek nation and are therefore a part of the tribal lands belonging to said nation under the supervision and control of plaintiff by virtue of the acts of Congress above referred to and others from time to time passed and approved, and by virtue of the several treaties from time to time concluded between the United States of America and the Creek nation of Indians.

No. 376.**Allegation Showing Why Named Persons Are Not Made Parties.**

The members of the firm of Steele, Miller & Company are not made parties to this bill because they are not within the eastern district of Louisiana, and because, though proper

parties, they are not necessary parties. They claim no right, title or interest in the subject-matter hereof and any interest they may have had, before their adjudication of bankruptcy, is held by the defendant, Pyle, as trustee. The members of the firm of Scheuch & Company are not made parties to this bill because they are not within the eastern district of Louisiana and because, though proper parties, they are not necessary parties. They claim no right, title or interest in the subject-matter hereof and have transferred any interest they may ever have had to the defendants, the Bank of Mulhouse and Paul Chardin and the Credit Havrais.

(Signature of Counsel.)

No. 377.

Prayer for the Production of Deeds, Papers, etc.(1)

And that the said defendants may set forth a list, or schedule, and description of every deed, book, account, letter, paper or writing relating to the matters aforesaid, or either of them; or wherein or whereupon there is any note, memorandum or writing relating in any manner thereto, which now are, or ever were, in their or either, and which, of their possession or power, and may deposit the same in the office of the clerk [*or*, in the hands of one of the masters] of this honorable court, for the usual purposes; and otherwise that the said defendants may account for such as are not in their possession or power.

(1) Dan. Ch. Pr. p. 1888.

No. 378.

Prayer for an Accounting of Money Had and Received.

Plaintiff prays that the defendant may set forth an account of all and every sum and sums of money received by them, or either of them, or by any person or persons by their, or either of their, order, or for their, or either of their use, for or in respect of the said [as the case stated in the bill may

be], and when and from whom and from what in particular all and every such sums were respectively received, and how the same respectively have been applied or disposed of.

No. 379.

Prayer for an Accounting Between Partners.

Plaintiff prays that an account may be taken of all and every the said late co-partnership dealings and transactions until the time of the expiration thereof, and also an account of the moneys received and paid by plaintiff and the said defendant, respectively, in regard thereto, and that the said C. D. may be directed to pay to plaintiff what, if anything, shall, upon such account, appear to be due to him, plaintiff being ready and willing and hereby offering to pay to the said defendant, C. D., what, if anything, shall appear to be due him from the said joint concern. And that some proper person may be appointed to receive and collect all moneys which may be coming to the credit of the said late co-partnership. And that the said defendant, C. D., may in the meantime be restrained by the order and injunction of this honorable court from collecting or receiving any of the debts due and owing to the said late co-partnership.

No. 380.

Prayer for Winding up a Partnership.

Plaintiff prays that the said land and buildings in [*describe them*] may be adjudged and decreed to be partnership property and assets of the said late firm of A. B. & Company, and that the same may be ordered to be sold under the direction of this honorable court for the purpose of winding up the concern, and that a receiver of all the co-partnership assets and property now unadministered by plaintiff may be appointed, and that proper and just accounts may be taken between the parties touching the matters in question; and that

the estate of the said S. B., deceased, may be charged with a fair rent for said dwelling house during the time it was in his occupation, and for such further time, if any, as may seem meet to this honorable court; and that all the affairs and concerns of said late firm of A. B. & Company may be wound up, adjusted and closed, under the direction of this honorable court, and, after payment of all the debts of the concern and the partnership balance which may be found due to plaintiff out of the assets, that the surplus may be divided between plaintiff and the administrator or heirs of the said S. B., according to their respective rights therein, and as to justice and equity may appertain.

And that in the meantime said administrator, widow and heirs of said S. B. may be restrained and enjoined from proceeding to take any steps to sell said real property or interest therein, or from any proceeding touching said real estate or any of it, adverse to the claims and interests of plaintiff until the relative rights and interests therein of plaintiff and the said defendants may be settled and determined.

No. 381.

Prayer for an Account, and Distribution.

Plaintiff prays that an account may be taken of the personal estate of the intestate come to the hands of the defendant, or of any person or persons by his order or for his use.

That an account may be taken of the debts and funeral expenses of the intestate; that the clear residue of the personal estate of the intestate may be ascertained, and that one equal — part of such residuary estate may be decreed to be paid to each of your orators, and that another — part thereof may be decreed to be paid to the defendant and to each of them, the said E. F. and G. H.

No. 382.**Prayer for an Accounting by Agent.**

Plaintiff prays that an account may be taken of all sums of money received by or come to the hands of the defendant as such agent of the plaintiff as aforesaid, for or on account of or for use of the plaintiff, and of the application thereof and of all dealings and transactions of the defendant as the plaintiff's agent; and that the defendant may be decreed to pay to the plaintiff what, on taking such accounts, shall be found due from the defendant to the plaintiff, and to deliver up to the plaintiff all documents in the defendant's possession or power belonging to the plaintiff; that the defendant may pay the costs of this suit.

No. 383.**Prayer for an Accounting and Injunction to Restrain Cutting Lumber.**

Plaintiff prays that an account may be taken by and under the direction and decree of this honorable court of the timber and other product removed from said lands or any thereof by the said defendants, or any or either of them, or with their permission or authority, and of the rents and profits received by the said defendants, or any or either of them, from said lands or any portion thereof.

And that said defendants may be respectively decreed to pay to plaintiff the value of said timber or other products so removed from said lands, with interest from the date of such removal; and the amount received for rents and profits, with interest from the date of the receipt thereof.

And that said defendants, and each and every of them, be perpetually restrained and enjoined from hereafter making any claim to said premises or in any manner intermeddling therewith or trespassing thereon or removing any timber or other product therefrom.

No. 384.**Prayer for an Accounting and Damages for Infringement of Copyright.**

That the defendant be required by decree of this honorable court to account for and pay over to plaintiff such gains and profits as have accrued or arisen or have been earned or received by said defendant, and all of such gains and profits as would have accrued to this plaintiff but for the unlawful doings of said defendant, and all damages the plaintiff may have suffered or sustained thereby; and that this honorable court may increase the actual damages so assessed against the defendant to a sum equal to three times the amount of such assessment.

No. 385.**Prayer for Damages against Agent for Mismanagement.**

Plaintiff prays that they, the said agents, E. F. and G. H., may be decreed to pay to plaintiff the said sums of \$—— and \$——, and such losses, damages and interest as plaintiff has suffered by reason of the premises, and that plaintiff may have such other relief as the nature of his case may require; and that the said E. F. and G. H. may, if they can, show why plaintiff should not have the relief hereby prayed.

No. 386.**Prayer for an Accounting for Infringing a Patent for Invention.**

Plaintiff prays that the said defendants may be compelled to account for and pay to him the profits by them acquired, and the full amount of damages suffered by plaintiff by reason of their aforesaid unlawful acts, together with such increase upon the actual damages, according to the provisions of law relating thereto as may seem to this honorable court meet and just.

No. 387.**Prayer for an Accounting of Rents and Profits of a Testator's Real Estate.**

Plaintiff prays that the said defendants may set forth a full, true and just rental and particular account of the real estates whereof or whereto the said testator was seized or entitled in fee simple at the time of his death, and also a full, true and particular account of all and every sum and sums of money which has or have been received by them or either of them, or any other person or persons by their, or either of their, order, or for their or either of their use, for or in respect of the rents and profits of the said estates or any part thereof; and whether any and which of said estates, or any part or parts thereof, have or has not been disposed of or sold, and at what price or prices, respectively, and when and to whom; and whether such price or prices, respectively, have or has not been paid, and to whom; and if not, why not.

No. 388.**Prayer for an Account of Personal Estate of a Testator.**

Plaintiff prays that said defendants may discover and set forth a full, true and particular account of all and singular the personal estate and effects of the said testator, and of every part thereof, which has been possessed by, or come to, the hands of the said defendants, or either of them, or to the hands of any other person or persons by their, or either of their, order, or for their, or either of their, use; with the particular nature, qualities, quantities and true and utmost values thereof, and of every part thereof, respectively, and how the same and every part thereof has been applied and disposed of; and whether any, and what part thereof, now remains unapplied and undisposed of, and why; and whether any and what part of such personal estate remains outstanding to any and what amount, and why; and that the said defendants may also set forth an account of the debts due

from the said testator, and of his funeral and testamentary expenses and legacies, and whether any and which of such debts are outstanding, and why.

No. 389.

Prayer in Bill to Quiet Title.

Plaintiff prays that the alleged title of the said C. D. and the C. D. Company and the deeds thereof herein set forth and referred to so far as they refer to the premises of plaintiff herein described or any part thereof, may be decreed to be null and void and of no force and effect, and that the cloud arising therefrom on the title of plaintiff may be removed, and that plaintiff is the owner in fee of said property.

No. 390.

Prayer in Bill to Quiet Title.

(Another Form.)

Plaintiff prays that your honors may adjudge and decree that the alleged claims of the defendants, and each of them, are invalid and void; that the defendants have not, nor has either of them, any estate or interest in the said property, or in any part thereof; that plaintiff is the owner in fee of said property, and that the defendants, and each and every of them, be forever barred from asserting or claiming any estate or interest therein.

No. 391.

Prayer for the Foreclosure of a Mortgage.

Plaintiff prays that the usual decree may be made for the sale of the mortgaged premises aforesaid, and for the payment of the amount due to himself for principal and interest upon the said bond and mortgage and his costs of this suit, and that the said defendants, and all persons claiming under

them subsequent to the commencement of this suit, and all other persons, although not parties to this suit, who have any liens by judgment or decree upon the mortgaged premises subsequent to the said mortgage of plaintiff, or any liens or claims thereon by or under any such subsequent judgment or decree, either as purchasers, incumbrancers or otherwise, may be barred and foreclosed of all equity of redemption in the said premises.

No. 392.

Prayer for Foreclosure of Mortgage.
(Another Form.)

Plaintiff prays that an account may be taken by and under the direction of this honorable court of what is due for the principal and interest on the said mortgage, and that the said defendants, or some of them, may pay unto the plaintiff the money which shall be found due to him by a short day to be appointed for that purpose by this honorable court, or in default thereof that all the said defendants and all persons claiming, or to claim by, from or under them, or any of them, may be absolutely barred and foreclosed of and from all right and equity of redemption of, in, and to the said property, and every part thereof, or if, on any account, the plaintiff is not entitled to any such foreclosure, then that the said property may be sold and all proper parties may join therein, and that the money so due to the plaintiff may be paid to him out of the money which shall be raised by such sale.

No. 393.

Prayer to Foreclose a Railroad Mortgage and for Injunction.

Plaintiff prays that the said mortgage may be decreed to be a lien upon all the property mentioned and described therein, and upon all the property, real, personal and mixed, rights, franchises, lands, titles, railroad branches, extensions, tolls,

incomes, rents, issues and profits of the said railroad company secured by said mortgage, and that said railroad company may be decreed to pay unto plaintiff for the holders of the bonds described by said mortgage, whatever may be due for interest on the bonds secured by the aforesaid mortgage, together with all the costs and expenses in this behalf incurred and expended, and in default thereof that the defendant railroad company above named, and all persons claiming under it, may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to all the property, rights and franchises covered by said mortgage, and every part and parcel thereof; and that all and singular the said mortgaged property, with the appurtenances, property and effects, rights, immunities and franchises in said mortgage mentioned, may be sold under a decree of this honorable court; that an account may be taken of the bonds secured by said mortgage and of the amount due on said bonds for interest; and that the trustee, after paying all reasonable costs, charges and expenses incurred by it in the execution of its trust, including taxes, counsel and attorney's fees, and indemnifying itself from all liability in the premises, shall apply so much of the proceeds of said sale as may be necessary to the payment of the interest then unpaid on the bonds then outstanding, ratably to the holders thereof, without discrimination or preference, and shall pay over any surplus to the railroad company or to whomsoever shall be entitled to receive the same; that during the pendency of this suit a receiver or receivers may be appointed according to the course and practice of this court, with the usual powers of receivers in like cases, of all the property, equitable interests, things in action, effects, moneys, receipts, earnings, rights, privileges, franchises, and immunities of the said railroad company and its tolls, incomes, rents and issues, and of all other property included in and covered by said mortgage, within the jurisdiction of this honorable court; and that the said defendant railroad company, and all other persons hav-

ing possession thereof, may be decreed to make such transfer or conveyance to such receiver or receivers when appointed and to the purchaser of said property at any sale which may hereafter be decreed to be made herein, as may be necessary and proper to put them or any of them in possession and control of said property; that a writ of injunction issue out of and under the seal of this honorable court directing, commanding, enjoining and restraining the said defendant railroad company and its officers, directors and agents, and all other persons whomsoever, from interfering with, transferring, selling and disposing of any property of the defendant, or from taking possession of, levying upon or attempting to sell by judicial process or otherwise, any portion of the property of said defendant railroad company.

No. 394.

Prayer for Redemption of Mortgage—Mortgagee in Possession.

Plaintiff prays that an account may be taken of what, if anything, is due to the said defendant for principal and interest on the said mortgage, and that an account may also be taken of the rents and profits of the said mortgaged premises which have been possessed or received by the said defendant or by any other person or persons by his order or for his use, or which, without his willful default or neglect, might have been received; and, if it shall appear that the said rents and profits have been more than sufficient to satisfy the principal and interest of the said mortgage, then that the residue thereof may be paid over to the plaintiff, and that the plaintiff may be permitted to redeem the said premises, the plaintiff being ready and willing and hereby offering to pay what, if anything, shall appear to remain due in respect to the principal and interest on the said mortgage; and that the said defendant may be decreed to assign and deliver up possession of the said mortgaged premises to the plaintiff, or to such

person as he shall direct, free from all incumbrances made by him or by any person claiming under him, and may deliver over to the plaintiff all deeds and writings in his custody or power relating to the said mortgaged premises.

No. 395.

Prayer for Redemption of Personal Property.

Plaintiff prays that an account may be taken for what is due to the said defendant for principal and interest in respect of the said loan of \$——, and that, upon payment thereof by the plaintiff, the said defendant may be decreed to deliver over to the plaintiff the said goods so deposited with him as aforesaid.

No. 396.

Prayer for Injunction (General Form).

Plaintiff prays that your honors grant unto plaintiff your writ of injunction commanding said C. D., and all persons claiming to act under his authority, direction or control, to absolutely desist and refrain from [*state acts to be enjoined*], until such time as your honors shall appoint and direct and order herein; and that upon such hearing the writ herein prayed for be made and confirmed until the final determination of this suit, and that thereupon the said injunction may be made perpetual.

No. 397.

Prayer for Injunction to Restrain City from Tearing up Railroad Tracks.

Plaintiff prays that pending the final determination of the subject-matter hereof, a preliminary injunction or restraining order issue, restraining the said city of ——, its legislative council, and the members of its board of police and fire commissioners, and the supervisors of public works hereinabove

named, from in any way interfering with complainant in its occupation and use of — street, or in its maintaining the railroad tracks now constructed and laid thereon.

That said defendants be enjoined from removing or attempting to remove the whole or any part of said tracks now on — street, and from compelling or attempting to compel, by any process, authority or action whatever, this complainant or any of its agents or employes to remove the whole or any part of said railway track, until the final termination of this cause; and that, on final hearing, this injunction be made perpetual.

That a preliminary mandatory injunction issue, requiring and compelling the city of —, and the officials thereof hereinbefore named, to put down and restore the said track, so torn up and removed by them, to the condition in which it was at the time they began work thereon, in order that the status of the subject-matter of this litigation may remain unchanged until the final disposition of this cause. If the court should be of opinion that a mandatory injunction should not be issued requiring the city of — to restore said street to the condition it was in at and before the time of the wrongs complained of herein, then complainant prays that on final hearing a decree may be entered herein, requiring and compelling said city of —, and the municipal authorities thereof, to so replace and restore the said tracks so removed by them to its former condition.

No. 398.

Prayer for Injunction to Enjoin Mining.

May it please your honors to grant unto plaintiff a writ of injunction *pendente lite*, issuing out of and in accordance with the rules and practice of this honorable court, to be directed to the said defendant, C. D. Company, to restrain it, its agents, servants, employes and confederates from entering into or upon the mine or mines, mining ground, lode, dips,

drifts, cuts, excavations, or works, or upon any part of the land, property and premises hereinbefore particularly described, and from working or mining thereon, or making or continuing any cut, opening or excavation on or in said mining ground, or any part thereof, any mineral, mineral deposit, ore, rock, or earth, or any mineral substance whatever, whether the same be in place or heretofore severed from the freehold, and from in any manner hindering or obstructing plaintiff or his agents, servants or employes, or any or either of them, in working or mining upon said premises, and from in any manner interfering with said premises, or with anything thereon; as also a restraining order to the same effect until an application for such injunction can be heard, and that at the final hearing such injunction may be made perpetual.

No. 399.

Allegations in Seeking Injunctive Relief against Rate Order of State Public Utilities Commission.

That these plaintiffs are prevented and intimidated from putting into effect a schedule of reasonable rates for gas supplied to all points in Missouri, because of the highly excessive and unusually severe penalties provided in the aforequoted penalty statute of the state of Missouri, and because of the suspension by the said public service commission of Missouri of all proposed schedules, and the announced policy of said commission, which it has adhered to, to suspend all rates and schedules of rates which are higher than the rates charged in the border cities of Kansas. That under the provisions of said penalty statute, if plaintiff receivers should raise the schedule of rates to be collected and upon a judicial investigation into their right to do so, it should be determined that plaintiff receivers' raise of said rates was not valid, then the fines and penalties provided for failure to conform to said orders of said commission of Missouri, at the maximum basis

thereof for the period of one year would approximate the enormous and the prohibitory sum of \$29,272,540,000. In fact, for the year from January 1, 1916, to January 1, 1917, the fines and penalties which might be imposed upon these plaintiffs under the conditions aforesaid would aggregate the exorbitant and confiscatory sum of \$29,272,540,000. In this connection these plaintiff receivers state that they furnish gas through the distributing companies to 80,196 consumers per day in the state of Missouri.

Because of the constraint and intimidation of said unusual penalties these plaintiffs have been forced to keep in effect the requirements and schedules prescribed by said public service commission of the state of Missouri from time to time, and the fines and penalties provided for failure to conform to said orders are so unusual and enormous as to force upon the plaintiffs an abandonment of their right to act independently of said void and illegal orders, and by virtue of such facts said orders of said public service commission are void and unconstitutional as depriving these plaintiffs of their property without due process of law in contravention of the fourteenth amendment to the Constitution of the United States. In this connection plaintiffs allege that the penalties provided for the failure to conform to said order of the said public service commission are so unusual, oppressive and unreasonable that the said plaintiffs are thereby precluded from the privilege of asserting their rights independently and challenging in the courts the validity of said orders except at the risk and with the chance of becoming subject to the unusual and excessive penalties aforementioned as the result of which situation these plaintiffs are denied the equal protection of the law in contravention of the fourteenth amendment to the Constitution of the United States.

Adequate relief at law from this situation would not be available to the plaintiffs and plaintiffs' resources and efforts would be absorbed in unnecessary and highly burdensome litigation. Because of which facts the said Kansas Natural

Gas Company's properties would be needlessly appropriated without due process of law.

That by reason and virtue of all of said facts and acts of the said public service commission of the state of Missouri and the penalty statute of the state of Missouri provided in connection with changes and charges not made with the consent and approval of said public service commission these plaintiffs are deprived of their property without due process of law and are compelled to transport and deliver gas to consumers in Missouri for less than the actual cost of said service, and therefore at an actual loss for each and every cubic foot of gas so supplied and delivered.

Plaintiffs are without adequate remedy at law in the premises hereinbefore set forth and will suffer irreparable injury unless accorded the injunctive relief herein prayed for.

Plaintiffs respectfully show to the court that all said circumstances above enumerated also deprive the Kansas Natural Gas Company of its property without due process of law, take its property without compensation and deny to it equal protection of the law, and apply with the same force and effect as they do to plaintiffs.

Plaintiffs respectfully show to the court that the said order of the public utilities commission of Kansas of December 10, 1915, is void for the following reasons:

(a) Because the penalties provided for the infraction thereof are so enormous as to intimidate these plaintiffs and to force an abandonment of all rights to act independently thereof, and said order and act are therefore unconstitutional as depriving these plaintiffs of property without due process of law in contravention of the fourteenth amendment to the Constitution of the United States.

(b) Because said order and schedule are so unreasonably low as to be non-compensatory, unremunerative and confiscatory, thereby depriving these plaintiffs of property without due process of law in contravention of Section 1 of the fourteenth amendment to the Constitution of the United States.

(c) Because said order is an interference with the transportation of gas in interstate commerce from the state of Oklahoma to consumers in Kansas, in contravention of Section 8 of Article I of the Constitution of the United States.

(d) Because the schedule of rates provided and required by said order to be maintained and kept in force is so unreasonably low, as applied to gas produced and sold within the state of Kansas as not to afford sufficient revenue to pay a fair return, above operative expenses, on the property employed in such service and thereby imposes a burden on the interstate commerce conducted by plaintiff receivers.

(e) Because said order and schedule of rates prescribed therein is so unreasonably low as to amount to the taking of and an interference with the property potentially in the possession of and under the control of this court.

(f) Because any rate lower than thirty-seven cents per thousand cubic feet in Kansas, north of Montgomery county, is so unreasonably low as to amount to the taking of property without due process of law and an interference with property potentially in the possession and control of this court.

Plaintiffs respectfully show that the refusal of the public utilities commission of the state of Kansas to permit the plaintiff receivers to put into force and effect a schedule of reasonable rates, in so far as said public utilities commission has control over gas delivered to consumers in the state of Kansas by these plaintiff receivers, is void for the following reason:

Because said refusal, in connection with the penalties provided for changing the rate without the consent of said commission compel these plaintiff receivers to adhere to the schedule of rates prescribed by said commission, which are so unreasonably low as to be non-compensatory, unremunerative and confiscatory, thereby depriving these plaintiffs of their property without due process of law in contravention of Section 1 of the fourteenth amendment to the Constitution of the United States.

No. 400.**Prayer for Injunction against Infringement of Trade-mark and Unfair Competition.**

For as much as plaintiff has no remedy in the premises by the strict rules of the common law and can only obtain relief in a court of equity where matters of this nature are properly cognizable and relievable, plaintiff therefore prays:

1. That an injunction, both preliminary and perpetual, may be issued by this honorable court to the said defendant, The A. K. Ackerman Company, enjoining it, its attorneys, servants and assigns,

(a) From in any form or manner whatsoever making use of the said oval trade-mark appearing in certificate No. 57,567, in connection with sticky flypaper and particularly sticky flypaper in the form of sheets, and from using the same on sheets that are put up in cartons or cases in simulation of plaintiff's cartons and cases;

(b) From any and every unlawful and untruthful use of said registered trade-mark; and that the packages, wrappers and receptacles in the possession of the defendant, bearing the trade-mark of the complainant, or any reproduction, counterfeit, copy or colorable imitation thereof, shall be delivered up and destroyed, in accordance with Section 20 of the trade-mark act;

(c) From introducing upon the market or offering for sale sticky flypaper in imitation of plaintiff's sticky flypaper, with marks thereon in imitation of plaintiff's trade-marks;

(d) From introducing upon the market or offering for sale sticky flypaper in cartons in imitation of plaintiff's cartons, with marks thereon in imitation of plaintiff's marks;

(e) From introducing upon the market or offering for sale sticky flypaper in cases in imitation of plaintiff's cases, with marks thereon in imitation of plaintiff's marks;

(f) From introducing upon the market or distributing advertising matter advertising flypaper in imitation of plaintiff's

advertising to mislead the trade and consumer when buying defendant's goods into believing that they are buying the goods of plaintiff;

(g) From continuing the use of the name Grand Rapids Sticky Fly Paper Company on the cases, cartons and sheets of sticky flypaper, because this term is only a fictitious name, adopted by said Albert G. Dickinson, there being no such company in existence;

(h) From marketing and selling sealed sticky flypaper in accordance with the expired patent No. 278,294 referred to herein, without distinctly marking thereon in some appropriate manner that it is not the product of the original manufacturer of sticky flypaper, The O. & W. Thum Company, or otherwise definitely showing that the same is not the product of such original manufacturer; and

(i) From doing any acts or things that would enable defendant to fraudulently substitute its product for the product of plaintiff.

2. That the defendant may come to a full and fair account of all profits it has received because of the sale of sticky flypaper in violation of plaintiff's rights herein.

3. That the defendant shall further account to plaintiff and pay to plaintiff all damages that it has inflicted upon plaintiff by its wrongful acts.

4. That plaintiff may have such further relief or such other relief as may be agreeable to equity.

5. That a subpoena may be issued out of and under the seal of this honorable court, directed to the said The A. K. Ackerman Company, commanding it to appear before this honorable court on a certain day and under a certain penalty to be herein inserted, to answer this bill of complaint, sentence by sentence and paragraph by paragraph, the same as if the same were here again repeated and it thereunto particularly interrogated.

And plaintiff will ever pray.

THE O. & W. THUM COMPANY,

By X. Y.,

President and General Manager.

A. B. and C. D.,

Solicitors for Complainant.

[*Verification.*]

No. 401.

**Prayer for an Injunction to Restrain Certifying Assessment
for Taxation.**

Your plaintiff prays that an injunction *pendente lite* be granted commanding said S. X., G. Y. and R. T. to refrain from assessing or attempting to assess the franchise of plaintiff, or any of plaintiff's property, except to the extent above indicated, and that the said S. X. be restrained from certifying any assessment which has been or may be made of the franchise or property of plaintiff to the county clerk of — county, or any other officer, except upon an assessment based upon the principles above stated, and upon such final hearing a decree be made establishing the right of plaintiff to be taxed in the method allowed to the individual citizens of the state and in a manner which will not result in compelling him to bear an improper proportion of the burdens of government, and that said defendants be perpetually enjoined from assessing or certifying any assessment made of plaintiff's franchise or properties except upon the basis aforestated, and from collecting any taxes or penalties because of any alleged delinquency of plaintiff in failing to pay taxes based upon any higher or different assessment.

No. 402.**Prayer for Injunction to Enjoin Infringement of Patent for Invention.**

Plaintiff prays that the said defendants, their agents, servants, attorneys, workmen, employes and representatives, and each and every of them, may be restrained and enjoined, provisionally and preliminarily, as well as perpetually, by the order and injunction of this honorable court, from directly or indirectly making, using, vending or putting into practice, operation or use, or in any way practicing or imitating the said patented invention, or any material or substantial parts thereof; or from inviting or encouraging or enabling others so to do; and that the defendant may be decreed to pay the costs of this suit; and that plaintiff may have such other and further relief as to this honorable court shall seem meet and agreeable to equity.

No. 403.**Prayer for Specific Performance of Contract to Make a Policy of Insurance.(1)**

Plaintiffs pray that the said agreement of the defendants to execute and deliver to them a policy of insurance according to the terms of the aforesaid paper, and in accordance with the defendant's contract of insurance, as aforesaid, may be specifically performed, plaintiffs hereby undertaking to perform their undertakings in the premises.

(1) As to jurisdiction of equity to grant this relief and also decree payment of policy, see *Herbert v. Mut. Life Ins. Co.*, 12 Fed. 807; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187.

No. 404.**Prayer for Specific Performance of Agreement to Execute Mortgage of Indemnity.(1)**

Plaintiff prays that the defendant may be decreed specifically to perform the said agreement and to make a mortgage

to the plaintiff of the said real estate and premises to indemnify him against the obligation he has entered into with E. F. and G. H., as hereinbefore described, and that it may be referred to a master to settle such mortgage if the parties should differ about the same.

(1) *Horton v. McKee*, 68 Fed. 404.

No. 405.

Prayer for Specific Performance of Contract for Sale and Purchase of Real Estate.(1)

Plaintiff prays that the said A. B. be compelled by the decree and order of the court to accept the said sum of money above named as part of the purchase price of the said above described property, and to convey, make and execute to plaintiff a good and sufficient deed to said property, to-wit: [*Describe the property.*]

(1) *Hunt v. Rousmaniere's Admrs.*, 1 Pet. 1; *Willard v. Taylor*, 8 Wall. 557; *Farrington v. Tourtelott*, 39 Fed. 738; *Foster's Fed. Prac.* 5th ed., Sec. 265.

No. 406.

Prayer for Specific Performance of Contract by Vendee to Buy Real Estate.(1)

Plaintiff prays that the said E. F. may be compelled by the decree of this honorable court specifically to perform the said agreement with the plaintiff, and to pay to him the remainder of the said purchase money, with interest for the same from the time said purchase money ought to have been paid, the plaintiff being willing and hereby offering specifically to perform the said agreement on his part, and, on being paid, the said remaining purchase money and interest, to execute a proper conveyance of the said premises to the said E. F., and to let him into possession of the rents and profits thereof from the said — day of —, 19—.

(1) See *Zeringue v. Texas & P. R. Co.*, 34 Fed. 239; *Foster's Fed. Prac.*, 5th ed., Sec. 265.

No. 407.**Prayer for Payment of Legacies and to Carry the Trusts of a Will into Execution.**

Plaintiff prays that an account may be taken of what is due and owing to him for the principal and interest of the said legacy, and that the said defendant may be decreed to pay the same to plaintiff; and if the said defendant shall not admit assets of the said testator sufficient to answer the same, then that an account may be taken of the estate and effects of the said testator which have been possessed or received by the said defendant, or by any other person by his order, or to his use, and that the same may be applied in due course of administration.

No. 408.**Prayer for Reformation of Deed on the Ground of Mistake.**

Plaintiff prays that the deed of conveyance from X. Y. to G. H., dated —, 19—, of the property hereinbefore described, may be reformed and made to conform to the true intent and purpose for which the property was purchased, and to that end it may be made to include the same uses and trusts raised, created and declared in the prior deed from R. S. to X. Y., according to the understanding and agreement of the parties.

No. 409.**Prayer for Cancellation of Deed.**

Plaintiff prays that the said deed to said lots [*describe them*], dated —, 19—, be set aside, annulled and held for naught, and that the defendants be required to surrender up the same to be cancelled; and that they, and each of them, be forever restrained and enjoined from setting up or claiming any estate, right, title or interest in or to the premises described in said deed, and that complainants be decreed to be the owners thereof and entitled to the possession of the same.

No. 410.**Prayer by Next of Kin for Account and Distribution and to Restrain Sale.**

Plaintiffs pray that an account may be taken, under and by the direction of this honorable court, of the personal estate and effects of the said C. D., intestate, ——— possessed by or come into the hands of the said defendant, E. F., his administrator, or to the hands of any other person or persons by his order or for his use; and also an account of said intestate's debts and funeral expenses, and that the said intestate's personal estate may be applied in due course of administration; and that the clear residue thereof may be ascertained, and that plaintiffs, respectively, may be paid one part each of such clear residue; and that in the meantime the said defendant, E. F., may be restrained by the injunction of this honorable court from selling or disposing of [*state property about to be sold*].

No. 411.**Prayer for Cancellation of Land Patent and Deeds.**

Plaintiff prays that the patent purporting to convey title to said above described lands may be set aside and cancelled and declared null and void, and that the several mesne conveyances from the said patentee, R. S., to said defendants herein may be set aside, cancelled and declared null and void.

No. 412.**Prayer to Have Trust Declared as to Personalty.**

Plaintiff prays that the defendant, the A. B. Bank, may be by this honorable court declared to have received and held the moneys of plaintiff as above alleged, amounting to a balance of \$——, on the —— day of ——, as deposited with said defendant by the said C. D. as treasurer and tax collector of said —— county, to be the money and property of

plaintiff, and that the defendant, the A. B. Bank, and the said E. F., as receiver thereof, be decreed to be trustee thereof, for the use and benefit of plaintiff; that plaintiff may have a lien upon all the moneys, choses in action, and other property in said A. B. Bank to the amount of the balance of the funds of plaintiff so deposited as aforesaid, and that the said balance of \$——, together with interest thereon from the —— day of —— at the rate of —— per cent. per annum, be returned to plaintiff.

No. 413.

Prayer to Have Trust Declared as to Real Estate.

Plaintiffs pray that the defendants, and each and every of them, may be adjudged and decreed to hold such portion of the said lands as are now in their possession in trust for plaintiffs and to convey the same to plaintiffs; and deliver to them any patents or other deeds of the same in their possession, and be restrained and enjoined from hereafter setting up any claim or title to said lands or any part thereof, or in any manner intermeddling therewith or removing any timber or other product therefrom.

And that the defendants, and each and every of them, may be adjudged and decreed to hold any timber or other product by them, their servants or agents, removed from said land, or the proceeds or manufactured product of the same, in trust for plaintiffs, and may be decreed to account to plaintiffs for the same or the value thereof, and to pay to plaintiffs said value, with interest from the date of sale if the same has been sold by the said defendants.

No. 414.

Prayer to Have Trust Declared as to Real Estate.

(Another Form.)

Plaintiff prays that the said A. B. Company be decreed to have furnished the money to said C. D., which he paid to

said E. F. for said contract and land; that the said C. D. in procuring said contract and land acted as the agent and trustee of the said company; that the said trust be declared; that the said company be decreed to be the beneficial party in interest in said contract, and that under and by virtue of said contract it acquired an equitable interest in said land, and that plaintiff is now the owner and holder of the equitable right, title and interest in said contract and land so acquired by said A. B. Company.

No. 415.

Prayer for Injunction Against Proceeding at Law — Declaration of Trust — Conveyance. (1)

To the end, therefore, that the plaintiffs may have that relief which they can only obtain in a court of equity, and that the said defendants, who are plaintiffs as aforesaid in the said action at law, may be perpetually enjoined from further prosecuting the same, and that it may be declared that the said lands are charged with a trust in favor of, and ought to be held for, the use and benefit of, etc., and that the said defendants, or so many and such of them as shall appear to have the legal title to said lands, may be decreed to convey such legal title, free of all encumbrances done or suffered by them, or any or either of them unto the plaintiffs, in their said capacity, to hold to them and their, etc., upon the trusts aforesaid, and for such further or other relief as the nature of this case may require, and to your honors shall seem meet.

(1) *Earl v. Wood*, 8 Cush. 430.

No. 416.

Prayer for Attorney's Fees.

Plaintiff prays that the amounts due and owing and unpaid for the compensation, expenses and counsel fees may be charged and determined, and that payment of so much there-

of as shall be due from and by the said defendants, or any of them, may be decreed by this court; that plaintiff may be indemnified and saved harmless from all loss, expenses and counsel fees aforesaid; that the signers of the agreement aforesaid may be compelled to pay off and discharge the expenses, compensation and counsel fees aforesaid so that plaintiff may be relieved from any obligation thereon or liability therefor.

No. 417.

Prayer in Bill of Interpleader.(1)

Plaintiff prays that the said defendants may be decreed to interplead together, and that it may be ascertained in such manner as this honorable court shall direct to which of them the said sum of money ought to be paid; and that plaintiff may have leave to pay the same into court, which he offers to do, for the benefit of such of the parties as shall be found or decreed to be entitled thereto; and that the said persons be in the meantime restrained from commencing or prosecuting any suit at law against plaintiff in his said capacity touching the said sum of money.

(1) As to interpleader, see Foster's Fed. Prac., 5th ed., Secs. 157 and 158; Daniell's Ch. Pr., 5 Am. Ed., p. 1560; Killian v. Ebbinghaus, 110 U. S. 568, 28 L. Ed. 246; Wells, Fargo & Co. v. Miner, 25 Fed. 533; McWhirter v. Halsted, 24 Fed. 828; Aetna Nat. Bank v. U. S. Life Ins. Co., 25 Fed. 531; Penn. Mutual Life Ins. Co. v. Union Trust Co., 83 Fed. 891.

No. 418.

Prayer in Bill of Interpleader by an Executor.

Wherefore plaintiff prays that the said several defendants may be decreed to interplead and state their several claims upon plaintiff in the execution of his said trust as executor, so that the court may adjudge whether a sufficient sum shall be taken from the assets of the estate in the hands of plain-

tiff to pay said mortgage debt and the interest thereon, or whether the same shall be paid to the defendants claiming under the residuary clause of said will.

No. 419.

Prayer for a Guardian *ad litem*.

Plaintiff prays that a guardian *ad litem* be appointed for E. S., the infant defendant named above.

No. 420.

Prayer for a Conveyance and Deed by Special Master.

Plaintiff prays that a good and perfect deed of conveyance may be made to him for the premises aforesaid; and that a commissioner may be appointed by the court to make and execute such deed, or that the master in chancery of this court be directed to execute the same.

No. 421.

Prayer for Writ of *Ne Exeat*.(1)

Wherefore plaintiff prays the court to grant him a writ of *ne exeat republica*, restraining and forbidding the said C. D., defendant hereinbefore named, from departing beyond the limits of the United States without leave of this court first had.

(1) See Judicial Code, Sec. 261; Desty's Fed. Proc., Sec. 237, and cases there cited; Foster's Fed. Prac., 5th ed., Secs. 326-328.

No. 422.

Prayer for Writ of *Certiorari*.(1)

May it please your honors, therefore, to grant unto plaintiff a writ of *certiorari*, to be directed to the judges of the said — court of —, thereby commanding them upon the

receipt of the said writ to certify and remove the said bill and all proceedings thereon into this honorable court; and to stand to and abide such order and direction as to your honors shall seem meet, and the circumstances of the case require.

(1) Foster's Fed. Prac., 5th ed., Sec. 260.

No. 423.

Prayer for Subpoena.

May it please your honors to grant unto the plaintiff a writ of subpoena, to be directed to the said C. D.(1), etc., thereby commanding them, and each of them, at a certain time, and under a certain penalty therein to be limited, personally to appear before this honorable court [*or, your honors in this honorable court*], and then and there full, true, direct, and perfect answer make to all and singular the premises, *and further to stand to, perform and abide such further order, direction and decree therein as to this honorable court [or, to your honors] shall seem meet [or, as shall seem agreeable to equity and good conscience]*.(2)

(1) The prayer for subpoena must contain the names of all the defendants. See Equity Rule, 12; Beach's Modern Eq. Prac., Sec. 94 and notes; Foster's Fed. Prac., 5th ed., Secs. 160-167.

(2) The words in italics must be omitted in bills merely for *discovery, or, to perpetuate the testimony of witnesses*. Story Eq. Pl., Sec. 44, note; Barton's Suit in Eq. 43, note 1; Equity Drafts, 6.

No. 424.

Prayer for Process Where the Government is a Defendant.

And may it please your honors that the district attorney of the United States for the district of —, on being attended with a copy of this bill, may appear and put in his answer thereto, and may stand to and abide such order, direction and decree in the premises as to your honors shall seem meet.

No. 425.**Signature of Bills.**

All bills must be signed by counsel. See 24th Rule in Equity; Beach's Modern Eq. Prac., Sec. 84, and cases cited; Foster's Fed. Prac., 5 ed., Sec. 155, and cases cited. Signature on the back of the bill has been held sufficient. *Dwight v. Humphreys*, 3 McLean, 104.

No. 426.**Verification (1) by Officer of Corporation Plaintiff.**

State of Delaware,

County of Newcastle:

Alexis I. Du Pont, being duly sworn, deposes and says that he is secretary of the E. I. du Pont de Nemours Powder Company, one of the above-named plaintiffs; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

ALEXIS I. DU PONT.

Sworn to before me this 3rd day of July, 1914.

[Seal.]

P. E. STRICKLAND,
Notary Public.

My commission expires May 24, 1918.

State of Delaware,

County of Newcastle:

R. R. M. Carpenter, being duly sworn, deposes and says that he is president of the Du Pont Fabrikoid Company, one of the above-named plaintiffs; that he has read the foregoing bill of complaint and knows the contents thereof; that the

same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes it to be true. R. R. M. CARPENTER.

Sworn to before me this 3rd day of July, 1914.

[Seal.]

P. E. STRICKLAND,
Notary Public.

My commission expires May 24, 1918.

(1) Eq. R. 29, paragraph fifth, requires verification by the oath of the plaintiff or some one else having knowledge of the facts, if special relief is desired pending the suit.

Here an officer of the corporation plaintiff verifies.

"The fact that special relief is prayed puts the bill in the category of those which must be verified in accordance with Rule 25" and a verification by the attorney in fact for the plaintiff is insufficient where he swears that "so far as the statements in said bill are within his own knowledge, they are true, and so far as they are predicated upon information from others he believes them to be true," for the statement is so indefinite as to be valueless.

Here preliminary injunction was asked, which was not subsequently insisted on, yet the rule relating to prayer for special relief applied. *Scheuerle v. Onepiece Bifocal Lens Co.*, 241 Fed. 270, 273.

Equity Rule 36 provides for verification of bill or other pleading before certain named officers; and Rule 69 provides for verification of petition for rehearing.

No. 427.

Verification by Copartnership.

State of New York, }
County of New York, } ss.:

Arend H. Weingardt, being duly sworn, says that he is a member of the firm of Knauth, Nachod & Kuhne, the complainants in the foregoing bill; that the complainants are co-partners pleading together and that he is authorized to make verification on behalf of his co-partners as well as on behalf of himself. That he has heard read the foregoing bill and knows the contents thereof, and that the same is true to his own knowledge except as to matters therein stated to be alleged on information and belief and that as to those matters

he believes it to be true, except that the membership of said firm and their citizenship is set forth as of the time when the suit was instituted.

AREND H. WEINGARDT.

Sworn to before me this 19th day of December, 1914.

[L. S.]

FRANK F. KIRKPATRICK,
Notary Public, N. Y. Co.

No. 428.

Verification of Amended Intervening Petition and Cross-Petition.

Charles F. Bisett, being duly sworn, states on oath that he is one of the intervenors and cross-petitioners in the foregoing cause; that he has read the above and foregoing amended intervening petition and cross-petition, and knows the contents thereof, and that the matters and things therein set forth are true as he is informed and verily believes.

CHAS. F. BISETT.

Subscribed and sworn to before me this 31st day of October, 1914.

ETHEL K. CHILDERS,
Notary Public.

[Seal.]

No. 429.

Verification of a Member of a Partnership.

State of Missouri, County of Jackson, ss:

A. Danciger, being first duly sworn, upon his oath states: that he is one of the plaintiffs in the above entitled cause and a member of the co-partnership composed of Dan Danciger, A. Danciger, Jack Danciger, Joseph Danciger and M. O. Danciger, doing business as Danciger Bros., Harvest King Distilling Company and Schiller Bros. Distilling Company, the plaintiffs in this action, and that he is authorized to and makes this affidavit in behalf of said plaintiffs; that he has read the foregoing bill; that he is familiar with the matters,

allegations and facts set out therein, and that the same are true to his certain knowledge. A. DANCIGER.

Subscribed and sworn to before me this 15th day of June, 1914. MARY A. COLLIER,

[Seal.]

Notary Public.

My commission expires Feb. 19, 1917.

No. 430.

Verification by a Solicitor.

[Venue.]

E. C. Day, being first duly sworn, on oath deposes and says that he is one of the solicitors for the plaintiffs above named; that each of said plaintiffs is a foreign corporation and has no officer or agent within the state of Montana, wherefore he makes this verification for and on behalf of said plaintiffs and as their said solicitor; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters therein stated are true to the best of his knowledge, information and belief. E. C. DAY.

Subscribed and sworn to before me this 14th day of July, 1916. T. A. M.,

[Seal.]

Notary Public, &c.

BILLS IN SPECIAL CASES.

No. 431.**Bill to Restrain Disclosures and Use of Trade Secrets.(1)**

[Caption.]

1. E. I. du Pont de Nemours Powder Company, a corporation of the state of New Jersey, and a citizen of said state, and having its principal office at 51 Newark street, in the city of Hoboken, county of Hudson, and state of New Jersey, and an office and place of business in the city of Wilmington, county of Newcastle, and state of Delaware; and Dupont Fabrikoid Company, a corporation of the state of Delaware, and a citizen of said state, and having its principal office in the city of Wilmington, county of Newcastle, and state of Delaware: bring this their bill of complaint against Walter E. Masland, Charles H. Masland, Maurice H. Masland, Charles W. Masland, Frank E. Masland and J. Wesley Masland, all citizens of the state of Pennsylvania, and residing in the city and county of Philadelphia, in the state of Pennsylvania, within the eastern district of Pennsylvania.

2. This is a suit in equity between citizens of different states to restrain the disclosure and use of trade secrets, the value of which exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000), and is brought in the district and state of which all the defendants are residents and inhabitants.

3. E. I. du Pont de Nemours Powder Company, one of the above-named plaintiffs, has been engaged since 1907 in the manufacture of explosives, and in the manufacture of articles utilizing products and by-products therefrom. It maintains and has maintained experimental stations employing technical

and other men to invent and discover new and useful processes, apparatuses, articles of manufacture, and compositions of matter, and new and useful improvements thereof, in connection with its said manufactures, some of which it protects by letters patent and others of which it maintains as trade secrets. Among its technical employes was Walter E. Masland, one of the above-named defendants, who entered its employ in 1905, soon after his graduation from the University of Pennsylvania, and who ceased to be so employed on or about the 13th day of June, 1914. All its employes at its experimental stations, including said Walter E. Masland, were employed with the understanding that all inventions and discoveries used or devised for or in connection with the business or discovered by its employes were its exclusive property and were not to be disclosed to others or utilized in any manner by said employes. These secrets were guarded with the utmost care and every precaution taken to prevent their becoming known. Said Walter E. Masland executed on or about the first day of August, 1905, a contract relating to his employment with E. I. du Pont Company, a corporation of the state of Delaware, the predecessor of said plaintiff, E. I. du Pont de Nemours Powder Company, and from whom said plaintiff purchased its present business together with all rights appertaining thereto.

On or about the first day of August, 1910, said plaintiff, E. I. du Pont de Nemours Powder Company, purchased the business of a concern manufacturing artificial leather, and on or about the first day of August, 1913, sold all the assets and property relating thereto to the other of said plaintiffs, du Pont Fabrikoid Company. In the early part of 1912 said Walter E. Masland was placed in charge of experimental work in inventing and discovering new and useful processes, apparatuses, articles of manufacture, and compositions of matter, and new and useful improvements thereof, in connection with said manufacture of artificial leather, and at that

time and at all times subsequent thereto, has had full access by reason of his said connection with said experimental work, to valuable discoveries, inventions and trade secrets, developed at the manufacturing plant of said plaintiff, the du Pont Fabrikoid Company, and to a limited extent to other laboratories and plants of said plaintiff, E. I. du Pont de Nemours Powder Company. Said Walter E. Masland and his assistants, together with other employes of both said plaintiffs, have brought said experimental work to such a stage that steps are being taken by plaintiffs for the construction of a commercial sized manufacturing unit for utilizing the same. On or about the first day of June, 1914, said Walter E. Masland notified plaintiff, E. I. du Pont de Nemours Powder Company, that it was his intention to resign from its employ and admitted that he was about to engage in the manufacture of artificial leather in his own behalf and with the aid and assistance of the above-named defendants, Maurice H. Masland, Charles W. Masland, Frank E. Masland and J. Wesley Masland, utilizing the inventions, discoveries and trade secrets of plaintiffs in so doing.

Plaintiffs are informed and believe, and therefore aver, that said defendant, Walter E. Masland, with the aid and assistance of the above-named defendants, Charles H. Masland, Maurice H. Masland, Charles W. Masland, Frank E. Masland and J. Wesley Masland, is about to engage in the manufacture of artificial leather, utilizing plaintiffs' secret processes, apparatuses, articles of manufacture, and compositions of matter therein.

And for as much as plaintiffs can have no adequate relief save by this honorable court, plaintiffs pray as follows:

(a) That a writ or writs of injunction be issued, preliminary until the hearing of this cause and permanent thereafter, enjoining said defendants, Walter E. Masland, Charles H. Masland, Maurice H. Masland, Charles W. Masland, Frank E. Masland and J. Wesley Masland, their officers, clerks, attorneys, servants, agents, employes, workmen, and confederates,

and each of them, from directly or indirectly making, using, selling or disclosing to any one or aiding or abetting in such making, using, selling or disclosing, in any manner or by any means, any and all secret processes, apparatuses, articles of manufacture, or compositions of matter, or any new and useful improvements thereof, which have become known to them by reason of the employment of said Walter E. Masland by said plaintiff, and commanding them and each of them to deliver forthwith into the custody of the clerk of this court in sealed envelopes, any and all memoranda, drawings, specimens, papers, and articles of any description relating thereto, in their possession or under their control, without making or retaining any copies or duplicates thereof.

(b) That said defendants, Walter E. Masland, Charles H. Masland, Maurice H. Masland, Charles W. Masland, Frank E. Masland and J. Wesley Masland, may be decreed to pay the costs of this suit.

(c) That plaintiffs may have such other and further relief as the equity of the case may require.

(d) To the end, therefore, that said defendants, Walter E. Masland, Charles H. Masland, Maurice H. Masland, Charles W. Masland, Frank E. Masland and J. Wesley Masland, may, if they can, show why plaintiffs should not have the relief prayed for and may full, true and direct answer make, according to the best and utmost of their knowledge, remembrance and belief, to the several matters hereinbefore averred and set forth as fully and particularly as if the same were repeated, paragraph for paragraph, and the said defendants specifically interrogated, may it please your honors to grant unto plaintiffs a writ of *subpoena ad respondendum*, issuing out of and under the seal of this honorable court directed to said defendants, Walter E. Masland, Charles H. Masland, Maurice H. Masland, Charles W. Masland, Frank E. Masland and J. Wesley Masland, commanding them and each of them to appear and make answer to this bill of complaint and to perform and

abide by such orders and decrees herein as to this court may seem just.

E. I. DU PONT DE NEMOURS POWDER Co.,
By Alexis I. Du Pont, Secy. [Seal.]

DU PONT FABRIKOID Co.,
By R. R. M. Carpenter. [Seal.]

CHARLES N. BUTLER,
Solicitor for Plaintiff.

EDWIN J. PRINDLE,
WARREN H. SMALL,
Of Counsel.

(1) A. FORM OF BILL—

Rule 25 of Rules of Practice for Courts of Equity of the United States, effective February 1, 1913, is new, and prescribes a simpler bill of complaint than the former practice; five matters are noted to render a bill sufficient. The rule does not require any particular features but merely fortifies a bill against attack if it contain the features set forth.

a. The caption is contained as usual in the above form.

b. The address is omitted since the rule does not mention it; the bill is sufficient without it.

c. The names, citizenship, and residences of all parties are set forth in the first paragraph.

d. A simple statement of the ground of jurisdiction is made in the second paragraph; venue is also set forth, although the bill is sufficient without it. However, it can not be objectionable, since it discloses to the court on the face of the bill the venue required by the Judicial Code, Sec. 51.

e. A simple, straightforward statement of the ultimate facts is made in paragraph 3, omitting the verbosity and circumlocution that had become an objectionable feature of pleading in equity under the old rules.

Such pleading as here given was not prohibited formerly, but it was not practiced. This rule stresses simplicity and generally the bar has welcomed the change.

f. The prayer for an injunction in paragraph 3a complies with fifth requirement of Rule 25; paragraph 3b is unnecessary under the new rule; paragraph 3c has always been embodied in bills of complaint, whereas paragraph 3d, although usual, is not covered by Rule 25, and could well be omitted.

The prayer for subpoena is not now necessary; Eq. R. 12 provides for the issue of subpoena and in *Pittsburg Water Heater Co. v. Beler*

Water Heater Co., 222 Fed. 950, the court decided that a court order for such subpoena is not needed, for the clerk shall issue the same under Rule 12.

Under present equity rules answer under oath is not called for in the bill of complaint, since the above case holds that that matter is now covered by Rule 58 providing for discovery by interrogatories, in writing and under oath.

Further, also, a prayer to require defendant to answer is not necessary, except in the case covered by Rule 40, relating to nominal parties defendant.

B. SIGNATURE OF COUNSEL—

Rule 24 requires the signature to the bill of one or more solicitors of record, and the signature is considered as a certificate by each solicitor (a) that he has read the pleading; (b) that according to his instructions it is well grounded; (c) that it contains no scandalous matter, (d) and is not interposed for delay.

In the above bill the parties plaintiff also sign; no rule requires or prohibits this nor makes any provision concerning it.

It is, therefore, unnecessary, but not open to valid objection. However, in the interest of brevity, simplicity and informality, such signatures should be dispensed with

C. ULTIMATE FACTS—

Manifestly a variety of conditions determine what may properly be pleaded; Rule 25 provides that *ultimate facts only need be stated* in the bill; and hence where the claim is based on written documents to which defendants are parties, plaintiff need set out only the execution and import of such writings. Defendant's motion to require the writings to be set forth by copy must rest on an averment of ignorance of the documents, otherwise Rule 25 is complied with. *St. Louis Car Co. v. Brill Co.*, 249 Fed. 502.

This rule permits the inclusion of allegations of due diligence tending to excuse plaintiff from laches, in a bill of complaint alleging lack of good faith and fair dealing under a contract. *Foster v. Callaghan & Co.*, 248 Fed. 944.

No. 432.**A Bill by Creditor Praying the Appointment of a Receiver.(1)**

The District Court of the United States
for the — District of —.

| | |
|---------------------------------|--------------|
| A. B., Plaintiff, | } In Equity. |
| vs. | |
| C. & D. Railway Co., Defendant, | |

To the Judges of the District Court of the United States for
the — District of —:

A. B., of —, and a citizen of the state of —, brings this his bill on his own behalf and that of all other creditors and stockholders of the C. & D. Railway Co., who may choose to become parties to this suit and contribute to the expenses thereof, against the said C. & D. Railway Co., which is a corporation organized and existing under the laws of the state of —, and being a citizen of the state of —, and an inhabitant of the — district of —.

And plaintiff shows unto your honors that the defendant was duly incorporated and organized under the laws of the state of — on the — day of —, as a common carrier company, with authority to lease, hold, and operate any line of railway and its appendages within or without said state of —; that the capital stock of said company was three million dollars, divided into thirty thousand shares of one hundred dollars each, which stock was immediately all subscribed and paid up, and on the — day of — said defendant company duly leased from the Northern Railway Co., by a written instrument bearing the date last mentioned, the line of railway known as the Northern Railway, which had been constructed and was owned by the said Northern Railway Co., a corporation organized and existing under the laws of the state of —, said Northern Railway extending from the city of — through the state of —, to the city of — in the state of

—; together with all the appurtenances thereto belonging as specifically set forth in said lease, and said company at once took possession of said railway and has ever since been and still is engaged in operating the same as a common carrier of goods and passengers under said lease.

The entire capital of said company was shortly after its organization invested in rolling stock, betterments, and completion of said railway, which said company was required to make by the terms of said lease. Upon all the property represented by such investment of said capital, or otherwise acquired by said company, a lien was reserved by said lease prior and preferably to any and all other liens whatsoever, to secure the payment of the rents, taxes and assessments reserved therein to be paid by said company, and to secure the faithful performance of the covenants of said lease by it. One of said covenants was that said company would provide and keep the said line of railway supplied with rolling stock and equipment so that the business of the same should be preserved, encouraged and developed, and at all times be done with safety and expedition and the public accommodated in respect thereto with all practicable conveniences and facilities, and that the future growth of such business, as the same might arise or be reasonably anticipated, should be fully provided for and secured.

The rental reserved in said lease was \$800,000 per annum during the first five years of the term thereof; \$900,000 per year during the second five years; \$1,000,000 per year during the third five years; \$1,090,000 per year during the fourth period of five years, and \$1,250,000 per year during the last period of five years, of the term of said lease, and an additional \$12,000 each year payable to the trustees of said railway. The present amount of rental which said company is required to pay under said lease is \$1,000,000 per year, payable quarterly, on the 12th day of January, April, July and October in each year. The rolling stock of said company is insufficient, and what it has is greatly in need of renewal in order to enable said company to maintain said railway as provided in said lease,

which would require a large sum of money to be expended each year in addition to said rent and to the ordinary maintenance of said property.

The earnings of said company have for some time past been and still are barely sufficient to pay said rental, leaving nothing for the other necessary expenditures aforesaid nor to meet other obligations, and for the past seven months there has been a deficiency of \$123,000 in such earnings in meeting the rent and other obligations of said lease. Said company has no property but said leasehold and the rolling stock and other investments aforesaid, with the exception of a small amount of real estate, whose value plaintiff can not state, but which value is inconsiderable, and which real estate, being used for terminal and other railroad purposes, can not be sold. Said company has no property which can be pledged or mortgaged to raise money, and has no credit to borrow money without security.

A large number of actions, in which large sums of money are claimed, are pending against said company in the courts of the state of —, state of —, and state of —, and in the federal courts therein, and the superior court of —, in an action which has been pending since shortly after the organization of said company, and has greatly embarrassed it in the prosecution of its business, has just rendered judgments against said company in favor of various persons, firms and corporations, amounting in the aggregate to over \$300,000, exclusive of costs, which judgments are based on a fraudulent issue of spurious stock certificates by its former secretary shortly after its organization. Said company has been advised by its counsel to prosecute proceedings in the supreme court of — for the reversal of such judgments, and said company desires and proposes so to do. In order to stay execution during such proceedings in error, a bond is required of said company in double the amount of said judgments, conditioned to pay the same in case they shall be affirmed. Said company has made every effort in its power,

through its stockholders and otherwise, to procure such bond, but is wholly unable to do so. It has sought to induce said judgment creditors to accept a first mortgage, subject to the lien reserved by said lease, on all its property of every description wherever situated, but said creditors refuse to accept such mortgage, and threaten and will, unless prevented by the granting of the relief hereinafter prayed, issue and levy executions upon the property of this company situated in the state of —, and commence proceedings to subject to the payment of their said judgments its property situated in other states, thereby preventing said company from carrying on its business, disabling it from paying said rental and complying with the obligations of said lease, and causing the loss and forfeiture of said leasehold estate which is provided by the terms thereof in case of the failure of said lessee to comply with its obligations thereunder, and causing the entire loss to the stockholders and creditors of said company of its rights, franchises and property.

Plaintiff is a stockholder in said company and a creditor thereof, being the owner of a certain judgment rendered against it in the supreme court of the state of — for the sum of seven thousand six hundred and thirteen dollars and twenty cents, with interest and costs, which judgment is and remains wholly due and unpaid, and the said company has no property subject to levy and sale upon execution to pay the same. Said company has judgments against it in all the said states on which it is liable to execution, and has a large floating debt, amounting to between \$200,000 and \$300,000 net, which it has not sufficient resources or credit to meet, and said company is insolvent. Plaintiff is, furthermore, chairman of the board of directors of said company, and is charged with the duty of protecting and preserving said property for the equal benefit of its creditors and, after their payment, for the benefit of the stockholders thereof, and he avers that there is no adequate remedy at law for the prevention of the wrongs and injuries threatened as aforesaid,

and for the preservation and protection of his rights above set forth, and that there can be no relief therefor only in equity.

Wherefore plaintiff, on behalf of himself and of all others in like relation to the said company and its property, prays, the premises considered:

First. That a writ of subpoena issue against the defendant, the C. & D. Railway Co., requiring it to appear in this court and answer this bill of complaint, and to stand and abide such orders and decrees as the court may from time to time adjudge and enter in the premises.

Second. That the court will fully administer as a trust fund all and singular the property, rights and franchises belonging to said company, including said line of railway with all and singular its appurtenances so held by lease as aforesaid, and will marshal its assets and ascertain the several respective liens and priorities existing thereon, and enforce and decree the rights, liens and equities of each and all the stockholders and creditors thereof as the same may be finally ascertained and decreed by the court upon the respective interventions or applications of each and every creditor or stockholder.

Third. That for the purpose of enforcing the rights and equities of the creditors of said company, as well as of protecting the rights, interests and property of said company, and to secure as far as possible the performance of the duties which said company owes to the public as a common carrier, as well as to preserve the unity of the business and property of said railway company as the same has been maintained and operated since the year of 18—, and of preventing disruption thereof by separate executions, attachments or sequestrations, and of preventing the loss and forfeiture of its leasehold and other property by reason of its failure to pay the rental reserved thereon as aforesaid, this court forthwith appoint a receiver for all and singular the property, rights, assets and franchises of every nature and wherever situated,

held, owned or controlled by said company, together with all leasehold rights and contracts, with full authority to manage and operate the same under the direction of the court; and that all of the officers, managers, superintendents, agents and employes of the said company be required forthwith to deliver up to such receiver the possession of all and singular each and every part of the said property wherever situated; and also all books of accounts, vouchers and papers in any way relating to its business or the operation of its said railway; and for an injunction restraining each and every of the officers, directors, managers, superintendents, agents and employes of the said company from in any way interfering with the possession and control of such receiver over said property.

Fourth. That at such time as may be found just and proper, the property of said company may be ordered to be sold and the proceeds distributed among those entitled thereto, and that plaintiff may have such other and further relief as to the court may seem proper and as may be necessary to fully protect and enforce his rights and equities and those of all other creditors and stockholders of said company.

X. & X.,

A. B.

Solicitors for Plaintiff.

[*Verification.*]

(1) See Beach's Modern Eq. Pleadings, Sec. 729, and notes.

The origin of the jurisdiction in case of creditors' bills was in the narrowness of common-law remedies by writs of execution, which were confined to those estates and interests recognized by the law, and did not extend to those which were equitable in their nature; but statutes both in England and in many of the states have greatly extended the scope of writs of execution so as to afford an adequate remedy in cases where formerly the party was compelled to resort to a creditor's bill. Where the remedy still exists, a judgment must first be obtained, and certain steps taken towards enforcing it before a bill can be filed. See Pom. Eq. Jur., Sec. 1415; *Hollens v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 37 L. Ed. 1113; *Johnson v. Waters*, 111 U. S. 640, 28 L. Ed. 547, and *Ager v. Murray*, 105 U. S. 126, 26 L. Ed. 942; *Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370; *Maxwell v. McDaniels*, 184 Fed. 311; *Natl. Tube Works Co. v. Ballue*, 146 U. S. 517, 36 L. Ed. 1070; *Miller v. Sherry*, 2 Wall. 237, 17 L. Ed. 827; *Jones v. Green*, 1 Wall. 330, 17 L. Ed. 553, and note

No. 433.

Stockholder's Bill Against Building Association.(1)*[Caption and introduction.]*

The bill of complaint of A. B. filed in behalf of himself and all other creditors and stockholders of the C. D. Building & Loan Association, against the C. D. Building & Loan Association, defendants.

Complainant respectfully shows unto your honors:

First. That he is a citizen and resident of the state of —, and that the C. D. Building & Loan Association, named as defendant in the caption, is a corporation duly organized and existing under the laws of the state of —, with its home office in the county of — and state of —, and that it is a citizen and resident of the state of — and of said county of —, and that the amount in controversy in this cause as hereinafter shown is of more than two thousand dollars in value, exclusive of interest and costs.

Second. That complainant is a member of and stockholder in said defendant company, the C. D. Building & Loan Association, and it is justly indebted to him on his stock in the sum of two thousand eight hundred dollars (\$2,800). As such member he is the owner of fourteen (14) shares of the thirty-fifth series of two hundred dollars each of the paid-up stock of said association, and upon said stock he has paid into said association said sum of \$2,800, pursuant to and by virtue of the constitution and by-laws of said association.

Third. Complainant is informed and believes and thereupon charges that the nominal assets of the defendant amount to a little upwards of sixty thousand dollars, consisting principally of notes and mortgages of the borrowing members of said association, and of fourteen pieces of real estate which said company in the course of its business has been compelled to buy in upon foreclosure of mortgages given to it. A list of the mortgages owned by defendant is herewith filed as exhibit "A" to this bill, and a description of said pieces of

real estate owned by defendant is herewith filed marked as exhibit "B" to this bill.

Fourth. Complainant is informed and believes and thereupon charges that the liabilities of defendant association amount to at least four thousand dollars more than its assets; that holders of upwards of four thousand dollars of investment stock in said association have given notice of withdrawal, and the association has no money with which to pay off the owners of said stock; that because of the recent decision of the supreme court of Tennessee with regard to building and loan associations, and the hopes raised thereby in the breasts of certain borrowing members that they may be able to prey upon the assets of defendant company, numerous suits have been brought against defendant and are now pending in the courts of Knox county, and others are threatened; and that because of the foregoing facts said association is greatly embarrassed and will be unable to meet its liabilities as they fall due. Complainant charges upon information and belief that this state of affairs has been brought about by the general shrinkage in values of real estate, by the failure of members to pay their dues promptly as they mature, and by the panicky condition of building and loan association affairs. Complainant is informed and believes and thereupon charges that said defendant company is insolvent. It is issuing no new stock and is making no loans and has ceased to do business.

Under this state of matters, it is impossible for said association to further accomplish the purposes of its said incorporation.

Fifth. Complainant further shows unto your honors that many persons are threatening to bring suit against said association, and unless restrained therefrom by injunction from your honors' court they will bring such suits and involve defendant in a multiplicity of suits and heavy costs.

Complainant can have no adequate relief except in this court, and by having said corporation wound up as an insol-

vent corporation and its assets collected and distributed among its creditors and stockholders according to their rights and equities.

Sixth. The premises considered, complainant prays:

1. That he may be allowed to file this bill in this honorable court as a general creditors' bill in behalf of himself and all other creditors and stockholders of the C. D. Building & Loan Association, and that by subpoena to answer issued from your honors' court under the seal thereof, said C. D. Building & Loan Association be made a defendant hereto, and be required to answer this bill.

2. That all the *bona fide* creditors of the defendant company be required to prosecute their claims and demands against said company in this court and in this cause, and to this end that they be allowed to file their petitions exhibiting their respective claims and demands, and to prove the same according to the usual practice of this court, and that they be granted all the benefits of this proceeding to which complainant may be entitled, and that the clerk be directed, by due publication, to notify all creditors of said association to file their claims in this cause within a time to be fixed by your honors.

3. That all the creditors of said association be enjoined from suing the same except by petition in this cause.

4. That a receiver be appointed to take into his possession all of the property of the defendant association of every sort whatsoever, whether real, personal or mixed, and that said receiver be empowered and directed to convert all of said property into money at the earliest practicable moment, and to collect all debts due the company, and to bring such suits as may be necessary to accomplish that end, or assert its rights or claims in the property, and to do all other acts necessary to collect or protect the assets of the company.

5. That all necessary and proper accounts be taken and stated to show the assets, creditors, shareholders and debts of said association, and the amount due to each of said creditors

and shareholders, and for all purposes proper to the winding up of said defendant company.

6. That all proper allowances be made for the receiver and for counsel fees.

7. That said defendant association be wound up and its assets distributed in this cause.

8. And that complainant and all other creditors and shareholders of said defendant corporation be granted all such other, further and general relief as they may be entitled to upon the facts and the rules of equity.

This is the first application for an injunction in this behalf, and is the first application for a receiver in this behalf.

R. X.,

A. B.

Solicitor for Complainant.

(1) As to the power of a court of equity to entertain such a bill see *Towle v. Am. Building, Loan & Ins. Co.*, 61 Fed. 446; *Universal Sav. & Trust Co. v. Stoneburner*, 113 Fed. 291, C. C. A.; *Coltrane v. Blake*, 113 Fed. 789, C. C. A.

No. 434.

Stockholders Against Corporation and Officers Charging Conspiracy to Injure the Corporation.(1)

[*Caption.*]

The complainants, suing on behalf of themselves and on behalf of all other stockholders of the defendant, American Blower Company, who may choose to come in and contribute to the expenses of this suit, bring this, their bill of complaint, against American Blower Company, Eugene N. Foss, Galen L. Stone and Charles H. Gifford, and respectfully show unto your honors the following statements of the grounds upon which the jurisdiction of this court depends, and of the ultimate facts upon which they ask relief, all of which facts they are informed and believe and therefore duly allege to be true:

For a First Cause of Action.

First. The complainants, Samuel Cleland Davidson and Hugh T. Coulter, are subjects of the king of Great Britain and residents of Belfast, Ireland, and are now and have been continuously since the organization of defendant, American Blower Company, and were at the time of the transactions hereinafter complained of, the owners and holders of record of 1,100 and 29 shares, respectively, of the stock of the said defendant, American Blower Company.

The complainants, Helen Lucy Coulter and Alice Mary Churchill, are subjects of the king of Great Britain and residents of Belfast, Ireland, and are now and have been continuously since the year 1912, and were at the time of the transactions hereinafter complained of, the owners and holders of record of 50 and 30 shares, respectively, of the stock of the said defendant, American Blower Company.

The complainant, Eugene V. Myers, is a resident of East Orange, state of New Jersey, and is a citizen of said state, and is now and has been continuously since the year 1909, and was at the time of the transactions hereinafter complained of, the owner and holder of record of five shares of the stock of the said defendant, American Blower Company.

The defendant, American Blower Company, is a corporation duly organized and existing under the laws of the state of New York, and is a resident of the northern district of said state, having its principal office and place of business at Green Island, county of Albany, state of New York; that the defendant, Eugene N. Foss, is a citizen and resident of the commonwealth of Massachusetts; that the defendant, Galen L. Stone, is a citizen and resident of the commonwealth of Massachusetts, and that the defendant, Charles H. Gifford, is a citizen and resident of the state of Michigan.

Second. The grounds upon which the jurisdiction of this court depends in this suit are the diversity of citizenship between the several plaintiffs and each and all of the defendants, the residence of the defendant, American Blower Com-

pany, which is the only necessary party defendant in the northern district of New York, and the local nature of the suit; i. e., it is a suit to enforce an equitable claim to personal property within the district where the suit is brought in accordance with the meaning and intent of Section 57 of the Judicial Code (Act of March 3, 1911).

The matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

Complainants have no plain, complete or adequate remedy at law and adequate relief can only be administered in a court of equity.

* * * * *

That in these ways the said defendants threaten to and will, unless restrained by this court, waste and destroy the assets and business of the defendant, the American Blower Company, to the great and irreparable damage of the said company and particularly of the minority stockholders thereof, including the complainants herein.

Seventeenth. Complainants have made a demand upon the board of directors of the defendant, American Blower Company, to institute a suit or proceeding to prevent the defendants, Foss, Stone and Gifford, from carrying out the illegal plan and conspiracy above set forth, and to obtain an injunction against the said defendants voting the stock of the said American Blower Company standing in the names of said defendants. A copy of the letter in which this demand was made is hereto annexed, marked Exhibit A, and thereby made a part of this complaint as fully as though set forth at length herein.

The defendant, American Blower Company, and its officers and directors have thereupon declined to institute any such suit or proceeding. A copy of the letter and the resolutions of the board of directors in which this refusal is set forth is

hereto annexed, marked Exhibit B, and thereby made a part of this complaint as fully as though set forth at length herein.

Complainants were thereupon compelled to institute the present suit for the benefit of the defendant corporation and of themselves and other stockholders similarly situated. No effort has been made to obtain action by the majority shareholders of the defendant, American Blower Company, for the reason that under the facts in this case the same is unnecessary and for the reason that the majority shareholders, to-wit, the defendants, Foss, Stone and Gifford, are the persons who are threatening this wrong to the corporation and whose actions it is the purpose of this suit to prevent.

For a Second, Separate and Distinct Cause of Action.

Eighteenth. Complainants repeat and reallege each and every allegation contained in paragraph first of this bill of complaint to which reference is hereby made as fully as though set forth at length herein.

Nineteenth. The grounds upon which the jurisdiction of this court depends are the diversity of citizenship between the several plaintiffs and each and all of the defendants, the residence of the defendant, American Blower Company, which is the only necessary party defendant, in the northern district of New York, and the fact that the matter in controversy arises under a law of the United States, to-wit, the Act of Congress of July 2, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies."

Your complainants further allege that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars (\$3,000), and that this suit is not a collusive one to confer upon a court of the United States jurisdiction in a case of which it would not otherwise have cognizance.

Complainants have no plain, adequate or complete remedy at law and adequate relief can only be administered in a court of equity.

Nineteenth. Complainants repeat and reallege each and every allegation contained in paragraphs numbered Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh of this bill of complaint, to which paragraphs reference is hereby made as fully as though they were set forth at length herein.

* * * * *

Twenty-sixth. Your complainants repeat and reallege each and every other allegation contained in paragraph Seventeenth of this complaint, to which reference is hereby made as fully as though it were set forth at length herein.

Wherefore and by reason of the premises, your complainants, on behalf of themselves and all other stockholders of the defendant, American Blower Company, who are similarly situated and who may intervene in this cause, pray this honorable court:

1. That a permanent injunction issue against the defendant, American Blower Company, and against the defendants, Foss, Stone and Gifford, restraining them and each of them from wasting the assets and property of the defendant, American Blower Company, and particularly from taking any action on behalf of the American Blower Company to destroy or diminish the right of the American Blower Company, or of the Sirocco Engineering Company, in the Davidson patents or in the decree obtained in the suit brought by the Sirocco Engineering Company against the B. F. Sturtevant Company, above mentioned, and from doing any act or thing, whatsoever, in furtherance of the conspiracy described under the cause of action numbered First herein.

2. That a permanent injunction issue against the defendants, and each of them, from combining or conspiring to monopolize, or to attempt to monopolize, or from directly or indirectly monopolizing, or attempting to monopolize, the manufacture and sale of, or the trade or commerce in, fans and blowers, kindred appliances and appurtenances, within the state of New York and among the several states or with

foreign nations, and from doing any act or thing, whatsoever, in furtherance of the combination or discovery described in cause of action numbered Second herein.

3. That a permanent injunction issue against the defendants and each of them from combining or conspiring to restrain trade or commerce among the several states or with foreign nations in fans, blowers, kindred appliances and appurtenances, and from directly or indirectly restraining or attempting to restrain competition in the state of New York in the supply or price of such commodities.

4. That a permanent injunction issue enjoining, on such terms and for such period as the court may prescribe, the defendants, Foss, Stone and Gifford, and each of them, from voting at any stockholders' meeting of the American Blower Company any shares of stock of the American Blower Company owned by them, or any of them, whether by proxy or otherwise, and whether said stock stands in the names of the said defendants or in the names of brokers or other individuals.

5. That a permanent injunction issue upon similar terms against all persons whose names are unknown, enjoining them from voting by means of proxies or otherwise at any stockholders' meeting of the American Blower Company the shares of stock in the American Blower Company owned by the defendants, Foss, Stone and Gifford, or any of them, or by any person affiliated with or under the control or domination of the said Foss, Stone and Gifford or of the B. F. Sturtevant Company.

6. That a permanent injunction issue upon similar terms against the American Blower Company, its officers, directors, agents and servants and against the persons whose names are unknown, who shall act as inspectors of election at any stockholders' meeting, and each and every one of them, from recognizing as valid any votes cast by the said defendants, Foss, Stone and Gifford, or any or all of them, whether by proxy or otherwise, and from recognizing as valid any votes

cast by any persons who are affiliated with or under the domination and control of the defendants, Foss, Stone and Gifford, or any of them, or who are acting for the benefit of the B. F. Sturtevant Company, and from permitting the said defendants, Foss Stone and Gifford, or any of them, or any such persons, to vote any of the stock standing in their names, whether by proxy or otherwise.

7. That a preliminary and temporary injunction issue during the pendency of this suit against the defendants, American Blower Company, Foss, Stone and Gifford, and the officers, agents and servants of the defendant, American Blower Company, and persons whose names are unknown, restraining them and each of them from any of the acts more specifically set forth in the prayers for relief above stated.

8. That the complainants have such other and further relief as may be just and equitable.

And to the end that your complainants may obtain the relief to which they are justly entitled, may it please your honor to grant unto your plaintiffs rights of subpoena directed to the defendants, American Blower Company, Eugene N. Foss, Galen L. Stone and Charles H. Gifford, commanding them and each of them to appear herein and answer, but not under oath (answer under oath being hereby expressly waived), the allegations contained in this your complainants' bill, and to abide and perform such order or decree as this honorable court may make in the premises, and your orators will ever pray.

X. Y., Solicitor.

A. B. and C. D.

[*Verification.*]

(1) *Heinz v. Natl. Bank of Commerce*, 237 Fed. 942, 150 C. C. A. 592.

Discussion by Judge Booth, of Eq. Rule 27 at pages 944 to 949, in which he reviews many cases.

In *Forbes v. Wilson*, 243 Fed. 264, the court discusses whether the bill complies with the requirements of Eq. Rule 27, holding that it does.

The rule receives further discussion and application in *Krouse v. Brevard Tannin Co.*, 249 Fed. 538, 161 C. C. A. 564, in which it is held that the plaintiff need not set forth with particularity his efforts to secure

corporate action desired, where the allegations show clearly that by reason of antagonistic control such efforts would have been futile.

Equity Rule 27 has no application to a bill by stockholder in which the plaintiff asks to enjoin the corporation from doing an illegal act. *General Investment Co. v. L. S. and M. S. Ry.*, 250 Fed. 160.

In *Wathen v. Jackson Oil and Refining Co.*, 235 U. S. 635, 59 L. Ed. 395, the court decides that the plaintiff failed in the bill to meet the requirements of the rule, and cite many cases at page 640.

See notes to *Fleming v. Warrior Copper Co.*, 51 L. R. A. (N.S.) 99; *Continental Securities Co. v. Belmont*, 51 L. R. A. (N.S.) 111, and *Kelly v. Thomas*, 51 L. R. A. (N.S.) 123.

See also, *Hopkin's new Federal Equity Rules*, pp. 172 to 176, and *Foster's Fed. Prac.*, 5th ed., Sec. 145.

No. 435.

Creditors' Bill Against a Corporation and its Stockholders to Enforce Statutory Liability.(1)

[Caption and introduction.]

And the plaintiffs show that the capital stock of said corporation was fixed and limited by said corporation at seven hundred and fifty thousand dollars; and that on the — of —, in the year —, and before the whole amount of the capital stock fixed and limited by said corporation had been fully paid in, and before any certificate thereof had been made and recorded as prescribed by law, the said The C. D. Co., by G. McK., its treasurer, duly authorized thereto, made and delivered to the plaintiffs three several promissory notes in writing, dated the said — day of —, one for the sum of fifty thousand dollars, the other two for fifteen thousand dollars each, and thereby, for value received, promised the plaintiffs to pay to them or their order the amount of said notes, to-wit, eighty thousand dollars, on the — day of —, in the year —, with interest from the — day of —, of the year —, copies of which notes, with the indorsements thereon, are set out in the copy of judgment hereto annexed.

And the plaintiffs further show that at the time the said The C. D. Co. made and delivered said notes to the plaintiffs, and from the time of its incorporation and organization until

the — day of —, in the year —, the said The C. D. Co. had not given notice annually, as required by the laws of the said state of —, in some newspaper printed in the county where the works of said corporation were established, to-wit, the county of E., or in any newspaper printed in any other county, of the amount of all assessments voted by the corporation and actually paid in; nor had it given notice in any newspaper of the amount of all existing debts due from said corporation.

And the plaintiffs further show that from the time of the incorporation and organization of the said The C. D. Co. to the time said corporation made and delivered said notes to the plaintiffs, and for a long time thereafter, the capital stock, fixed and limited by said corporation as aforesaid, had not been fully paid in; nor has there, from the time of its organization to the present time, been any certificate of the payment of said capital stock made and recorded by said corporation as by law provided.

And the plaintiffs further show that on, to-wit, the — day of —, in the year —, they commenced a suit against the said The C. D. Co. upon the aforesaid notes, returnable to the — court, then next to be holden at N., within and for the said county of E., on the first Monday of —, in the year —, and duly entered said suit in said court, and there prosecuted the same to judgment. And at said term of the said court, on, to-wit, the — day of —, in the year —, by consideration of the justice of said — court, judgment was rendered in said suit against said The C. D. Co. in favor of the plaintiffs for the sum of \$—, debt, and \$—, costs of suit, and execution was thereupon issued by said — court, on, to-wit, the — day of said —, against said The C. D. Co. in favor of the plaintiffs for the said sum of \$—, debt, and \$—, costs of suit; copies of which judgment, execution and officer's return upon said execution are hereto annexed.

And the plaintiffs further show that on, to-wit, the said — day of —, the day of issuing said execution, they placed for collection said execution in the hands of one A. F., a deputy sheriff, qualified to collect, serve and return said execution. And the said deputy sheriff, on, to-wit, the — day of —, made demand upon the said The C. D. Co. for the payment of the amount due to the plaintiffs; and for which judgment and execution had been rendered and issued in said suit as aforesaid.

And the plaintiffs show that the said The C. D. Co. did neglect, for the space of thirty days after said demand by said deputy sheriff, holding said execution, to exhibit to said deputy sheriff real or personal estate belonging to said corporation, subject to be taken on execution, sufficient to satisfy said execution, or any part thereof. And the said corporation has never exhibited to said deputy sheriff any estate, real or personal, from which he might satisfy said execution in whole or in part; and the said corporation has ever since neglected and refused to pay the same, or any part thereof; and the said deputy sheriff duly returned said execution into the clerk's office of said — court, at S., in said county of E., in no part satisfied; and there is now due to the plaintiffs upon said judgment, rendered upon said notes, the said sum of \$—, debt, and \$—, costs of suit, making in all \$—, with interest from the said — day of —, the day of the date of said judgment.

And the plaintiffs further show that at the time when said judgment debt was contracted, on, to-wit, the — day of —, in the year —, the day of the date of said notes, and during the time from and after the said — day of —, and before the capital stock of said corporation, fixed and limited as aforesaid, was fully paid in, and before any certificate that said capital stock had been paid in was made and recorded, as by law required, and from and after the said — day of —, and before any notice of the assessments voted by said corporation and actually paid in had been given,

in any newspaper printed in said county of E., or printed in any other county; and from and after said — day of —, and before any notice of the amount of all existing debts due from said corporation had been given in any such newspaper as by law required, and at the time when your orators commenced their suit aforesaid against the said The C. D. Co., and in which judgment aforesaid was rendered, the following named persons became, and were, stockholders in the said The C. D. Co., each holding stock therein of the amount and number of shares set against their respective names:

T. A., of L., county of M., holder of — shares, par value \$—.

E. B., of B., county of S., holder of — shares, par value \$—.

Etc., etc.

Wherefore the plaintiffs, in behalf of themselves and the aforesaid other creditors of the said The C. D. Co., bring the foregoing bill against said The C. D. Co., and the aforesaid stockholders therein, and pray that the aforesaid stockholders may be ordered and decreed to pay to the plaintiffs the amount due them as aforesaid, as fixed and determined by the judgment aforesaid, with interest from the date of said judgment, and to pay such other creditors of the said corporation as may become parties to this bill such sums as may be found due to such creditors; and that the amount of the debt due as aforesaid to the plaintiffs from said The C. D. Co., and such as may be found due to such other creditors as may become parties hereto, may be assessed upon said stockholders as law and equity may require.

And that the plaintiffs may have such orders, decrees and process as may be necessary to enforce the payment of such sums as may be assessed upon said stockholders, and may have such further and other relief in the premises as the

nature and circumstances of the case require, and as shall seem meet unto this honorable court.

X. & X.,

Solicitors and of Counsel.

A. B.

C. B.

[*Verification.*]

(1) *Essex Company v. Lawrence Machine Shop*, 10 Allen 352.

No. 436.

**Bill to Enforce Statutory Liability of a Stockholder Against
Real Estate in a Foreign Jurisdiction.(1)**

[*Caption.*]

To the Honorable Judges of the Circuit Court of the United
States, in and for the — District of —.

Plaintiff, J. R., humbly complaining, shows unto your honors that he is a citizen and resident of the state of — and that M. K., H. K., I. K. and M. K., administratrix of the estate of J. K., deceased, whom plaintiff prays may be made defendants to this his bill of complaint, are each of them citizens and residents of the state and district of —.

He further says that in a certain suit of A. B., plaintiff, against the Commercial Bank of —, a corporation created and existing under the constitution and laws of the state of —, and others, defendants, then pending in the court of common pleas of — county, in the said state of —, he was, on the — day of —, by the order and decree of said court, duly appointed and qualified receiver, with authority and direction to receive from the stockholders of the said Commercial Bank of —, the amount of individual or statutory liability from said stockholders, respectively, by reason of the insolvency of said bank.

Plaintiff further shows that the said J. M., then and for many years prior to the — day of —, was a citizen and resident of — county, state of —, and that upon the date last above set out the said J. K. departed this life, intestate,

leaving surviving him the said M. K., his widow, and said H. K. and I. K., his only children and heirs-at-law; that the said I. K. is a minor, without a statutory guardian, the other said children each being of the full age of twenty-one years.

That upon the — day of —, the said M. K. and H. K. were appointed administrators of the estate of the said J. K., deceased, by order of the county court of — county, —, and thereupon qualified as such, and undertook the administration of said estate.

That the said Commercial Bank is a corporation as aforesaid, organized under the laws of the said state of —, for the purpose of conducting a general banking business in the city of —, in said state, in which said business the said bank was engaged under and by virtue of its charter and organization as aforesaid, until the — day of —, in the year —, when it was discovered by its directors to be insolvent, and as by the constitution and laws of the state of —, it might lawfully be done, it was by its directors declared to be insolvent and unable to pay its debts and liabilities; and thereupon it made a general assignment of all of its property and assets for the benefit of its creditors, which assignment has been duly administered under the insolvency laws of the said state of —. That the said assigned assets of said bank have been converted by the assignee thereof into money, and applied under the judgments and orders of said insolvency court towards the payment of the claims of creditors of said bank; but the said assets so converted and applied were wholly insufficient for the payment of the indebtedness of said bank, and it became and was necessary to levy an assessment upon the stockholders of said bank, as authorized under and by virtue of the constitution and laws of the state of —, to pay the remaining indebtedness, and for that purpose an action was commenced and prosecuted in the court of common pleas of — county, —, in the name of A. B., on behalf of himself and other creditors, against the said bank and all the stockholders within the jurisdiction of the said

court, upon whom the process of the said court was duly served; and thereupon it was on the — day of — ascertained and decreed by said court, after a full hearing, that it was necessary to levy an assessment upon the said stockholders for the full amount of the par value of all shares held by said stockholders respectively, and judgment was rendered by said court against all the holders of stock in said bank for an assessment upon them respectively of an amount equal to the par value of the stock held by each, with interest thereon from the — day of —; and nearly all of said assessments have been paid to this complainant; and the fund so realized has been applied towards the payment of the indebtedness aforesaid of said bank.

That by reason of the aforesaid deficiency of the assets of the said bank for the payment of the debts thereof, it was and is necessary to levy an assessment upon the stockholders for the full amount of the par value of their stock in said bank, in order to pay its said indebtedness as aforesaid.

That plaintiff was likewise by said court of common pleas in said cause above referred to, duly authorized to commence and prosecute all suit, actions and legal proceedings necessary to collect the amounts of liability due from the stockholders as aforesaid, and is still acting under and by virtue of his said appointment and qualification and under said authority and orders brings this action. He files as part hereof, certified copies of the orders and decrees of the said courts of common pleas and insolvency, made in that behalf as aforesaid, and prays that the same may be read and considered as evidence on his part upon the trial of this cause.

That at the time of the failure and occurrence of the insolvency of said bank, its total indebtedness amounted to the sum of \$632,774.45, while its total assets were not sufficient to pay more than one-half of the said indebtedness; and that the total number of shares of the capital stock of said corporation at the time of its said failure consisted of 6,560 of the par value of fifty dollars per share, representing in money

\$328,000. Of these, 1,095 shares were held by persons who were and are still insolvent, leaving solvent holders of 5,465 shares subject to assessment, and representing an aggregate in money of \$273,206; wherefore it became and is a fact that if the total assessment of the full value of the stock be collected from each one of the solvent stockholders, there will not be a sufficient amount received to pay the remaining unpaid indebtedness of said bank.

That at the time of the occurrence of the insolvency and the failure of said bank, the said J. M., now deceased, was the owner and holder of 120 shares of the capital stock of said bank of the par value of \$6,000, evidenced by certificates thereof, duly issued by said bank, and then in his possession, which had been transferred to him on the stock book of said bank, upon which he was liable to assessment for the full value thereof, and his personal representative and his estate is now in like manner liable under the constitution and laws of the said state of —.

That though the said M. K. has, as stated, on the — day of —, together with the said H. K., been appointed and qualified in the — county, — court, at —, and assumed the duties of administratrix and administrator of the estate of the said J. K., deceased, and executed bond as such with M. K. and G. K. their sureties; and on the — day of —, the said administratrix and administrator filed a writing in said court, purporting to be a settlement of their accounts of their said administration, and the said H. K. tendered his resignation of his said office of administrator, which was accepted by the court, and the said M. K. was continued by the order of the said court, and assumed the sole administration of the said estate, and is still so acting.

That, though the above stated purported settlement of said administration accounts of said estate were filed as aforesaid, and on the — day of —, confirmed as such, yet the said settlement does not show, nor have said administrators filed, as by law they were required to do in said court, any inven-

tory of the personal estate of the said decedent, nor has plaintiff any knowledge of what it consists, its nature or value; there is no information in relation thereto upon the records of said court, except that the purported settlement recites that all the personal estate of the decedent which came to the hands of said administrator and administratrix has been turned over to the latter, and was then said to be in her possession.

That on or about the — day of —, he having made proof by his own affidavit in due form of law, as required by the state of —, as well as by the affidavit of H. D., his attorney, a legally competent witness, who has knowledge of the correctness of said claim of indebtedness of the estate of said decedent, J. K., as hereinbefore set forth, presented the same to M. K., administratrix of the said decedent, and demanded payment thereof from her, but the same was not paid, and still remains unpaid, no part thereof having at any time been paid. A copy of said proof and bill of the particulars thereof is filed herewith, which he prays may be taken and read as evidence on his behalf in support of said claim upon the hearing hereof.

Plaintiff makes certified copies of the orders of the said — county court appointing and qualifying said administratrix, and all others made by said court in relation thereto.

Plaintiff prays that the said administratrix be required to account for said personal estate, and to show what disposition has been made of it.

Plaintiff further says that said J. K., at the time of his death, was the owner of and seized in fee of the title to the following described real estate, to-wit, those parcels of land situated in the county of —, state of —, in the city of —, bounded as follows: [*Describe the property.*]

A copy of said deed, duly certified, is filed as part hereof, marked "B."

Plaintiff further alleges and charges that the personal property left by the said J. K., deceased, was and is not sufficient

in value to pay the debts of the decedent, and it therefore becomes necessary to sell so much of said real estate as will suffice to pay said debt to plaintiff, as receiver as aforesaid; and he prays that the amount of said personal estate now in possession of the said administratrix be applied to the payment of the amount owing to him as receiver as aforesaid of said bank, from the personal estate of the decedent; and in case the same shall not be sufficient, the balance of said indebtedness may be paid by a sale of a sufficiency of said real estate.

Plaintiff is not advised that any of the said heirs of decedent are possessed of any estate, real or personal, except that which is left to them by their father, the said J. K.

Plaintiff further shows unto your honors that the said conveyance of said real estate by the said children of the decedent, J. K., to their mother, the said M. K., administratrix as aforesaid, not having been made for a valuable consideration paid by their mother to them, and no valuable consideration therefor having been received by said grantors, the said conveyance is fraudulent as against the creditors of the said J. K., and especially as to the complainant herein suing in his character as receiver as aforesaid, of the assets of the said Commercial Bank, and owing to the said fraud, the title to the said real estate has not passed from the said children or become vested in the said grantee, the said M. K.

Plaintiff avers that under the law of —, where said real estate is situated, and where the said J. K. resided at the time of his death, and for many years theretofore, and where his wife and children resided with him, and have continued to reside in said state since his death, the said conveyance to M. K. is fraudulent and void as to creditors.

Plaintiff further avers that the interest or share of the said I. K., the minor daughter of the said J. M., remains intact, and the title by descent to her remains undivested by her, and is subject to the claim of plaintiff, as in this bill set forth.

Plaintiff pleads and relies upon the statute passed by the general assembly of —, and approved on the — day of —, and upon the fraud committed by the said children against him as a creditor of said J. K., in the attempted conveyance of the said real estate by said H. K. and M. K., and he prays that a sufficiency of said real estate, after exhausting the personalty in the hands of the administratrix, if any, may be by your honors decreed to be sold for the payment of said indebtedness of the intestate, as hereinbefore set forth.

Plaintiff does not know of any other debts owing by the decedent at his death and now unpaid.

Wherefore plaintiff says that the said M. K., as widow of the decedent, will have a claim as doweress upon the real estate of said decedent, and also a claim for homestead therein, of \$1,000 in value; but she may not claim both dower and homestead in said estate.

If dower is claimed by her, and is decreed to her, and is of greater value than \$1,000, the excess above that value should be deducted from the allowance to said widow.

Plaintiff prays that M. K. may be made a party defendant herein, in her individual right as well as administratrix of the said decedent, and that she be required to answer in relation thereto.

Wherefore plaintiff prays that he may have the process of the court, a subpoena in chancery issued to him against the said M. K., administratrix of said J. K., deceased, and in her individual right as aforesaid, and H. K., M. K. and I. K., the last named being a minor and without a statutory guardian.

And plaintiff prays that the said defendants may be required to answer this, his bill of complaint, and upon final hearing he may have such decree for proper relief as the nature of the case may require, and defendants, the administratrix and heirs of the decedent, may be required to pay the necessary assessment upon the capital stock in said bank, owned by the intestate in said Commercial Bank of —, as

in this bill set out; that the assets of the estate of said J. K. be applied to the payment of the same so far as necessary; that the court proceed to administer said estate, if necessary, to secure the payment of said claim; and that he may have all and every manner of equitable relief as the nature of his case demands.

X. & X.,

Solicitors for Complainant.

State of —, County of —, ss.:

J. R., being first duly sworn, says that he is the complainant in the foregoing bill, and that the statements and allegations therein contained are true, except such as are stated upon information and belief, which latter affiant believes to be true.

J. R.

Sworn to before me and subscribed in my presence this — day of —, A. D. —.

J. H.,

Notary Public,

— County, —.

(1) Taken from the record in *Kirtley v. Holmes*, 46 C. C. A. 102, 107 Fed. 1. See also *Burr v. Smith*, 113 Fed. 858; *Ins. Co. v. Schulty*, 25 C. C. A. 453, 80 Fed. 337; *Hale v. Harden*, 37 C. C. A. 240, 95 Fed. 747, as to jurisdiction to entertain such suits.

No. 437.

For a Dissolution of a Partnership.

[Caption and introduction.]

That in or about the month of —, plaintiff entered into an agreement with C. D., of, etc., and E. F., of, etc., the defendants hereinafter named, to form a partnership with them, in the business of auctioneers, which agreement was reduced to writing, and signed by plaintiff and the said defendants, and was in the words and figures, or to the purport and effect, following; that is to say [*stating the same*], as in and by the said agreement, reference being thereunto had, will appear.

And plaintiff shows that the said co-partnership business was entered upon and has ever since continued to be carried on by plaintiff and the said defendants, in pursuance of and under the aforesaid agreement, no articles or other instrument having ever been prepared and executed between them.

That having much reason to be dissatisfied with the conduct of the said C. D., and being desirous therefore to dissolve the said partnership, plaintiff, on or about ———, caused a notice in writing, signed by himself, to be delivered to the said C. D. and E. F., in the words and figures of the purport and effect following, that is to say: "In conformity," etc., etc.; as in and by such written notice now in the custody or power of the said defendants, or one of them, when produced, will appear.

That the said C. D. has, from time to time since the commencement of the said partnership, applied to his own use, from the receipts and profits of the said business, very large sums of money, greatly exceeding the proportion thereof to which he was entitled, and in order to conceal the same the said C. D., who has always had the management of the said co-partnership books, has never once balanced the said books.

That having, in the beginning of the year ———, discovered that the said C. D. was greatly indebted to the said co-partnership, by reason of his application of the partnership moneys to his own use, plaintiff, in order to form some check upon the conduct of the said C. D., requested that he would pay all co-partnership moneys which he received into their bankers, and would draw for such sums as he had occasion for, but the said C. D. has wholly disregarded such request, and has continued to apply the partnership moneys received by him to his own use, without paying the same into the bankers, and has also taken to his own use moneys received by the clerks, and has by such means greatly increased his debt to the partnership, without affording to plaintiff and the said E. F. any adequate means of ascertaining the true state of his accounts.

That, by himself and his agents, from time to time, plaintiff has applied to the said C. D., and has requested him to come to a full and fair account in respect of the said co-partnership transactions, with which just and reasonable requests plaintiff well hoped that the said defendant would have complied, as in justice and equity he ought to have done. But said defendant, C. D., absolutely refuses so to do, and he at times pretends that he has not received and applied to his own use more than his due proportion of the partnership profits. Whereas plaintiff charges to the contrary thereof to be the truth, and so it would appear if the said defendant would set forth a full and true account of all and every his receipts and payments, in respect of the said partnership transactions, and of the gains and profits which have been made in each year since the commencement of the said partnership.

Plaintiff charges that the said C. D. has in fact received the sum of ——(1) dollars, and upwards, beyond his due proportion of the partnership profits, and that he is nevertheless proceeding to collect in the partnership debts and moneys, whereby the balance due from him will be increased, to the great loss and injury of plaintiff and the said E. F. And plaintiff charges that the said C. D. ought therefore to be restrained by the order and injunction of this honorable court from collecting and receiving any of the said partnership debts and moneys; and plaintiff further charges that the said E. F. refuses to join in this suit.

Plaintiff prays that the said defendants may answer the premises; that the said co-partnership may be declared void, and that an account may be taken of all and every the said co-partnership dealings and transactions from the time of the commencement thereof; and also an account of the moneys received and paid by plaintiff and the said defendants respectively in regard thereto; and that the said defendants may be decreed to pay to plaintiff what, if anything, shall, upon the taking of the said accounts, appear to be due to him, plaintiff being ready and willing, and hereby offering, to pay to the

said defendants, or either of them, what, if anything, shall, upon the taking of the said accounts, appear to be due to them, or either of them, from plaintiff; and that in the meantime the said defendant, C. D., may be restrained by the order and injunction of this honorable court from collecting or receiving the partnership debts or other moneys. [*And for further relief, etc., and for injunction against C. D.*]

(1) Must exceed \$3,000.00, exclusive of interest and costs; see Judicial Code, Sec. 24.

No. 438.

**For an Account of Partnership Dealings after a Dissolution,
and for a Receiver.(1)**

[*Caption and introduction.*]

That on or about —, plaintiff, A. B., and C. D., of, etc., the defendant hereinafter named, entered into co-partnership together as attorneys and solicitors, plaintiff engaging to bring into the business the sum of — dollars, and being to receive one-third part or share of the profits; and the said C. D. engaging to bring into the business the sum of — dollars, and being to receive two-third parts or shares of the said profits.

Plaintiff accordingly brought into the business the said sum of — dollars, and the said co-partnership was carried on and continued until the — day of —, when the same was dissolved by mutual consent, and the usual advertisement of such dissolution was inserted in the —, a paper published at —, once a week for the period of — weeks.

The said co-partnership business was carried on in an office building known as No. —, — street, which building, at the time of the dissolution of the said co-partnership, was held by the said defendant and plaintiff under an agreement for a lease for — years from —, and it was verbally agreed between the said defendant and plaintiff that the said defendant should take to himself the benefit of the said agree-

ment, accounting to plaintiff for his proportion of the value thereof, and in pursuance of such agreement the said defendant has ever since continued, and now is in possession of the said house or building.

No settlement of the said co-partnership accounts has ever been made, and since the said dissolution plaintiff has repeatedly applied to the said defendant to come to a final settlement with respect thereto. And plaintiff well hoped that the said defendant would have complied with such reasonable request, as in justice and equity he ought to have done. But now the said defendant absolutely refuses so to do. And plaintiff charges that the said defendant has possessed himself of the said co-partnership books, and has refused to permit plaintiff to inspect the same, and has also refused to render to plaintiff any account of the co-partnership moneys received by him. And plaintiff charges that he has, since the said dissolution, paid the sum of — dollars in respect to the co-partnership debts.

And plaintiff further charges that upon a true and just settlement of said accounts it would appear that a considerable balance is due from the said defendant to plaintiff in respect of their said co-partnership dealings, which said sum or balance is at least the sum of — dollars; but nevertheless the said defendant is proceeding to collect in the said co-partnership debts, and to apply the same to his own use, which the said defendant is enabled to do by means of his possession of the books of account as aforesaid. And plaintiff charges that the said defendant ought to be restrained by the injunction of this honorable court from collecting in the said debts, and that some proper person ought to be appointed by this honorable court for that purpose.

Plaintiff prays that an account may be taken of all and every the said late co-partnership dealings and transactions until the time of the expiration thereof; and that the said C. D. may be directed to pay to plaintiff what, if anything, shall upon such account appear to be due from him, plaintiff

being ready and willing, and hereby offering, to pay to the said C. D. what, if anything, shall appear to be due to him from the said joint concern. And that some proper person may be appointed to receive and collect all moneys which may be coming to the credit of the said late co-partnership. And that the said C. D. may in the meantime be restrained by the order and injunction of this honorable court from collecting or receiving any of the debts due and owing thereto. [*And for further relief.*]

(1) Equity has practically exclusive jurisdiction in proceedings for an account and settlement of partnership affairs, including suits for an account and settlement between the partners themselves, suits for a settlement of firm affairs between the survivors and the personal representatives of a deceased partner, and suits to settle the affairs of an insolvent firm, and to adjust the demands of a firm's creditors, and the creditors of the individual partner. The equitable jurisdiction over partnerships is a necessary outgrowth of the jurisdiction over accounting, and the remedies of dissolution, injunction, and receivership are incidents necessary to a final and complete relief. Pom. Eq. Jur., Sec. 1421. Equity has jurisdiction of matters of account where the parties stand in a fiduciary relation to each other, and the account is so complicated that it can not be conveniently taken in a court of law. *Pacific R. R. of Mo. v. Atlantic & Pacific R. R. Co.*, 20 Fed. 277. Thus complicated accounts preliminary to a distribution of assets or division of profits are of equity cognizance. *John Crossley Sons v. New Orleans*, 20 Fed. 352. Jurisdiction is conferred upon federal courts in such case under the conditions included in Sec. 24 of the Judicial Code.

No. 439.

Foreclosure of Mortgage.(1)

[*Caption and introduction.*]

That heretofore, to-wit, on the — day of —, in the year —, the said C. D., defendant, being indebted unto plaintiff in the sum of —(2), current money, and intending to secure the payment thereof unto him, did, by his deed of that date, convey unto plaintiff and his heirs certain real estate lying in said county, and particularly described in said deed, to which said deed there is a condition annexed that it be void on payment by said — to plaintiff of the aforesaid

sum of money, with interest thereon from —, on or before the — day of —, in the year —, as by a copy of said deed filed herewith as a part of this bill will more fully appear.

And plaintiff charges that no part of the aforesaid sum of money, or the interest accruing thereon, has been paid, but the same is still owing to him, although the time limited for the payment thereof by the condition aforesaid has passed, and payment thereof has been duly demanded of the said —(3).

Wherefore plaintiff prays that the premises aforesaid, or so much thereof as may be necessary, may be sold for payment of his claim, with interest as aforesaid, and that he may have such further or other relief as his case may require.

R. X.,

Solicitor for Plaintiff.

And plaintiff admits that the interest, which accrued prior to and on the —, has been paid to him by the said —; and he also admits the receipt of the further sum of —, which was paid to him on the — for further interest, and in part of the principal debt secured by said mortgage. But he insists that the residue of said debt, with interest accrued thereon since the last-mentioned day, is still due and owing to him.

[Or as follows:]

And plaintiff admits that sundry payments have been made to him by the said —, on account of said mortgage, as is more particularly admitted in the statement marked Exhibit B, and filed as part of this bill; but by said statement it appears, and so he insists, there is yet due to him on said mortgage a balance of —, besides interest thereon from the — day of —.

(1) Equity deals primarily and almost exclusively with the mortgagee. His interest in the mortgage is no longer an estate but a mere lien, an appendage of the debt; personal assets; a thing in action as signable with the debt but incapable of being separated from the debt and trans-

ferred by itself. He has no legal remedy on the mortgage, and can enforce the lien against the land only in equity, as this is the primary object of a foreclosure suit, which does not vest the title in the mortgagee, although it extinguishes that of the mortgagor by transferring it to the purchaser at the judicial sale. Pom. Eq. Jur., Sec. 1190. Milf. & Tyl. Pl. & Pr., p. 511.

(2) Must exceed \$3,000 to give district court jurisdiction. Sec. 24, Judicial Code.

(3) If payments have been made on account, they should be admitted in the bill, either specially or by referring to some statement or account accompanying the bill as in the following forms.

No. 440.

Bill to Foreclose a Railway Mortgage.

[Caption.]

To the Honorable Judge of the District Court of the United States for the District of Kansas, sitting in Equity:

The Mercantile Trust Company, a corporation created by and existing under the laws of the state of New York, brings this its bill of complaint against the Missouri, Kansas and Texas Railway Company, a corporation created and existing under and by virtue of the laws of the state of Kansas, and the Missouri Pacific Railway Company, a corporation existing under the laws of said state and of the state of Missouri, as hereinafter set forth.

Plaintiff says that the Mercantile Trust Company is a corporation created by and existing under the laws of the state of New York, and having its principal office for the transaction of its business in the city of New York in said state of New York, and is a citizen of said state of New York.

On and prior to the 1st day of December, 1880, there existed a railroad corporation known as the Missouri, Kansas & Texas Railway Company, which was created a body corporate by the consolidation, amalgamation and purchase of the property and franchises of certain other corporations, created by and existing under and by virtue of the laws of the states of Kansas and Missouri, and possessed of and en-

dowed with powers, rights, privileges, franchises and immunities granted by the laws of said states, and also by certain acts of the Congress of the United States, and acts of the legislature of the state of Texas. That said Missouri, Kansas & Texas Railway Company owned and operated a number of lines of railway situate in the states of Missouri, Kansas and Texas, and in the Indian Territory, with branches extending in various directions within such states and territory, and then had and still has its principal office for the transaction of its business in the city of Parsons in the said state of Kansas, and was and is a citizen of said state of Kansas.

Heretofore and on or about the 1st day of December, 1880, the said Missouri, Kansas & Texas Railway Company, being thereunto duly authorized, by its president and secretary and under its corporate seal, made and executed its forty-five thousand bonds, known as general consolidated mortgage bonds, numbered consecutively from 1 to 45,000, both numbers inclusive, each for the sum of \$1,000, bearing date on said 1st of December, 1880, by the terms of which bonds the said company promised to pay to the holder of each bond, or in case the same should be registered, then to the registered owner thereof, the sum of \$1,000, United States gold coin, of or equal to the then standard of value, at its financial agency in the city of New York, forty years after the date of said bond, and also interest thereon at the rate of six per centum per annum, payable semi-annually, in like gold coin, on the first days of June and December in each year, on the presentation and surrender of the respective interest coupons annexed to said bonds at the financial agency aforesaid.

On or about said 1st day of December, 1880, the said Missouri, Kansas & Texas Railway Company, being the owner of or having an interest in, by way of lease or otherwise, and being in possession of, the lines of railway and property therein described, did, in order to secure the payment of the principal and interest of the said issue of general consolidated

bonds, as the same should mature, make, execute and deliver to plaintiff a certain deed or indenture of trust or mortgage, known as its general consolidated mortgage, whereby it conveyed to plaintiff as trustee, and its lawful successor or successors in the trust thereby created, and assigns, all the right of way and railroad and other property of the said Missouri, Kansas & Texas Railway Company particularly described in said mortgage, with the exceptions therein noted, which property is by said mortgage more particularly described as follows, to-wit: [*Here follows description.*]

It was expressly provided in and by said general consolidated mortgage that while the bonds therein stated, issued under and by virtue of the mortgages made by the Union Pacific Railway Company, Southern Branch, on the 14th of November, 1868, to Russell Sage and N. A. Cowdrey, trustees, and in the mortgage made by the said Missouri, Kansas and Texas Railway Company to the said Union Trust Company, dated February 1, 1871, were outstanding and unpaid, the lands in said mortgages described, or any part thereof, might be sold in accordance with the provisions in said mortgages contained and the proceeds applied to the payment of the bonds secured thereby, the same as if the general consolidated mortgage had not been made. But that when the bonds secured by said two mortgages had been fully paid, retired or cancelled, and the mortgages were satisfied, then and in such case all the provisions of the ninth article of the mortgage of February 1, 1871, should be considered and taken to be a part of the general consolidated mortgage, as fully to all intents and purposes as if it had been incorporated therein, substituting, however, plaintiff or its successor in place of said Union Trust Company.

After said mortgage was made the Missouri, Kansas and Texas Railway Company did construct and acquire certain lines of railroad in the state of Texas, and did expend and use in and about the construction and acquisition thereof large amounts of bonds secured by said general consolidated mort-

gage and proceeds of the sales of such bonds, and that the lines of railroad so constructed and acquired, and which are hereinafter more particularly mentioned, thereupon became and now are subject to the lien of the said last-mentioned mortgage.

A true and correct copy of the said general consolidated mortgage is annexed to this bill of complaint and marked Exhibit "A," and plaintiff prays that the same may be taken as a part of this bill as fully as if embodied herein. That the execution of said general consolidated mortgage to secure the payment of said issue of bonds was duly authorized by the board of directors of the said railway company and was further authorized by the stockholders of said railway company at two several meetings held respectively on the 19th of May, 1880, and the 17th day of November, 1880. That said general consolidated mortgage was duly executed, acknowledged and recorded as required by law.

It was provided and covenanted in by said general consolidated mortgage that of the bonds authorized to be issued as aforesaid, and when issued to be secured by the provisions of said mortgage, bonds numbered from 1 to 18,217, both numbers inclusive, should be certified by the trustee thereunder, or its successor or successors in said trust, only in exchange for outstanding issues of bonds under prior mortgages which were a lien upon the said railroad of the said party of the first part thereto, or upon some part thereof.

Of the bonds so authorized to be issued as aforesaid and numbered from 1 to 18,217, both numbers inclusive, no bonds have been certified and delivered by plaintiff as trustee under said mortgage, and none of such bonds are now actually issued and outstanding.

In and by section sixth of said general consolidated mortgage it was provided that bonds numbered from 18,218 to 28,217, both numbers inclusive, amounting in the aggregate to \$10,000,000, were set apart and reserved for retiring upon such plan and terms as should be adopted by the board of

directors of the said railway company, the income bonds issued or which might be issued under the mortgage of April 1, 1876, made by said railway company to the Union Trust Company as trustee, and the coupons and scrip certificates representing interest accrued upon such bonds.

By the terms of a resolution of the board of directors of the said railway company, passed in pursuance of the provisions of said section sixth, it was provided that the bonds issued in exchange for such income bonds, coupons and scrip certificates should bear interest at and after the rate of five per cent. per annum.

Of the bonds so authorized to be issued by said section sixth, bonds numbered from 18,218 to 27,591, both numbers inclusive, amounting in the aggregate to \$9,374,000, have been actually issued and are now outstanding in the hands of *bona fide* holders thereof.

By the terms of said general consolidated mortgage it was provided that bonds numbered from 28,218 to 30,217, both numbers inclusive, amounting in the aggregate to \$2,000,000, might be issued and used for the purpose of providing for new equipment and rolling stock; further, that the remaining bonds numbered from 30,218 to 45,000, both numbers inclusive, were to be issued and used in securing the construction and acquisition of extensions and branches of said railway in the states of Missouri, Kansas, Texas and Indian Territory, and elsewhere; and further, that the said railway company might, upon the conditions therein set forth, issue bonds to be secured by said mortgage, in addition to the \$45,000,000 of bonds provided for therein, at the rate per mile specified in said mortgage.

By virtue of the covenants and provisions of said general consolidated mortgage, and under the authority therein granted, the said railway company has made, issued, executed and delivered, and plaintiff as trustee under said mortgage has certified and delivered, bonds numbered from 28,218 to 46,496, both numbers inclusive, amounting in the aggregate

to \$18,278,000, all of which are now actually outstanding in hands of *bona fide* holders thereof.

In accordance with the action in that regard contemplated by said general consolidated mortgage, and in order to better carry out the intention thereof and the intention of the provisions therein contained, the said railway company has made, executed and delivered to plaintiff, as trustee, certain supplemental mortgages as follows:

First. A mortgage dated the 1st day of March, 1882, wherein and whereby it conveyed to plaintiff, upon the conditions and covenants contained in said general consolidated mortgage, the property in said supplemental mortgage described.

A true and correct copy of said supplemental mortgage is annexed to this bill of complaint and marked Exhibit "B," and plaintiff prays that the same may be taken as a part of this bill as fully as if embodied herein.

Second. A mortgage dated the 1st day of December, 1886, wherein and whereby it conveyed to plaintiff, upon the conditions and covenants contained in said general consolidated mortgage, the property in said supplemental mortgage described.

A true and correct copy of said supplemental mortgage is annexed to this bill of complaint and marked Exhibit "C," and plaintiff prays that the same may be taken as a part of this bill as fully as if embodied herein.

Third. A mortgage dated the 1st day of December, 1887, wherein and whereby it conveyed to plaintiff, upon the conditions and covenants contained in said general consolidated mortgage, the property in said supplemental mortgage described.

A true and correct copy of said supplemental mortgage is annexed to this bill of complaint and marked Exhibit "D," and plaintiff prays that the same may be taken as a part of this bill as fully as if embodied herein.

And plaintiff further shows that said railway company, in and by said general consolidated mortgage, expressly granted, bargained, sold, assigned, transferred and conveyed to plaintiff, in addition to the property herein particularly described, all and singular its railroad and branches, to be constructed or acquired under its existing charters, constituent acts or any amendments thereof, and also including in the grant and conveyance therein and thereby made all roads then owned by it or all that it might thereafter own, whether built by itself or acquired by purchase, consolidation or otherwise, and also all leasehold rights which might be acquired in other roads, and all rights acquired, or to be acquired, in other roads under contract for the sole or joint use thereof by the said railway company, and that the said railway company thereby agreed to execute and deliver to plaintiff, as trustee, or its successor or successors, any further reasonable and necessary trust deed, to bring in and make subject to the conditions of said mortgage every such extended or future acquired road, and every other land and property, real or personal, that might thereafter be acquired by it, for the purpose, and with the intent, of securing the payment of the bonds, composing every increased issue, as well as the bonds therein described, equally and alike upon the property of the said railway company, and the interest due, and to grow due thereon, in the same manner as if said bonds had been originally secured by one and the same indenture.

Said defendant, the Missouri, Kansas and Texas Railway Company, since the execution of the said mortgage, has acquired, as absolute owner thereof, ninety-seven thousand, two hundred and eighty-four shares of the capital stock of the International and Great Northern Railroad Company, a corporation organized and existing under the laws of the state of Texas.

On or about the 1st day of June, 1881, the said International and Great Northern Railroad Company, being thereto duly authorized, made, executed and delivered to the de-

fendant, the Missouri, Kansas and Texas Railway Company, a certain indenture in the nature of a lease, wherein and whereby it leased to the said Missouri, Kansas and Texas Railway Company all its property, the railroad and branches of the said International and Great Northern Railway Company in the state of Texas as therein particularly described, to which said indenture of lease or a copy thereof, when produced, plaintiff begs leave to refer for the contents thereof, as fully as if the same had been embodied and made part of this bill.

Plaintiff is informed and believes that by the intention and operation of the terms and covenants contained in said general consolidated mortgage the said shares of the capital stock of the said International & Great Northern Railway Company, and all right, title, interest, claim, property or possession to the said Missouri, Kansas & Texas Railway Company acquired in, under and by virtue of the ownership of said shares of the capital stock, and in, under and by virtue of said indenture of lease dated the 1st day of June, 1881, immediately became and was and continued to be subject to the lien of said general consolidated mortgage, and became and was a part of the property which was pledged by operation of said general consolidated mortgage with plaintiff, as a further security for the payment of the principal and interest of the issue of bonds thereby secured.

Said Missouri, Kansas & Texas Railway Company, since the date of the said general consolidated mortgage, has acquired by purchase, lease, or contract in the nature of lease, or by construction or otherwise, divers other lines of railway and other appurtenant property, situated in the state of Texas and the Indian Territory, which said lines of railway have become and now are subject to the lien of said mortgage as a first and paramount charge or incumbrance, and which said lines are situated and extend substantially as follows, to-wit: *[Here follows statement.]*

In and by the terms of the resolution of the board of directors of the said defendant, the Missouri, Kansas & Texas Railway Company, hereinabove referred to, and under and by virtue of all the bonds issued under said general consolidated mortgage, bearing interest at five per cent. per annum and issued in exchange for income bonds, scrip and coupon, it was further provided that all the income bonds received in exchange for the new five per cent. bonds and the coupons and scrip so received in exchange for five per cent. bonds should be deposited with plaintiff as trustee and held uncanceled as security for the new bonds until all the income bonds had been retired.

Under and by virtue of the terms of said resolution plaintiff has received and now holds uncanceled for the security of the new bonds, until all the income bonds have been exchanged, — dollars in par of said income bonds with coupons thereon from and after the coupon dated —, and coupons and scrip certificates detached from said bonds to the amount of — dollars.

Certain portions of the railroad owned by said railway company were at the time of the execution and delivery of said general consolidated mortgage incumbered by one or more mortgages or deeds of trust, made, executed and delivered by the defendant railway corporation, or by the respective corporations which owned said lines or portions of said railroad, prior to the time of the acquisition thereof by said Missouri, Kansas & Texas Railway Company.

That the mortgages or deeds of trust which at the time of the execution and delivery of said general consolidated mortgage were liens upon portions of the railway and equipment conveyed thereby are substantially as follows: [*Here follows statement.*]

On or about the 1st day of December, 1880, by an indenture or agreement dated on that day, made between the said Missouri, Kansas & Texas Railway Company and the Missouri Pacific Railway Company, said Missouri, Kansas &

Texas Railway Company leased, demised and to farmletted unto the Missouri Pacific Railway Company its line of railway. [*Here follows enumeration.*]

In and by the terms of said lease it was made expressly subject and inferior to the lien of the existing mortgages upon the property of said railway company, and especially to the lien of the general consolidated mortgage executed as aforesaid by the Missouri, Kansas & Texas Railway Company to plaintiff as trustee.

Said lease was intended to and by its terms did extend to and cover, subject as aforesaid to the lien of the mortgages executed by the Missouri, Kansas & Texas Railway Company, any extensions or further constructed railway of said Missouri, Kansas & Texas Railway Company.

Plaintiff further says that the said Missouri Pacific Railway Company has, or claims to have, by virtue of said lease, some claim in and to or lien upon the railway of said Missouri, Kansas & Texas Railway Company, which lien or claim, if any it has, is subject and inferior to the lien of the general consolidated mortgage so as aforesaid executed and delivered to plaintiff.

That on the 1st day of June, 1888, there became due and payable and accruing upon the bonds secured by said general consolidated mortgage, and then actually outstanding, the semi-annual installment of interest, evidenced by the coupons attached to said bonds, amounting to the sum of \$771,645. That default was made in the payment of the interest on said bonds and said installment of interest accruing on said bonds as aforesaid. That the said Missouri, Kansas & Texas Railway Company wholly failed, omitted and refused to pay the said installment of interest and to pay the interest mentioned and provided for in the said coupons due on said last-mentioned day, or upon any of them, but therein wholly made default; that a large number of said coupons, representing interest due and payable upon the said 1st day of June, 1886, were on that day actually presented for payment at the place

where the same were and are payable, to-wit, at the financial agency of the said Missouri, Kansas & Texas Railway Company in the city of New York, and payment thereof was demanded and refused. That on said 1st day of June said railway company also made default in payment of interest then due on bonds secured by mortgage hereinbefore mentioned, known as the Tebo & Neosho mortgage, and which constitutes a lien on part of the property covered by said general consolidated mortgage.

That the holders of a large amount in value of said general consolidated mortgage bonds now actually outstanding have in writing requested plaintiff to enforce the remedies provided in said mortgage or deed of trust.

Plaintiff is informed and believes that said railway company is insolvent and unable to pay its floating debt and current and presently accruing indebtedness, and the taxes which have been levied and assessed upon the property of said railway company by the municipal and state authorities, or some of them, having authority to levy and assess such taxes, and that some portion at least of the property of said railway company covered by said mortgage has been advertised for sale as required by law in order to meet the payment of such taxes so levied and assessed upon its property and in default.

Plaintiff is informed and believes that there will presently become due a large amount on account of wages, labor and current expenses of said railway company, which the said railway company is wholly unable to pay, and that the mortgaged property is insufficient and inadequate security for the payment of the outstanding bonds secured by said general consolidated mortgage after providing for the payment of liens prior thereto and of preferred claims.

That there is great danger that the property of said defendant railway company, or some part of it, may be sold in order to pay the taxes so levied and assessed upon it, and which are now in default, or that judgments may be recovered against it for the floating indebtedness now due or which will shortly

become due, and that the property of said railway company may be sold under such judgments so to be recovered as aforesaid, and that the property and lines of said Missouri, Kansas & Texas Railway Company may be separated and broken up and the earning capacity of said lines destroyed or greatly impaired by the contests of creditors having conflicting claims.

No proceedings at law have been had, nor any suit or action commenced, by or on behalf of plaintiff, or any holder of any of the bonds of the said company, secured by the mortgage aforesaid, for any interest unpaid or accrued thereon, except only this action.

In consideration whereof, and for as much as plaintiff is remediless in the premises, at and by the strict rules of the common law, and is only relievable in a court of equity, where matters of this kind are properly recognizable and relievable.

Plaintiff therefore prays the aid of this honorable court, and that the said mortgage or deed of trust may be decreed to be a lien upon all the property, real, personal or mixed, rights, franchises, lands, land grants, titles, railroads, branches and extensions of the said Missouri, Kansas & Texas Railway Company, described in the said mortgage or deed of trust, within the jurisdiction of this honorable court, and that the said Missouri, Kansas & Texas Railway Company may be decreed to pay unto plaintiff and the other bondholders under aforesaid mortgage or deed of trust all arrears of interest now due, or that may hereafter become due and payable upon said bonds, together with all the costs and expenses in this behalf incurred and expended. And, in default thereof, that the said defendants above named, and all persons claiming under them or either of them, may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to the said mortgaged premises, and every part and parcel thereof, and that all and singular the said mortgaged premises, within the jurisdiction of this honorable court, with

the appurtenances, property and effects, rights and immunities and franchises in the said mortgage mentioned, may be sold under a decree of this honorable court, and that out of the money arising from the sale thereof, after deducting from the proceeds of any such sale just allowance for all disbursements and expenses of the said sale, including attorneys' and counsel fees, and the reasonable charges of plaintiff for services rendered as trustee and for all expenses incurred by it in the premises, and all payments which may be made for taxes or assessments on the said premises, or any part thereof, to apply the said proceeds to the payment of the principal of such of the aforesaid bonds as may be at that time unpaid, whether or not the same shall previously have become due, and of the interest which shall at that time have accrued on the said principal and be unpaid, without discrimination or preference, ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest.

Plaintiff further prays that an account may be taken of the bonds secured by the said general consolidated mortgage, and of the amount due on said bonds for principal and interest, or either, and the names of the lawful holders thereof may be ascertained.

Plaintiff further prays that a receiver may be appointed according to the course and practice of this court, with the usual powers of receivers in like cases of all the property, equitable interest, things in action, effects, money, receipts and earnings, rights, privileges, franchises and immunities of the said railway company, and of all other property included in and covered by the said mortgage within the jurisdiction of this honorable court, and that the defendants be decreed to make such transfer or conveyances to such receiver, and to the purchasers of said property at any sale as aforesaid, as may be necessary and proper to put them or either of them in possession and control of said property.

Plaintiff further prays that a writ of injunction issuing out of and under the seal of this honorable court, or issued by

one of your honors, according to the form of the statute in such case made and provided, directing, commanding, enjoining and restraining the said defendants, and each and every one of them, from interfering with, transferring, selling and disposing of any of the property mentioned in and covered by the said mortgage, or from taking possession of, levying upon or attempting to sell, either by judicial process or otherwise, any portion of the property embraced in or covered by the said mortgage; and that plaintiff may have such further or other relief in the premises as the nature of the circumstances of this case may require and to this honorable court shall seem meet.

And it may please your honors to grant unto plaintiff a writ of injunction, issuing out of and under the seal of this honorable court, or issued by one of your honors, according to the form of the statute in such case made and provided, directing, commanding, enjoining and restraining the said defendants, and each and every one of them, from interfering with, transferring, selling or disposing of any of the property mentioned in or covered by the said mortgage, or from taking possession of, levying upon or attempting to sell, either by judicial process or otherwise, any portion of the property embraced in or covered by the said mortgage.

And as to the said Missouri Pacific Railway Company, who is properly a party defendant to this bill of complaint, and who is a citizen of the state of Missouri, and who may be out of the jurisdiction of this court, plaintiff prays that process may be issued to make it party if it should come within such jurisdiction, or that if it should not come within such jurisdiction, such proceedings may be had in regard to such defendant, by publication or otherwise, to conclude it in this behalf as may be authorized by and be according to the form of the statutes in such case made and provided.

X. & X.,

Solicitors for Complainant.

United States of America,
— District of —, ss.

E. L., being duly sworn, says that he is the vice-president of the Mercantile Trust Company, the complainant in the foregoing bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts, are true, and as far as they relate to the acts of others he believes them to be true.

That in regard to all matters and things in the foregoing bill of complaint alleged which are not within the personal knowledge of this deponent the deponent has been fully informed and he believes that the same are true.

E. L.

Sworn to before me this — day of —.

[Seal.]

H. P.,

U. S. Commissioner for the
— District of —.

(1) Taken from the record in *Mercantile Trust Co. v. M. K. & T. Ry.* pending in the Circuit Court of the United States for the District of Kansas.

As to bills for foreclosing mortgages see note to *Seattle, etc., R. R. Co. v. Union Trust Co.*, 24 C. C. A. 523; *Compton v. R. R. Co.*, 15 C. C. A. 397, 68 Fed. 263; *Toledo, St. L. & K. C. R. R. Co. v. Continental Trust Co.*, 36 C. C. A. 155, 95 Fed. 497.

No. 441.

**To Have Goods Redelivered, Which Have Been Deposited as
a Security for Money Lent.**

[Caption and introduction.]

That plaintiff, having occasion for a sum of money for the purpose of his business, made application to C. D., of, etc., the defendant herein, to lend him the same, and thereupon the said C. D., on or about —, advanced and lent to plaintiff the sum of — dollars, and in order to secure the repayment thereof with interest, plaintiff deposited with the said

defendant [*here insert a description of the goods*], which were of the value of — dollars, and upwards, and at the same time executed and delivered to the said defendant a bill of sale of the said goods so deposited with him; but it was not meant and intended thereby, either by plaintiff or the said defendant, that the said transaction should amount to an absolute sale of the said goods to the said defendant, but it was expressly agreed between plaintiff and the said defendant that plaintiff should, nevertheless, be at liberty to redeem the same.

That being desirous to redeem the said goods, plaintiff has repeatedly applied to the said C. D., and has offered to repay him the said sum of — dollars, with lawful interest thereon, on having the said goods redelivered to him, with which just and reasonable requests plaintiff hoped that the said C. D. would have complied, as in justice and equity he ought to have done.

Plaintiff prays that the defendant may answer the premises, and that an account may be taken of what is due to the said defendant for principal and interest in respect of the said loan of — dollars, and that upon payment thereof by plaintiff the said defendant may be decreed to deliver over to him the said goods so deposited with him as aforesaid.

No. 442.

**To Redeem by Purchaser of an Equity of Redemption from
the Assignee in Insolvency of the Mortgagor.**

[*Caption and introduction.*]

That one S. H., of N., in said county of W., and state of —, on or about the — day of —, was seized in fee simple of, or otherwise well entitled to, certain real estate situated in said N., particularly described in certain deeds of conveyance of the same to said S. H.—one from J. F. and S. W., dated —, and one from J. E., dated —, recorded in the registry of deeds for the county of W., book 242, page 32; also a deed from J. E. to said S. H., dated —, recorded

in said registry of deeds, book 248, page 457, copies of which deeds are hereunto annexed, and made a part of this bill, and marked —.

And plaintiff further shows that the said S. H., on or about said — day of —, made a conveyance of said premises, by way of mortgage, to one H. M., of B., in the county of S., and commonwealth of Massachusetts, to secure the repayment of a sum of money, with interest then due from the said S. H. to the said H. M.; and that subsequently, and on or about the — day of —, the said H. M. transferred and assigned all his interest in said mortgage deed, and in the premises therein described, and in the debt thereby secured, to the defendant. Copies of said mortgage deed, and of the assignment thereof, are hereunto annexed, marked —, and made a part of this bill.

That after the making of the said transfer, and on the — day of —, the said defendant entered into the possession of the said mortgaged premises, or into the receipt of the rents and profits thereof, and has ever since continued in such possession and receipt.

That since the said mortgaged premises have been in the possession of the defendant, the mills and principal buildings thereon have been destroyed by fire, and that the same were insured by the said S. H., who occupied said premises under lease from said defendant for the benefit of said defendant, as further security for said mortgage debt, and that large sums have been paid to said defendant on said policies, and that they still hold other policies upon the machinery in said mills, which was also destroyed by fire, which policies have been assigned to said defendant as further security for, and in payment of, said mortgaged debt, and that the whole amount of said policies is sufficient to cancel the greater part, if not the whole, of the residue of said debt, which had not otherwise been paid by said S. H., and that if a just account were taken of such payments, and of the sums received, or to be received, on said policies, which are now due and payable, and of said rents and profits received by said defendant, the whole of

said mortgage debt would be found to be justly paid and discharged.

That on the — day of —, the equity of redemption which the said S. H. retained and owned in said property was transferred to one A. W. by assignments in the course of proceedings under the insolvent law of said commonwealth of Massachusetts, to which the said S. H. was a party, and that said A. W., as such assignee of said S. H., by his deed dated the — day of —, conveyed said equity of redemption to plaintiff, a copy of which deed is hereunto annexed, marked —.

And plaintiff charges that the matter in dispute herein exceeds the sum or value of three thousand dollars, exclusive of interest and costs.

And plaintiff further shows that being the owner of said right of redemption in said property, he has applied to said defendant and requested him to come to an account for the rents and profits of the said premises so received by him, and of the moneys received by him from said S. H., for the interest and principal of said debt, and from the said policies of insurance, and to deliver up the possession of said mortgaged premises to him, upon being paid what, if anything, should be found to be justly due to him upon said account, which plaintiff is, and has been, ready and willing to pay, and is ready to bring the same into court, if anything shall be found to be justly due to said defendant upon the proper taking of said account. And plaintiff well hoped that the said defendant would have complied with such requests, as in justice and equity he ought to have done; but the said defendant, acting in concert with divers persons unknown to plaintiff, refused to comply therewith, and insists upon holding possession of said estate, and foreclosing plaintiff's right of redemption therein, and restraining said policies and the amounts received thereon, and said rents and profits, without accounting for the same.

To the end, therefore, that the said defendant may, if he can, show why plaintiff should not have the relief hereby

prayed, and the said defendant may answer the premises, and that an account may be taken of what, if anything, is due to the said defendant for principal and interest on the said mortgage, and that an account may be taken of the rents and profits of the said mortgaged premises, which have been possessed or received by the said defendant, or by any other person or persons, by his order or for his use, or which, without their willful default or neglect, might have been received; and also of all the sums that may have been paid by said S. H. or others towards the principal and interest of said mortgage debt; and also of the policies of insurance and other securities which the said defendant has received, and of the sums which he has or might have realized therefrom, on account of the principal and interest of said debt, and of the value of such policies and other securities now in his hands on account of said debt, which he has not sold or turned into money; and that the said defendant be ordered to apply the same to the payment of said debt; and that if it shall appear that said rents and profits and the payments and the proceeds of said policies and other securities have been and are more than sufficient to pay the principal and interest of said mortgage debt, that the residue may be paid over to plaintiff; and that plaintiff may be permitted to redeem the said premises, he being ready and willing, and hereby offering to pay what, if anything, shall appear to remain due, in respect to the principal and interest on the said mortgage; and that the said defendant may be decreed to deliver up possession of the said mortgaged premises to plaintiff, or to such person as he shall direct, free from all encumbrances made by him, or any persons claiming under him, and may deliver to plaintiff all deeds and writings in his custody or power relating to the said mortgaged premises; and that plaintiff may have such further and other relief in the premises as the nature of this case shall require, and to your honors shall seem meet.

X. & X., Solicitors.

A. B.

[*Verification.*]

No. 443.**By Husband of Legatee Against Executor.(1)**

[Caption and introduction.]

That W. S., late of, etc., duly made and published his last will and testament in writing, bearing date on or about —, and thereby, amongst other bequests, gave to his nephews and nieces, the children of his late sister, M. A., the sum of — dollars each, to be paid to them as they should respectively attain the age of twenty-one years, and appointed C. D., of, etc., the defendant hereinafter named, the sole executor of his said will, as in and by the said will, or the probate thereof when produced will appear.

That the said C. D., soon after the death of the said testator, duly proved the said will in the proper court, and hath since possessed himself of the personal estate and effects of the said testator to an amount much more than sufficient for the payment of his just debts, funeral and testamentary expenses and legacies.

That after the death of the said testator plaintiff intermarried with A. A., who was the niece of the said testator, and one of the children of the said M. A., in the said will named, and by virtue of such intermarriage plaintiff in right of his said wife became entitled to demand and receive the aforesaid bequest of —(2) dollars.

That plaintiff's said wife lived to attain her age of twenty-one years, and that she hath lately departed this life, and that neither plaintiff nor his said wife received any part of the said legacy.

And plaintiff further shows that having obtained letters of administration upon the estate of his said wife, he has repeatedly applied to the said C. D. for the payment of the said legacy, and interest thereon from the time of his said late wife attaining her age of twenty-one years, and plaintiff hoped that such his reasonable requests would have been complied with, as in justice and equity they ought to have been.

But now so it is, may it please your honors, that the said C. D., combining, etc. To the end, therefore, that, etc.

And that an account may be taken of what is due and owing to plaintiff for the principal and interest of the said legacy, and that the said defendant may be decreed to pay the same to plaintiff. And if the said defendant shall not admit assets of the said testator sufficient to answer the same, then that an account may be taken of the estate and effects of the said testator which have been possessed or received by the said defendant, or by any other person by his order or to his use, and that the same may be applied in a due course of administration. [*And for further relief.*]

[*Verification.*]

(1) To recover a legacy at common law the assent of the executor was necessary; and the jurisdiction of equity over legacies, as well as over administrations, is based upon the trust relation existing between an executor or administrator and the creditors, legatees and distributees; upon the necessity of a discovery, an accounting or a distributing of assets in order to determine the rights of all interested parties; and the fact that the remedies given by all other courts are inadequate, incomplete and uncertain. Pom. Eq. Jur., Sec. 1127. In this country, probate courts have generally the power to decree the payment of legacies at the suit of the individual legatees, during the pendency of an administration; and in such proceedings they follow the settled doctrines of equity. Pom. Eq. Jur., Sec. 1129. For an extensive collation of the cases illustrating the jurisdiction of probate courts and courts of equity in the several states over the administration of estates, including suits for the payments of legacies, see Pom. Eq. Jur., Sec. 1154, note 2.

(2) For jurisdictional amount see Sec. 24, Judicial Code.

No. 444.

On Behalf of Infant Legatees.(1)

[*Caption and introduction.*]

The plaintiffs, infants under the age of twenty-one years, by J. E., of, etc., their next friend, that E. H., the elder, late of, etc., but now deceased, duly made and published his last will and testament in writing bearing date, etc., whereby he directed that W. T., of, etc., and E. B., of, etc., the defend-

ants hereinafter named, and C. G., of, etc., who were the trustees and executors in his said will named, should, out of the moneys which should come to their hands in manner therein mentioned, lay out and invest in or upon government or real securities at interest the sum of — dollars, upon trust, etc. [*The trustees were to pay the dividends to E. H., the testator's wife, during her life, or until her second marriage, and after her decease or second marriage, the whole of the dividends to be applied by the trustees for the maintenance and education of testator's grandchildren, the plaintiffs, to whom the principal was to be transferred, to the grandsons at twenty-one, and to the granddaughters at twenty-one or marriage*], as in and by, etc. And the plaintiffs further show that the said testator departed this life in or about the month of —, without having in any manner revoked or altered the said will, except by a codicil bearing date, etc., which did not relate to or affect the said trustee of the said sum of — dollars.

And the plaintiffs further show unto your honors that W. T., and E. B., and the said C. G. duly proved the said testator's will, and acted in the trusts thereof, and out of the moneys which came to their hands from the estate and effects of the said testator, in or about, etc., appropriated the sum of — pounds sterling, in satisfaction of the aforesaid legacy, in the purchase of the sum of — pounds sterling three per cent. consolidated bank annuities, and the said sum of stock is now standing in their names in the books of the governor and company of the Bank of England.

And the plaintiffs further show that the said C. G. has departed this life, and that the said E. H., on or about, etc., intermarried with and is now the wife of the said J. E., whereupon the interest of the said E. H. in the said sum of — pounds sterling three per cent. consolidated bank annuities wholly ceased.

And the plaintiffs further show that the said defendants paid to the said J. E. and E., his wife, the year's dividends

which became due on the said sum of stock on the — day of —, as well for the interest of the said E. E. in the said stock as for the maintenance and education of the plaintiffs up to that time; but the said defendants have retained in their hands the subsequent dividends which accrued due on the said stock, and have made no payments or allowances thereon for the maintenance or education of the plaintiffs.

And the plaintiffs further show that some proper person or persons ought to be appointed as the guardian or guardians of the plaintiffs, with suitable allowances for their maintenance and education for the time past since the said — day of —, and for the time to come, and that the said sum of stock ought to be secured in this honorable court. To the end, therefore, etc.

And that the said defendants may answer the premises; and that some proper person or persons may be appointed the guardian or guardians of the plaintiffs, with suitable allowances for their maintenance and education for the time past since the said — day of —, and for the time to come, and that the said defendants may account for the dividends of the said trust stock which have accrued due since the said — day of —, and may thereout pay the allowances which shall be made for the maintenance and education of the plaintiffs since the said — day of —, and may pay the residue thereof into this honorable court for the benefit of the plaintiffs; and may transfer also the said sum of — pounds sterling three per cent. consolidated bank annuities into the name of the accountant general of this honorable court, to be there secured for the benefit of the plaintiffs and such other persons as may eventually be interested therein. [*And for further relief.*]

[*Verification.*]

(1) A specific legatee, filing a bill for a general account of the administration, is not confined to the particular errors alleged in the bill, as he might be if he were surcharging and falsifying a stated account. *Pulliam v. Pulliam*, 10 Fed. 53.

Jurisdictional amount must be alleged, Judicial Code, Sec. 24.

No. 445.**By an Executor and Trustee Under a Will, to Carry the
Trusts Thereof into Execution.(1)**

[Caption and introduction.]

The plaintiff, A. B., of, etc., is executor of the will and codicils of M. S., late of, etc., deceased, and also a trustee, devisee and legatee named in the said will and codicils, and that the said M. S., at the several times of making her will and codicils hereinafter mentioned, and at the time of her death, was seized or entitled in fee simple of or to divers messuages, lands, etc., of considerable yearly value, in the several counties of C. and D., in the state of —, and being so seized or entitled, and also possessed of considerable personal estate, the said M. S., on or about —, made her last will and testament in writing, and which was duly signed and attested and published by her, according to law, and thereby, after giving divers pecuniary and specific legacies and divers annuities, the said testatrix gave and devised unto the plaintiff all, etc. *[Stating the substance of the will.]* And the said testatrix afterwards, on or about —, made a codicil to her said will, which was duly signed, attested and published according to law, and thereby gave, etc., and in all other respects she thereby confirmed her said will and all other codicils by her theretofore made; as by said will and the said several codicils thereto, or the probate thereof, to which the plaintiff craves leave to refer, when produced, will appear.

And the plaintiff further shows that the said testatrix, M. S., departed this life on or about —, without having revoked or altered her said will and codicils, save as such will is revoked or altered by the said codicils, and as some of the said codicils have been revoked or altered by some or one of such subsequent codicils; and the said testatrix at her death left the said E. G., formerly E. S., and the said B. S., her cousins and co-heiresses at law. And the plaintiff being

by the said codicil of the — day of —, appointed sole executor of the said will and codicils, has since her death duly proved the said will and codicils in the proper court, and taken upon himself the execution thereof.

And the plaintiff further shows that the said testatrix, at the time of her death, was possessed of, interested in, and entitled unto considerable personal estate and effects, and, amongst other things, she was entitled to an eighth share and interest in a certain co-partnership trade or business of a tin-blower and tin-melter, which was carried on by the testatrix and certain other persons at —, under the firm of S. F. & Co., in which the testatrix had some share of the capital, and which was a profitable business, and by the articles of co-partnership under which the said business was carried on, the plaintiff, as the said testatrix's personal representative, is now entitled to be concerned in such share of the said business for the benefit of said testatrix's estate; and she was also possessed of or entitled to certain leasehold estates held by her for the remainder of certain long terms, etc.

And the plaintiff further shows that he has possessed himself of some parts of the testatrix's personal estate, and has discharged her funeral expenses, and some of her debts and legacies, and the plaintiff has also, so far as he has been able, entered into possession of the said testatrix's estates, which she was seized of, or entitled to at the times when she made her said will and codicils, and which consisted of, etc., being all together of the yearly value of — dollars or thereabouts, besides the said mansion-house, and besides the premises, which, by the said codicil, dated on the — day of —, are devised to the plaintiff for his own use and benefit; and the plaintiff is desirous of applying the said testatrix's personal estate and effects, not specially bequeathed, in payment of the said testatrix's debts, and of her legacies now remaining unpaid, and of the annuities bequeathed by the said will and codicils, so far as the same will extend, and of paying the remainder thereof out of the rents and profits of the said real

estate, and of applying the whole of the rents and profits, according to the directions of the said will and codicils, as in justice and equity ought to be the case.

But now so it is, may it please your honors, that the said C. D. and E., his wife, B. S., and J. S., in concert with each other, make various objections to the plaintiff's applying the said personal estate, and the rents and profits of the said real estate, according to the directions of the said will and codicil; and the said defendants, C. D. and E., his wife, sometimes pretend that, by virtue of the said testatrix's will, they are entitled to the residue of the said testatrix's personal estate, not specifically bequeathed, including all her household estates, after payment of all her funeral expenses and debts, and that the said personal estate is not subject to the payment of the several legacies and annuities given by the testatrix's said will and codicils, but is exempt therefrom, and that all the said legacies and annuities ought to be paid out of the rents and profits of the said testatrix's real estates.

Whereas the plaintiff charges the contrary of such pretenses to be true, and that the said personal estate is applicable to the payment of all the said testatrix's legacies and annuities, after satisfying all her funeral expenses and debts; and the said C. D. and E., his wife, are desirous that the plaintiff, as the personal representative of the said testatrix, should, by means of the said testatrix's share of the capital employed in the said trade or business, carry on the said trade or business for the benefit of them and of the said testatrix's estate, but which the plaintiff can not safely do without the direction and indemnity of this court; and the said C. D. alleges that he is not of ability to maintain and educate his said son, J. S., who is an infant of the age of ten years or thereabouts, and he therefore claims to have some part of the rents and profits of the said premises paid to him, for the maintenance and education of the said J. S.; and the plaintiff, under the circumstances aforesaid, is unable to administer the said personal estate, and to execute the trusts of

the said real estate, without the directions of this honorable court, and the defendants are desirous of having a person appointed by this court to receive the rents and profits of the said real estate, devised as aforesaid by the said fifth codicil, to which the plaintiff has no objection. In consideration whereof, etc. To the end, therefore, etc.

And that the trusts of said will and codicil may be performed and carried into execution by and under the direction of this court, and that an account may be taken of the said testatrix's personal estate and effects, not specifically bequeathed, and of her funeral expenses and debts, and of the legacies and annuities bequeathed by the said will and codicils, the plaintiff being ready and hereby offering to account for all such parts of the said personal estate as have been possessed by him, and that the said personal estate may be applied in payment of the said funeral expenses, debts and legacies and annuities in a due course of administration, and that the clear residue, if any, of the said personal estate may be ascertained and paid to the said defendants, C. D. and E., his wife, in her right; and in case it shall appear that the said personal estate, not specifically bequeathed, is not sufficient for payment of all the said funeral expenses, debts, legacies and annuities, or that any parts thereof are not payable out of such personal estate, then that proper directions may be given for payment of such deficiency, or of such parts thereof as are not payable out of the said personal estate, according to the trusts of the said term of one hundred years, vested in the plaintiff as aforesaid, and that an account may be taken of the rents and profits of the said real estates, comprised in the said term received by or come to the hands of the plaintiff, and that the same may be applied according to the trusts of the said term; and that proper directions may be given touching the effects specifically bequeathed by the said will and codicils as heirlooms, and that proper inventories may be made thereof; and that all necessary directions may be given touching the application of a sufficient part of

the rents and profits of the said real estates to the maintenance and education of the said J. S., in case this court shall be of opinion that any allowance ought to be made for that purpose; and that a proper person may be appointed by this honorable court to receive the rents and profits of the said real estates devised as aforesaid by the fifth codicil. [*And further relief.*]

[*Verification.*]

(1) In pleading a trust concerning lands it need not be alleged that it was created by writing; this will be presumed if the statute requires a writing in order to create such a trust as the bill alleges. *Lamb v. Starr, Deady* (U. S.) 350. Equity will enforce all lawful trusts. If a trust should be created for an illegal or fraudulent purpose, equity will not enforce it, nor, it seems, relieve the person creating it, by setting aside the conveyance. When, however, a trust is unlawful because forbidden by statute, the whole disposition is void. *Pom. Eq. Jur.*, Sec. 987.

No. 446.

To Cancel a Written Instrument—A Bill of Exchange.(1)

[*Caption and introduction.*]

That plaintiff, previously to the month of —, had frequently accepted bills of exchange for the accommodation of Messrs. D. W. and J. H., then of —. And that some time in or about the said month of — they applied to plaintiff to assist them with a loan of his acceptance for a sum of money, and they severally assured him that if he would accept or indorse a certain bill of exchange for them, the said D. W. and J. H., they could procure the same to be discounted, and that they, or one of them, would punctually provide plaintiff with the money to take up the same. Relying upon such promise, he agreed to accept such bill of exchange to be drawn upon him by the said D. W., and J. H. accordingly drew upon plaintiff a certain bill of exchange for the sum of — dollars.(2) dated the — day of —, and payable three months after date, which plaintiff thereupon accepted.

That the said bill of exchange having been delivered by plaintiff to the said D. W. and J. H., without any consideration whatsoever had or received by plaintiff for the same, the said D. W. and J. H. ought either to have provided him with the money to take up the same when due, as they had promised, or else have redelivered the same to him to be cancelled; but the said D. W. and J. H., combining and confederating to and with J. J., of, etc., and T. O., of, etc., and with divers other persons, etc., they, the said confederates, absolutely refuse to deliver or cause or procure to be delivered up to plaintiff the said bill of exchange to be cancelled, and instead thereof the said T. O. hath got into his possession the said bill, and has lately commenced an action at law against plaintiff to recover the amount thereof, the said confederates, or some of them, at times giving out and pretending that the said bill of exchange was made and given by plaintiff to the said D. W. and J. H. for a full valuable consideration or considerations in money.

Whereas plaintiff expressly charges the contrary thereof to be the truth, and that he never had or received any good or valuable consideration or considerations for the said bill of exchange, and that the same was delivered by him to the said D. W. and J. H., for their accommodation, without receiving any consideration or considerations for the same, and upon the firm reliance that they, or one of them, would supply him with the money to take the said bill up when the same became due and payable, and so the said confederates will sometimes admit; but then the said confederate, J. J., pretends that he discounted the said bill of exchange for full valuable considerations in money or otherwise at the time when the said bill was indorsed to him, and that when he paid or gave the full valuable consideration or considerations for the same, he had not notice that the said bill had been given by plaintiff in the manner and upon the express stipulations hereinbefore mentioned, or without a full valuable or any consideration received by plaintiff for the same, and that therefore plaintiff

ought to pay the amount thereof. And the said J. J. further pretends that he indorsed the said bill of exchange to the said T. O. for good and valuable considerations before he, the said J. J., received any notice from plaintiff, and before plaintiff had requested him to deliver up the same. Whereas plaintiff charges the contrary of all such pretenses to be true, and particularly that the said J. J. did not ever give, pay, or allow to the said D. W. and J. H., or either of them, the full value or any consideration whatever, for the said bill of exchange; and that the said J. J. had full notice, or had some reason to know, believe or suspect that the said bill had been given by plaintiff to the said D. W. and J. H., in the manner and upon the express stipulations hereinbefore mentioned, and without any valuable or other considerations having been received by him therefor.

Plaintiff further says that the said J. J. received the said bill from the said D. W. and J. H., to get the same discounted for them, and with an express undertaking on his part to deliver over the money he obtained upon such bill to them, the said D. W. and J. H., but that he never did procure such bill to be discounted, or if he did he applied the moneys he obtained upon the same to his own use, and never paid or delivered over any part thereof to the said D. W. and J. H., or either of them.

Further plaintiff says that the said J. J. has received notice from plaintiff and the said D. W. and J. H., of the terms upon which the said bill had been obtained by the said D. W. and J. H., and had been required by plaintiff to deliver up the same to him before he, the said J. J., had indorsed the said bill of exchange to the said T. O., and as evidence thereof plaintiff expressly charges that the said J. J. had the said bill of exchange in his custody, possession or power on the — day of —, last past; and that the said J. J. did, on the — day of —, last, offer the said bill of exchange for sale, together with other bills, to various persons.

That at the time of the said bill of exchange being indorsed or delivered to the said T. O., and of his paying or giving such consideration or considerations (if any were or was paid by him), he knew, or had been informed, or had some reason to know, believe or suspect that plaintiff and the said D. W. and J. H. had never received the full or any consideration for the said bill of exchange, and he well knew or had been informed that plaintiff had accepted the said bill of exchange for the accommodation of the said D. W. and J. H., without having received any consideration for the same.

Plaintiff further says that the said T. O. is a trustee for the said bill of exchange for the said confederate, J. J., or for some other person or persons whose names he refuses to discover, and that he holds the same for the said confederate, J. J., or for such person or persons, without having given any consideration or considerations for the same, and that if he receives the amount of the said bill of exchange, or any part thereof, he is to deliver over or pay the same to the said J. J., or such other person or persons, and that he is indemnified by the said J. J., or such other person or persons, from all the costs attending the attempt to recover upon the said bill of exchange on which he has brought his said action at law. And notwithstanding the said T. O. got the said bill of exchange into his possession without giving any consideration for the same, yet he threatens and intends to proceed in his action at law, and in case he should recover judgment to take out execution against plaintiff for the amount thereof.

Plaintiff further says that the said several defendants, or some or one of them, now have or has or lately had in their or one of their custody, possession or power some book or books of accounts, letters, documents or writings from which the truth of the several matters and things aforesaid would appear. And so it would appear if the said defendants would set forth a full, true and particular account of all such books of account, letters, documents and writings. Wherefore plaintiff prays that the said defendant, T. O., may be decreed to

deliver up, and the said D. W. and J. H. and J. J. be decreed to procure the said bill of exchange to be delivered up to plaintiff to be cancelled, as having been given by plaintiff and received by the said D. W. and J. H., and the said several defendants, without any consideration. And that the said defendants, respectively, may be restrained by the injunction of this honorable court from proceeding in any action at law already commenced against plaintiff upon the said bill of exchange, and from commencing any other proceedings at law against plaintiff upon the said bill of exchange. And that plaintiff may have such further and other relief in the premises as to your honor shall seem meet and the nature of this case may require.

[Verification.]

(1) Mistake of law is no ground for relief if it consists of mere ignorance of law on part of complainant. *Allen v. Elder*, 2 Am. St. Rep. 63. But it is otherwise of an honest mistake of law on part of both parties. *Allen v. Elder*, 2 Am. St. Rep. 63.

To reform written instruments on ground of mistake it must be clearly established, but relief will not be withheld because there is conflicting testimony. *Hutchinson v. Ainsworth*, 2 Am. St. Rep. 823.

See *Fuller v. Percival*, 126 Mass. 381, where a firm note fraudulently given by a partner of the plaintiff to a holder with notice of the fraud was canceled. So in an action on a note given for the price of land, defendant may have the note canceled to the extent of the damages sustained by him by reason of false representations in the sale. *Hosleston v. Dickinson*, 51 Iowa 244.

(2) Must exceed \$3,000 now to give the district court jurisdiction See Judicial Code, Sec. 24.

No. 447.

**Suit to Determine Legality of Municipal Bonds and for
Specific Performance and Other Relief.**

[Caption.]

Come now the plaintiffs above named and for cause of action show unto your honor:

1. That the plaintiff, Sweet, Causey, Foster and Company, was at all the times hereinafter mentioned and still is a cor-

poration organized and existing under the laws of the state of Delaware and a citizen of the said state; that the plaintiff, James N. Wright and Company, was at all the times hereinafter mentioned and still is a corporation organized and existing under the laws of the state of Delaware and a citizen of said state; that the plaintiff, C. W. McNear and Company, was at all the times mentioned hereinafter and still is a corporation organized and existing under the laws of the state of Illinois and a citizen of said state.

2. That the defendant, City of Bozeman, was at all the times hereinafter mentioned and still is a municipal corporation organized and existing under the laws of the state of Montana; that the defendant, John A. Luce, was at all the times hereinafter mentioned and still is the duly elected, qualified and acting mayor of the said city of Bozeman and a citizen of the state of Montana; that the defendant, C. A. Spieth, was at all the times hereinafter mentioned and still is the duly appointed, qualified and acting city clerk of the said city of Bozeman and a citizen of the state of Montana.

3. That this is a suit in equity between citizens of different states and the matter in controversy, exclusive of interest and costs, exceeds the sum or value of three thousand dollars.

4. That pursuant to the powers vested in municipal corporations of the state of Montana by the laws of said state, the duly, elected, qualified and acting city council of said city of Bozeman, at a special meeting thereof duly held at the council chambers thereof in the city of Bozeman on the 28th day of February, 1916, duly and legally passed and enacted a certain resolution, known as Resolution No. 695, by the affirmative vote of all the members thereof, the vote being by ayes and noes, and which resolution was thereafter on said date approved by the mayor of said city, providing for the holding of a special election, submitting to the taxpayers of said city the question of issuing water-works bonds upon the credit of the said city in the sum of two hundred and thirty-five thousand dollars (\$235,000), the proceeds from the sale

thereof to be used as follows, to-wit: one hundred thousand dollars to be used in redeeming the present outstanding water-works bonds, and the balance in extending, improving and enlarging the existing water-works system and in acquiring an auxiliary or additional water-works system from Bozeman creek for said city, a copy of which said resolution is hereto attached as "Exhibit A" and made a part hereof the same as if set forth at length herein.

That thereafter and at the same meeting and pursuant to the same powers the city council duly and legally passed and enacted a certain other resolution known as Resolution No. 696, by the affirmative vote of all the members thereof, the vote being by ayes and noes, and which resolution was thereafter on said date approved by the mayor of said city, providing for the holding of a special election for the purpose of submitting to the taxpayers of the city of Bozeman the question of the city issuing sewer bonds upon the credit of the city in the sum of seventy thousand dollars, the proceeds from the sale thereof to be used in extending, improving and enlarging the existing sanitary sewer system of the city of Bozeman, a copy of which said resolution is hereto attached as "Exhibit B" and made a part hereof the same as if set forth at length herein.

5. That by the terms of said resolutions a special election was ordered to be held at the time of the general spring election on April 3, 1916, for the purpose of ascertaining the will of the taxpayers to be affected thereby; that it was provided in said resolutions that separate ballots should be used for such special election, on one of which should be printed the terms, "Water Works Bonds, Bonds—Yes, Bonds—No," and on the other the terms, "Sewer Bonds, Bonds—Yes, Bonds—No."

6. That under and by virtue of the provisions of said resolutions the city clerk was authorized and directed to give notice of such election as required by law, and said notice was given by posting in five public and conspicuous places in each

ward throughout the said city, was also published in the "Weekly Courier," a weekly newspaper published in said city, once a week for five consecutive weeks, the first publication being on the 1st day of March, 1916, and the last publication being on the 29th day of March, 1916, and which said notices so posted and published were in words and figures as follows, to-wit: [*Notice follows here.*]

7. That the said special election was held at the time of the general election for said city on the 3d day of April, 1916, and at said election separate ballots and separate ballot-boxes, election books, sheets and certificates were used, and all voting and votes upon each of said questions were upon separate ballots, and the questions so submitted were voted upon separately at said election, and the counting of the ballots and the certification thereof, and the canvass of the votes therefor, were all had and done separately with reference to each of the said questions; that at a meeting of the city council held on the 6th day of April, 1916, being the regular meeting following said election, the city council adjourned to meet in regular adjourned session on April 7, 1916, at which time the returns of said special election were canvassed, and the result thereof determined as follows:

For the water bonds, "Yes," 224; "No," 132; for the sewer bonds, "Yes," 239; "No," 116; that from the said canvass it appeared that the question of issuing the water bonds had carried by a majority of 92, and the question of issuing the sewer bonds had carried by a majority of one hundred and twenty-three (123).

8. That at the time of holding said special election the said city of Bozeman was indebted in an amount exceeding the three per cent. limit provided for by the constitution and laws of the state of Montana, and that the question of extending the constitutional limit of indebtedness of said city for the purpose of procuring a water supply for its inhabitants, or constructing a sewer, was not submitted to the taxpayers affected thereby, as required by the constitution and laws of

the state of Montana, at said election or at any election held prior thereto or thereafter; nor was the said question ever submitted to the taxpayers affected thereby except as hereinabove set forth.

9. That thereafter at a special meeting held on the 7th day of April, 1916, the city council, pursuant to authority conferred by statute, appointed the 18th day of May, 1916, at 7:30 o'clock p. m., in the city hall building in the city of Bozeman, as the time when and place where the issue of \$235,000 of water-works bonds and \$70,000 of sewer bonds should be offered for sale at public auction, and the city clerk was directed to give notice of such sale by advertisement in the "Weekly Courier," a weekly newspaper published in said city, and in the "Financier," a weekly newspaper published in the city of New York, for four weeks before the 18th day of May, 1916, which said notice as directed to be given and as actually given was in words and figures as follows, to-wit: *[Here follows notice.]*

10. That thereafter and pursuant to authority conferred by statute, the said city council, at its regular meeting held on the 7th day of April, 1916, duly and regularly passed and enacted an ordinance, known as Ordinance No. 456, being an ordinance directing the issuance of water-works bonds to the amount of \$235,000, a copy of which ordinance is attached hereto as "Exhibit C" and made a part hereof the same as if set forth at length herein.

That at the same meeting and pursuant to the same authority the said city council duly and regularly passed and enacted an ordinance, known as Ordinance No. 457, being an ordinance directing the issuance of sewer bonds to the amount of \$70,000, a copy of which ordinance is hereto attached as "Exhibit D" and made a part hereof the same as if set forth at length herein. *[Here follow details of the sale and agreement made, including the deposit of a certified check, and refusal of the clerk to deliver the bonds, or to turn back the check, refusal to test the validity of the bonds.] * * **

18. That the plaintiffs have no adequate remedy at law in the premises. Wherefore plaintiffs pray:

1. That this court may determine whether or not the issue of bonds so sold to these plaintiffs and the proceedings incident thereto are legal and valid.

2. That if the issue of bonds hereinabove described be adjudged to be illegal, that the defendants be ordered and directed by an injunction having the force and effect of a writ of mandamus to deliver to these plaintiffs the two certified checks of \$2,000 each, drawn on the Interstate Trust Company, of Denver, Colorado, in favor of the defendant, City of Bozeman; or if the said checks have been cashed and can not be returned, that the plaintiffs have judgment against the city of Bozeman for the sum of \$4,000, together with interest thereon at the rate of eight per cent. per annum from the date said checks were cashed.

3. That if said issue of bonds be adjudged by this court to be legal outstanding obligations of the city of Bozeman, that a writ of injunction having the force and effect of a writ of mandamus may be issued out of this honorable court commanding the defendants, John A. Luce and C. A. Spieth, as mayor and city clerk, respectively, of said city of Bozeman, to deliver to these plaintiffs the issue of bonds as described in said bids, upon these plaintiffs depositing in this court the amount of said bids.

4. That upon the filing of this bill of complaint an order be issued directed to the said defendants and each of them requiring to show cause, at a time and place to be fixed by this court, why a preliminary writ of injunction should not issue against them, enjoining and restraining them from selling and delivering said issue of bonds to other persons, and from negotiating or cashing said certified checks so deposited with them.

5. That from time to time such other and further orders, general and specific, may be made by your honor as will effectuate the object and purposes for which this suit is brought,

and that the plaintiffs may have such writs, processes and other aids of the court as may from time to time be found necessary to accomplish said object and purposes.

6. And for all such other, further and general relief as to a court of equity may seem meet in the premises.

Signatures of Plaintiffs.

X. Y., R. O. & M. K.,
Of Counsel.

By A. B., Solicitor.

[*Verification.*]

No. 448.

To Reform a Policy of Insurance.

[*Caption and introduction.*]

Plaintiff says that on the — day of, etc., he was the sole owner of a ship or vessel of the value of — dollars, called the —, then lying at Q., in the province of —, and bound on a voyage from said Q. to a port of discharge in said U. K., on board which said ship there had been and was then laden a cargo of merchandise, the property of various persons other than plaintiff, and which said merchandise he has agreed should be conveyed in said ship from said Q. to said port of discharge, for a certain amount of hire, or freight, to be paid him by said parties respectively therefor, amounting in the whole to the sum of — dollars. And plaintiff being desirous to procure said vessel and said freight to be insured for said voyage at and from said Q. to said port of discharge, namely, the said ship for the sum of — dollars, valued at — dollars, and said freight for the sum of — dollars, valued at — dollars, against the perils of the seas and other risks usually contained in marine policies of insurance, on property of such description, did, in writing, by letter, bearing date, etc., request his agent, one J. E., of said Q., to procure the same to be insured on account of plaintiff, and to have the policies of insurance thereon in the name of plain-

tiff, a copy of which letter, marked "A," he hereto annexes, and prays that the same may be taken as a part of this his bill of complaint.

That said J. E. afterwards, on the — day of the same —, in compliance with the request of plaintiff, did, through one H. M., of —, broker, request one A. M., of the city of —, and state of —, insurance broker, to procure said insurance upon said ship and said freight, to be made and effected at some proper and solvent insurance company in said —, or in —, in said state of —, and did cause to be transmitted to said A. M., insurance broker as aforesaid, a copy of plaintiff's said letter, bearing date the said —; and thereupon the said A. M., being unable to procure said insurance to be made and effected for a reasonable premium in said —, did, in writing, authorize and request one D. R., of said —, commission merchant, to cause said insurance to be made and effected by some proper insurance company in said —, which said written request and authority so given by said A. M. to said D. R. was and is contained in two certain letters written by the said A. M. to said D. R., one of which letters bears date, etc., and the other of said letters bears date, etc.; and plaintiff hereto annexes copies of both said letters, marked respectively "B" and "C," and prays that the same may be taken as parts of this his bill of complaint.

That in said letter of said A. M., bearing date, the etc., by accident and mistake the said D. R., was directed to cause said ship to be insured for the sum of — dollars, to be valued at the sum of — dollars, and said freight to be insured at the sum of — dollars, and to be valued at the sum of — dollars; and in and by said letter of said A. M., bearing date the said —, said mistake was in part corrected, and said D. R. was directed to insure said ship for the sum of — dollars, and to insure said freight for the sum of — dollars; but by accident and mistake the sum for which said ship and said freight were to be valued thereon was wholly omitted.

That the said D. R., after receiving said letters on the —, did apply to the said C. M. Marine Insurance Company to make insurance upon said ship and freight for plaintiff, according to the order and request of the said A. M., and did then and there exhibit both said letters of said A. M. to said insurance company, with the intent to inform said insurance company as well of the relation of said A. M. as agent of the owners of the said ship as to enable them to determine the character of the risk to be insured, and said insurance company did afterwards read and examine said letters, and on the same day did agree with the said D. R., acting as agent of plaintiff, to insure the said ship on the voyage aforesaid, at and from said Q., for the sum of — dollars, to be valued at the sum of — dollars, and to insure the said freight of said ship on said voyage for the sum of — dollars, to be valued at the sum of — dollars, and to receive as premiums therefor the sum of — dollars.

Thereafter, on the, etc., —, the said insurance company, with the intent and design to carry into effect said agreement, did cause to be made in writing, or policy, of insurance, signed by the president and secretary, bearing date, etc., a copy of which is hereto annexed, and marked "D," which plaintiff prays may be taken as part of this his bill of complaint, and did deliver said policy to said D. R., the agent of plaintiff as aforesaid, and did receive from said D. R., the agent of plaintiff, said premium of — dollars, which sum was thereafterwards by plaintiff repaid to said D. R.

That although, when said insurance company had so agreed to insure said ship and freight for the amounts aforesaid, it was well known to said insurance company that said A. M. was merely the agent of the owner of said ship and of the person entitled to, and solely interested in, said freight; and that he, said A. M., had no insurable interest or other interest whatever in either said ship or said freight, and that said A. M. was, by profession and pursuit, a mere insurance broker, and that he was acting as the agent of the person who

owned said ship and who was solely interested in said freight, and yet by accident and mistake said insurance on said ship and said freight was, by the terms of said policy, etc., declared to be on account of said A. M., and without adding thereto the word agent or any other term indicating that he, the said A. M., was insured as said agent of the party owning said ship and interested in said freight, and without the usual clause, commonly inserted in such policies, that said insurance was effected for whom it might concern.

That said insurance company knew, and was distinctly informed by said D. R. by said letter of said A. M. to said D. R., bearing date, etc., and submitted to and read by them as aforesaid, that said A. M. was the mere agent of and broker for the owner of said ship, and had no interest whatever in said ship or freight, except so far as he would be entitled to the usual commission of a broker for procuring said insurance; and the said insurance company did agree, consent and understand at the time said agreement to insure said ship and freight was made with said D. R., and before said policy so made to carry said agreement into effect was written and signed, that said insurance was to be made for the benefit and on account of the owner of said ship; and that said A. M. was not the owner of said ship nor interested therein or in said freight, and that by mere inadvertence, accident and mistake in writing said policy of insurance it was omitted to be inserted in said policy that said insurance was made on account of said A. M. as agent and for whom it might concern.

That said policy was received by the said D. R. and transmitted to the said J. E., the agent of plaintiff, and by him kept and retained in ignorance that by the terms and legal effect thereof no other interest was insured thereby save that of the said A. M., and in the full understanding as well by said A. M., said D. R. and said J. E., that the interest of plaintiff in said ship and freight, to the extent of the sums named in said policy, was thereby insured and protected, in

accordance with plaintiff's directions contained in his said letter to said J. E., bearing date the said, etc.

And plaintiff further shows, etc. [*Here state the loss of, etc.*]

Plaintiff submits to your honors that, by reason of the premises, he is justly and equitably entitled to have said mistake so made in drawing said policy of insurance corrected, and said policy reformed by inserting therein that said insurance was made on account of A. M. as agent, or for whom it may concern; and that the sums so insured by said company on said ship and said freight be paid to him accordingly.

Plaintiff further shows that previously to this suit being commenced, on the — day of —, and since, he applied to and requested, and caused application to be made to, said insurance company, to act towards plaintiff in such a way as is equitable and just, and to reform said policy as aforesaid, and to adjust and pay to him the sums so insured by them on said ship and said freight, and so lost to plaintiff as aforesaid by reason of the perils insured against in said policy, and exhibited to said insurance company the usual and proper proofs of said agency of said A. M., and of said loss, and of his sole ownership of said ship and sole interest in said freight at the time of said agreement so made with the agent of plaintiff by said insurance company to insure the same as aforesaid, and plaintiff well hoped that said insurance company would have yielded to his said applications and paid to him the sums so insured by them and lost by him as aforesaid. [*Pray relief.*]

No. 449.

To Cancel Decree of Naturalization.(1)

[*Caption.*]

The United States, by W. H., their attorney general, and J. H., the United States attorney for the — district of —, bring this their bill against C. D., a resident of the city of —, in the district aforesaid, and an alien and subject of the — of —.

And thereupon plaintiffs complain and say that on or about the — day of —, 18—, the said defendant, who was and now is an alien and subject of the — of —, appeared in the — court, it then being a court of record of the state of —, purporting to have common-law jurisdiction, and a seal and clerk, and at a term and session thereof then being holden in the city of —, within the district aforesaid, and applied to be admitted a citizen of the United States.

That thereupon said court, on the day and year last aforesaid, entered up a decree purporting to admit said defendant to be and become a citizen of the United States, under the provision of Section 2167 of the Revised Statutes of the United States, in and by which decree it is recited, among other things, that said defendant had proven to the satisfaction of the court, by the testimony of one S. T., that he had arrived in the United States a minor under the age of eighteen years; that he had resided in the United States at least five years, including the three years of his minority, and in the state of — at least one year immediately preceding his said application, and that for three years prior thereto it had been *bona fide* his intention to become a citizen of the United States. That thereupon a certain copy of said decree as aforesaid was delivered to said defendant, who ever since has claimed, by virtue of said pretended decree, and not otherwise, to be a duly naturalized citizen of the United States, and now claims that by virtue of said proceedings he is such citizen, and as such is entitled to all the rights, privileges and franchises of a citizen of the United States, and claims to be entitled to the protection of the United States as a citizen thereof.

Plaintiffs state and charge that it is not true that the said defendant was a minor under the age of eighteen years when he arrived in the United States; it is not, nor was it then, true that he had resided in the United States for three years next preceding his arriving at the age of twenty-one years;

it is not, nor was it then, true that he had resided in the United States at least five years, including the three years of his minority; it is not, nor was it then, true that it had been *bona fide* his intention, for two years next preceding the date of his application, to become a citizen of the United States.

That the decree aforesaid was obtained by defendant from the court aforesaid by fraud and perjury, willfully and knowingly committed at and before the court aforesaid, which fraud and perjury was and is that the defendant introduced witnesses for the purpose of obtaining the said decree, who, having been duly sworn, willfully testified falsely in substance and to the effect following, to-wit, that said defendant was under the age of eighteen years when he arrived in the United States, and that he had resided in the United States three years next preceding his arrival at the age of twenty-one years, whereas, as the said defendant and said witnesses well knew, such were not the facts, nor were any of such facts known to any of said witnesses.

That the facts aforesaid, as to the qualifications of defendant, were not proven or made to appear to the satisfaction of the court aforesaid by the testimony of any witness who had any knowledge thereof, nor in any lawful manner, nor by any competent or lawful testimony whatsoever, and that said decree was based upon the fraudulent and false testimony aforesaid, and said court was induced to render it by and through mistake as to the true facts, as well as by the fraud and perjury aforesaid, and the imposition practiced upon it by said defendant.

That said defendant did then and there, on the hearing of his said application, make and cause to be made, in, to and before said last-named court, with the intent to procure and to aid in procuring his naturalization as aforesaid, and the issue of the certificate of citizenship to him, a false statement, which was and is that the said defendant, at the time he arrived in the United States, was under the age of eighteen years, and had resided in the United States three years next

preceding his arrival at the age of twenty-one years; whereas in truth and in fact, as the said defendant then and there well knew, he was not, at the time he arrived in the United States, under the age of eighteen years, and had not resided in the United States three years next preceding his arrival at the age of twenty-one years.

That for the purpose of obtaining said decree said defendant did then and there, on the hearing of said application, commit a fraud upon the plaintiffs and said court by then and there intentionally and knowingly concealing from said last-named court the facts that at the time he arrived in the United States he was over the age of eighteen years, and had not resided therein three years next preceding his arrival at the age of twenty-one years, and by then and there intentionally and knowingly failing and refusing to make known to said last-named court the facts that at the time he arrived in the United States he was over the age of eighteen years, and had not resided therein three years next preceding his arrival at the age of twenty-one years, and by then and there falsely pretending in, to and before said last-named court that at the time he arrived in the United States he was under the age of eighteen years, and had resided therein three years next preceding his arrival at the age of twenty-one years, and was then and there entitled to be admitted to become a citizen of the United States.

That the United States had no notice of the said application of said defendant nor of the hearing thereof, and were not represented thereat, and had no opportunity to contest the false and fraudulent claim of the defendant, but that the proceeding was entirely *ex parte* and not contested, by reason whereof the real facts in the matter was not presented to nor were they before the said last-named court on said hearing, and said court was imposed upon and induced by said false testimony offered by defendant, and mistake as to the real facts, and the aforesaid false and fraudulent pretenses and claims made by him and on his behalf, and suppression of the

facts as aforesaid and by mistake of the facts, to then and there enter the decree aforesaid admitting said defendant to be a citizen of the United States under said application, the said defendant not being then and there entitled to be admitted to become such citizen either under such application or otherwise.

That at the time when he obtained said decree the defendant had not, as he well knew, at least two years prior to his pretended admission, made the declaration required by the first subdivision of Section 2165 of the Revised Statutes of the United States, nor did he come within any of the exceptions or other provisions of the statutes of the United States entitling him to said decree. To the contrary, plaintiffs charge that said defendant procured said decree, contriving and conniving to work a fraud upon the United States and upon the court by which the decree was granted, and that defendant accepted it, and still claims the benefits thereof, well knowing that he was not then and is not now entitled to it, or to the benefits thereof, and that the court had been imposed upon, and had been induced to issue it through mistake of the true facts as aforesaid, and through the fraud and imposition practiced upon it as aforesaid.

That the said pretended decree of naturalization was procured, as defendant well knew at the time he procured and accepted the same, without any compliance with the laws of the United States, and in fraud thereof, and plaintiffs aver and charge that the existence of the fraudulent decree on its face entitled the defendant to exercise the rights of a citizen of the United States, and to claim their protection, whereto he is not entitled, and if the same remains uncanceled and in force, it can be used in fraud of the United States, and of persons relying thereon as a valid decree.

Plaintiffs therefore pray that the decree of naturalization aforesaid be declared null and void; that the said defendant be required to surrender up the certified copy thereof delivered to him; that he be forever restrained and enjoined from

setting up or claiming any rights, privileges, benefits or advantages whatsoever under said decree; and that plaintiffs shall have, generally, such other and further relief as the circumstances and nature of the case may require.

W. H.,
Attorney General.

J. H.,
U. S. Atty. — Dist. of —.

R. X.,
Of Counsel for Plaintiff.

(1) U. S. v. Norsch, 42 Fed. 417.

34 Stat. L. 601, June 29, 1906 (6 Fed. Stat. Ann., 2d ed., pp. 987 et seq.), authorize cancellation on the ground of fraud or illegal procurement; the United States district attorneys are given the duty of instituting proceedings, in any court having jurisdiction to naturalize and in the district in which the naturalized person resides.

The constitutionality of this statute has been upheld in *Johannesen v. U. S.*, 225 U. S. 227, 56 L. Ed. 1066, and in *Luria v. U. S.*, 231 U. S. 9, 58 L. Ed. 101.

The remedy of this statute is cumulative, *In re Macoluso's Naturalization*, 237 Pa. St. 132.

The cancellation decree may be by a federal court although the naturalization certificate was awarded by a state court. *U. S. v. Griminger*, 236 Fed. 285; *U. S. v. Plaistow*, 189 Fed. 1006; and a state court may cancel naturalization awarded by a federal court. *U. S. v. Aakervik*, 180 Fed. 137.

The remedy granted by this statute is essentially equitable. *Luria v. U. S.*, 231 U. S. 9, 58 L. Ed. 101; *U. S. v. Mansour*, 170 Fed. 671.

For a discussion of grounds of cancellation see *U. S. v. Olsson*, 196 Fed. 562, where advocating doctrines subversive of constitutional government constituted the charge.

No. 450.

For Specific Performance of a Lease.

[Caption.]

The plaintiff, the Philadelphia & Reading Coal & Iron Company, brings this its bill against the above-named defendant, Great Northern Railway Company, and thereupon complains and alleges as follows:

1. That at all times hereinafter and in this bill mentioned, plaintiff was, and at the commencement hereof is, a corpora-

tion duly organized, created and existing under and by virtue of the laws of the state of Pennsylvania, and was, and at the commencement hereof is, a citizen of said last-named state. That the defendant, Great Northern Railway Company, was, at the several times hereinafter mentioned, and at the commencement hereof is, a corporation duly organized, created and existing under and by virtue of the laws of the state of Minnesota, and was, and is, at the commencement hereof, a citizen of said last-named state. That at all the several times hereinafter mentioned the Silver Creek & Morris Coal Company was a corporation duly organized, created and existing under and by virtue of the laws of the state of Illinois. That at all times hereinafter mentioned the Eastern Railway Company of Minnesota was a corporation duly created, organized and existing under and by virtue of the laws of the state of Minnesota. That the amount in controversy exceeds the sum or value of three thousand dollars (\$3,000), exclusive of interest and costs.

2. That heretofore and on or about the 1st day of February, 1890, the above-mentioned Eastern Railway Company of Minnesota, by a certain indenture of lease of the date last mentioned, as lessor, demised, leased and let unto the above-mentioned Silver Creek & Morris Coal Company and the last-named company hired and took from said lessor certain premises then owned by said lessor situated, lying and being within the city of West Superior, Douglas county, Wisconsin, said premises being designated in such indenture of lease and commonly known and described as Dock Number Six (6), except a certain portion thereof then leased to the Jones & Adams Company.

3. That in and by the terms of said lease it was provided that the said lessee should have the use and possession of said leased premises for and during the term of ten (10) years from and after the 1st day of May, 1890, upon and subject to certain conditions therein expressed, including the payment of the therein stipulated monthly rental of three hun-

dred (300) dollars for the first five (5) years of said term and three hundred and fifty (350) dollars for the remainder of said term. That it was further stipulated in and by the terms of said lease, and the said lessor therein covenanted, that at the option of the lessee the term thereof should, at the expiration thereof, be renewed on like terms and conditions except as to rental, stipulated in the event of such renewal to be four hundred (400) dollars monthly for the entire extended term.

4. That it was further provided and stipulated in and by the terms of said lease that the said lessee should have the privilege to erect upon the demised premises, and thereafter to maintain, repair, renew and operate while said lease continued in force, all suitable machinery, fixtures and apparatus for the handling of coal as had been theretofore agreed between the parties or should be thereafter agreed from time to time during the term for which said premises were leased.

5. That said lease contained amongst other provisions and conditions the following:

Said railway company covenants and agrees that upon the expiration of the lease hereunder, without default or breach on the part of the lessee, it will take all the machinery and apparatus on the premises demised, established and operated thereon from time to time with its approval and consent, and within thirty days thereafter pay said coal company therefor on the basis of a fairly appraised valuation, which, if it can not be agreed upon between the parties hereto, shall be determined by an arbitrator, if one can be promptly agreed upon, or otherwise by three competent and disinterested arbitrators, selected in the customary manner, whose decision shall be conclusive and binding; provided, that the foregoing covenant shall not be binding upon said railway company unless said coal company shall have given said railway company notice in writing not less than six months, nor more than one year, before said expiration, of its desire that said railway company should so take said machinery and apparatus. And it is

agreed that after such notice said railway company shall have a right to take said machinery and apparatus on the terms above set forth.

6. That thereafter and on or about the 1st day of May, 1890, the aforesaid lessee entered into and took possession of the said demised premises under the terms of said lease and thereafter continued in the use and possession thereof for the purposes and in accordance with the terms of said lease up to on or about the 15th day of March, 1892. That during the period of such occupancy, said lessee, in accordance with the provisions thereof, erected, constructed and maintained thereon various apparatus, fixtures and machinery adapted and used for the handling and conduct of the business for which said premises were leased.

7. That on or about the 15th day of March, 1892, the said Silver Creek & Morris Coal Company, being then in possession of said leased premises as aforesaid, and said lease being then in force according to its terms, by instrument in writing duly assented to by the above-mentioned lessor, assigned and transferred all its right, title and interest in said lease and the premises thereby covered to plaintiff. And, at the time of such assignment, sold and delivered to plaintiff all and several the apparatus, machinery, fixtures, etc., theretofore by it, said lessee, erected, constructed or maintained on said dock. That plaintiff thereupon entered into and took possession of said premises and other property hereinbefore referred to on or about the date of the assignment last hereinbefore mentioned and thereafter continued to possess and use said premises as hereinafter alleged.

8. That on or about the 24th day of July, 1894, a certain agreement in writing was duly and regularly entered into between the said Eastern Railway Company of Minnesota and plaintiff, which said agreement, after reciting the terms of the lease aforesaid, the assignment of such lease to plaintiff and the continued possession of plaintiff of said leased premises, provided and stipulated for the enlargement and extension of

said dock, such extension to constitute a part and portion of the originally demised premises and to be used in connection with the latter by plaintiff under all the terms and provisions contained in said original lease, except that in consideration of the extension of said dock plaintiff was to pay in addition to the originally stipulated rental provided by the terms of said original lease the additional sum of one hundred (100) dollars per month for and during the remainder of said original term. That the conditions of said agreement last herein mentioned were carried out and plaintiff thereafter continued in possession of said premises, including those originally leased and the extension last hereinbefore mentioned and hereinafter alleged.

9. That on or about the 22d day of November, 1897, a further agreement was duly made and entered into in writing between the said Eastern Railway Company of Minnesota and plaintiff, dated on the date last mentioned, which said agreement, after reciting the original lease hereinbefore alleged, the agreement for the enlargement and extension of said leased premises with the increased rental, further recited that the said Eastern Railway Company of Minnesota had constructed a further extension of said dock which it was the desire of plaintiff to use and for which plaintiff had agreed and proposed to pay an additional rental of three hundred and fifty (350) dollars a month. That in and by the terms of said agreement last mentioned it was duly and legally stipulated between the parties that plaintiff should have the use of such extension for and during the remainder of the term for which said original lease was made in consideration of the payment of the increased monthly rental of three hundred and fifty (350) dollars a month. It was further provided that the option reserved by said original lease for the extension of the term thereof should be held to cover and embrace the additions to said leased premises provided in the agreement under date of July 24, 1894, as well as the addition therein embraced and mentioned, on condition of the payment of an in-

creased rental for such extended term as herein provided and expressed. And it was further provided in and by the terms of said written agreement of November 22, 1897, that the said original lease of February 1, 1890, and the said lease of July 24, 1894, should be construed in all respects as thereby confirmed, and that plaintiff should have all the rights thereunder conferred upon the said original lessee, the Silver Creek & Morris Coal Company.

10. That plaintiff continues to hold, use and enjoy under the terms of the aforesaid several contracts of lease all of the premises with the extensions and enlargements thereof as hereinbefore recited and during the period as next hereinafter alleged. That at or about the date of expiration of the term of said original lease, plaintiff duly and regularly exercised the option therein and thereby reserved and confirmed by said supplemental agreements as hereinbefore alleged, for the extension of the term of said original lease for the period of ten (10) years from and after the 1st of May, 1890, and that thereupon said term was duly, regularly and legally extended as to all of said demised premises covered by said original and supplemental leases for the period last above mentioned. That on or about April 4, 1910, said lease still being in force and effect and plaintiff being in possession under the terms thereof and under the terms of supplemental agreements aforesaid, said term was again extended by agreements of the parties for a period of sixty (60) days from May 1, 1910.

11. That on or about the 1st day of November, 1907, the above-named defendant, Great Northern Railway Company, succeeded to all the rights and interest of the said Eastern Railway Company of Minnesota in said above described leased premises, and thereupon and thereafter during the continuance of said term, the defendant received all rentals from plaintiff under said lease and assumed the performance of all the conditions and covenants therein and thereby imposed upon its said predecessor, the Eastern Railway Company of Minnesota.

12. That during the period of its occupancy of said premises, plaintiff, by and with the consent of the defendant and its predecessor, erected, constructed and maintained on said leased premises various machinery and apparatus for the conduct and carrying on of its business on such dock, for the conduct and carrying on whereof the same was leased as aforesaid; all whereof continued to be and remain on said dock at the date of expiration of the term of said lease, as extended, as aforesaid.

13. That prior to the expiration of said term and while said leased premises continued in the possession of plaintiff as aforesaid, certain negotiations were had between plaintiff and the said defendant looking to the purchase by the defendant of such machinery and apparatus. That it was then and there agreed between plaintiff and defendant that all said machinery and apparatus should be taken by defendant and that the terms of said original lease, providing for such taking should be held and construed as in force and effect. That it was further agreed between plaintiff and said defendant that there should be no abandonment of any rights upon the part of plaintiff of said machinery and apparatus by the failure of removal thereof by plaintiff before the expiration of the term of said lease and that all thereof should remain upon said premises notwithstanding the expiration of said term, subject to the further negotiations between the parties concerning the amount which defendant should pay and account for to complainant by reason of the taking of said machinery and apparatus.

14. That pursuant to said understanding and agreement last hereinbefore mentioned, all of said machinery and apparatus erected, constructed and maintained on said dock as aforesaid by plaintiff was, at the expiration of said term, left by plaintiff on said dock, and by consent of the said defendant, plaintiff remained in possession thereof, maintaining and paying the compensation of a watchman for said dock and other property thereon existing, down to the time next here-

inafter mentioned. That heretofore and prior to the filing of this bill and while plaintiff remained in possession of said property in the manner and under the circumstances as last hereinbefore alleged, it was mutually agreed between plaintiff and this defendant that in consideration of the surrender by plaintiff of possession of said premises without the removal or disturbance of said machinery and apparatus thereon constructed, that such surrender should be without prejudice to the rights of plaintiff in respect to such property and that the value thereof should be determined or appraised and paid by the defendant in accordance with the terms and stipulations of said above described original lease, and in the event that said arbitration, as provided by the terms of said original lease, should for any reason prove abortive or be abandoned by the parties, then and in that event that the defendant should and would account to plaintiff for the value of said machinery and apparatus in an appropriate proceeding for such accounting and to determine the value thereof, and that plaintiff should be entitled to recover against the defendant such amount as should be decreed as a result of such accounting and that the same should be and constitute a lien upon said leased premises.

15. Thereupon and pursuant to such agreement as last aforesaid and not otherwise, plaintiff surrendered possession of said premises and additional property hereinbefore mentioned. That following the date of such surrender and pursuant of the terms of the agreement hereinbefore recited, proceedings were had between the parties looking to the arbitration of the value of said property as provided by the terms of said original lease. That the arbitrators originally selected by plaintiff and defendant were unable to agree on the value of said property and were unable to agree upon or designate a third arbitrator as provided by the terms of said lease and thereupon and prior to the filing of this bill, it was mutually agreed between the parties in accordance with the previous agreement hereinbefore alleged that said arbitration should

be abandoned. That the defendant has not accounted to plaintiff for the value of said machinery, fixtures and apparatus which are of a value of in excess of thirty thousand (30,000) dollars.

Wherefore and whereasmuch, plaintiff has no adequate remedy at and by the rules of common law and can only have relief by the specific performance of the terms of the agreement hereinbefore recited, and to the end that in accordance with the terms of such agreement the defendant may be held and adjudged to account for the value of such property and that the amount as thus adjudged and ascertained by the court may be decreed to be and constitute a lien on the hereinbefore described premises:

May it please the court to adjudge and decree that plaintiff is entitled to the specific performance of the terms of the agreement hereinbefore recited and that the court may take an account of the value of the machinery, fixtures and apparatus hereinbefore and in this bill described and that the defendant be adjudged to pay the amount thus ascertained and decreed to plaintiff and that the amount thus ascertained may be held and decreed to constitute a lien on said premises and that plaintiff may have any other and further relief consistent with equity and with the facts hereinbefore alleged. (1)

M. H. BOUTELLE &
A. M. HIGGINS,
Solicitors for Complainant.

(1) Foster's Fed. Prac., 5th ed., Sec. 79.

No. 451.

For Cancellation of Land Patent.(1)

[Caption.]

The United States of America, by D. H. Linebaugh, United States attorney for the eastern district of Oklahoma, by direction of the Hon. James C. McReynolds, attorney general of the United States, and by leave of this honorable court first

had, brings this amended bill against Bessie Wildcat, a minor; Santa Watson, as guardian of Bessie Wildcat, a minor; Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a minor; Saber Jackson, as guardian and next friend of Martha Jackson, a minor; J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Jack Gouge, Ernest Gouge, Mattie Bruner (formerly Mattie Phillips), Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs and Barnossee Unussee, each of the said defendants being a citizen and resident of the state of Oklahoma and of the eastern judicial district thereof, and being within the jurisdiction of this court; and against the defendant, Black Panther Oil & Gas Company, which is a corporation organized and existing under and by virtue of the laws of the state of Oklahoma, and is a citizen and inhabitant of the said state and of the eastern judicial district thereof; and thereupon plaintiff complains and says:

I. That the said defendants, Bessie Wildcat, a minor; Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a minor; Aggie Marshall, Phillip Marshall, Jack Gouge, Ernest Gouge, Mattie Bruner, nee Phillips; Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs and Barnossee Unussee, all and singular, claim to be, and plaintiff is informed and believes, and therefore avers the fact to be, that they are the sole heirs at law of Barney Thlocco, deceased (hereinafter more particularly referred to), and all and singular they claim whatever right, title or interest they claim to have in and to the land hereinafter described by virtue of being heirs at law of the said Barney Thlocco, deceased.

II. Plaintiff further shows that for more than seventy years past that portion of the territory belonging to the United States known and designated as the Indian Territory and now forming a part of the state of Oklahoma and within the eastern judicial district thereof, has been occupied by the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nation

of Indians. That said above-named tribes of Indians formed and constituted a particular and distinct class of Indians, known and designated as the five civilized tribes, as distinguished from other Indians or Indian tribes within the jurisdiction of the United States and under its care, protection and control. That in many of the laws passed by the Congress of the United States pertaining to said five tribes of Indians and to their property they are referred to and designated as the five civilized tribes of Indians, and that wherever so designated or referred to, in any of the acts of Congress, were and are included within the provisions of such acts in the same manner and with like force and effect as though each of said five tribes were particularly and separately designated and named therein. That during all of the times mentioned herein the Creek tribe of Indians has maintained and still maintains tribal relations among themselves and towards complainant, and complainant has at all times mentioned herein, in dealing with the said tribes, recognized such tribal relations. That complainant has at all times mentioned herein and still maintains an Indian agent for said tribes of Indians, who has supervision and control over the tribal property belonging to said Creek tribe of Indians. That the Creek tribe of Indians still has a large amount of tribal property and unallotted lands belonging to the members of said tribe of Indians which is still under the control and management of the complainant.

III. Plaintiff further shows that under and by virtue of the existing treaties between complainant and the Creek tribe of Indians, and by virtue of the several acts of Congress passed in relation to the affairs and property of the five civilized tribes of Indians, the United States government has always and now does assume the relation of guardian and trustee of the property of the Indian tribes and members thereof, constituting the five civilized tribes. That its political department has always declared and now declares such relation to exist between complainant and said tribes of Indians, and especially the Creek tribe, in so far as the same relates to the members and property of said tribes of Indians.

That complaint, under and by virtue of the provisions of an act of Congress passed and approved June 28, 1898, and by virtue of the several acts of Congress supplemental thereto and amendatory thereof, and particularly the acts of Congress passed and approved March 1, 1901, and June 30, 1902, assumed and undertook the duty of allotting in severalty to the various members and freedmen and enrolled citizens and freedmen of said Creek tribe or nation of Indians, the lands belonging to said tribe of Indians. That the work of allotting the tribal lands of the Creek tribe or nation of Indians is still in progress by complainant, and is, as yet, uncompleted, and that by virtue of complainant's right and duty as a sovereign and governing power of said tribe of Indians, and for the purpose of discharging its full duty and obligation toward said tribes of Indians, and fully executing, carrying out and discharging its duty in relation to the allotment in severalty of the lands of said tribe of Indians, to the duly enrolled members thereof, according to the true spirit, intent and purpose of said trust, complainant brings and prosecutes this action in its own behalf and in behalf of the Creek tribe or nation of Indians.

IV. Plaintiff further shows that the following described lands, to-wit:

The northwest quarter of section 9, in township 18 north, range 7 east, was, on the 1st day of April, 1899, and at all the times hereinafter mentioned, and still is, a part of the land belonging to the Creek nation of Indians as public and unallotted domain, subject to be allotted to lawfully enrolled members and citizens of the Creek nation by complainant, under and by virtue of, and in accordance with, the terms and proceedings of the acts of Congress passed and approved March 1, 1901, and June 30, 1902.

V. Plaintiff further shows that by virtue of the authority conferred upon the commission to the five civilized tribes under the acts of Congress passed and approved June 28, 1898, March 1, 1901, and June 30, 1902, as amended by the several acts of Congress supplemental thereto and amendatory thereof, said commission to the five civilized tribes, acting under the

supervision of the secretary of the interior, was charged with the duty of determining who were entitled under the said acts of Congress to be enrolled as citizens and freedmen of the Creek nation, and with the duty of surveying and allotting to the lawfully enrolled citizens and freedmen of said nation their respective due proportions of the allottable land belonging to the said nation, of which the land hereinbefore described was a part.

VI. Plaintiff further shows that one Barney Thlocco was in his lifetime a Creek Indian by blood; that he died at about the beginning of the year 1899 and prior to April 1, 1899, and he was not entitled to be enrolled as a citizen of the Creek nation or to receive in allotment any part of its lands under the acts of Congress hereinbefore referred to; that on or about the 24th day of May, 1901, the commission to the five civilized tribes caused the name of the said Barney Thlocco to be placed on the rolls of the Creek citizens by blood which the said commission was then preparing under the aforesaid acts of Congress; that no hearing was held or investigation made by said commission and no evidence of any kind was produced before or obtained or had by it with respect to the said Barney Thlocco's right under said acts of Congress to be so enrolled, and the said commission neither gave nor caused to be given to the Creek nation or its officers or any other person any notice that said Barney Thlocco's name was about to be or would be so enrolled, and there was no controversy, contest or adverse proceeding of any kind by or before the said commission with respect to the enrollment of the said Barney Thlocco or his right to be so enrolled.

Plaintiff avers that in so causing the name of the said Barney Thlocco to be placed upon the roll of Creek citizens by blood, the said commission acted arbitrarily and summarily and without knowledge, information or belief that said Barney Thlocco was living or dead on April 1, 1899, but acted on a mere arbitrary and erroneous assumption wholly unsupported by evidence of information, that the said Barney Thlocco was living on April 1, 1899, and was entitled to be enrolled by the said commission under the acts of Congress aforesaid.

Plaintiff further shows that the said commission in so arbitrarily assuming that the said Barney Thlocco was living on April 1, 1899, and in so causing his name to be placed on the roll of Creek citizens by blood, made a gross mistake of fact and of law, for plaintiff avers that the said commission did not know nor did they have any evidence before them at the time they caused the name of the said Barney Thlocco to be so enrolled, either showing or tending to show whether the said Barney Thlocco was living or dead on April 1, 1899, but if the true time of the death of the said Barney Thlocco as hereinbefore alleged had been known to the said commission at or before the time of the enrollment of the said Barney Thlocco as a citizen of the Creek nation who had been living on April 1, 1899, entitled to receive a distributive share of the lands of the Creek nation, he would not have been so enrolled by the said commission.

Plaintiff avers its inability to set out here any evidence taken before or had by the said commission respecting the question whether Barney Thlocco was living or dead on April 1, 1899, for plaintiff says that no evidence whatever bearing in any way upon that question was taken before or had by the said commission.

VII. Plaintiff further shows that after the said arbitrary and erroneous enrollment of the name of the said Barney Thlocco as being the name of a Creek Indian who was living on April 1, 1899, and was entitled to receive a distributive share of the unallotted domain of the Creek nation, and on, to-wit, the 30th day of June, 1902, the said commission to the five civilized tribes, being wholly without evidence or information showing or tending to show whether Barney Thlocco had been living or dead on April 1, 1899, and solely by reason of his said arbitrary and erroneous enrollment, purported to allot in the name of the said Barney Thlocco the tract of land hereinbefore described, and accordingly, on June 30, 1902, a certificate of allotment was issued in the name of the said Barney Thlocco as if he were, and under the arbitrary assumption on the part of the said commission that he then was a

living person, that assumption being founded on no evidence or information whatever as to the time of Barney Thlocco's death or as to whether Barney Thlocco was or was not a living person on April 1, 1899, or on June 30, 1902. A true copy of the said allotment certificate is hereto attached and made a part hereof as "Exhibit A."

VIII. Plaintiff further shows that after the purported allotment of the above described land in the name of the said Barney Thlocco, homestead and allotment patents purporting to convey the said land to the said Barney Thlocco were executed by the principal chief of the Creek nation on March 11, 1903, and approved by the secretary of the interior on April 3, 1903. A copy of the said homestead and allotment patents are hereto attached, marked Exhibits "B" and "C," respectively, and are made a part of this amended bill of complaint. The land described in the said patents comprises the same land hereinbefore described, all of which is located in what is now Creek county in the eastern judicial district of the state of Oklahoma. Neither of said patents has ever been delivered to the said Barney Thlocco or to any other person, but the same are in the possession of complainant through its officers and agents.

IX. Plaintiff further shows that knowledge or information as to the mistake of fact made by the said commission in causing the name of the said Barney Thlocco to be enrolled and in purporting to allot to him a portion of the lands of the Creek nation was not had by complainant until after the purported allotting of the said land and the issuance of said allotment certificate and until after the preparation, execution and approval of the said patents; nor did complainant know until thereafter that the said Barney Thlocco had died prior to April 1, 1899.

X. Plaintiff further shows that on, to-wit, December 13, 1906, the secretary of the interior, by his executive order, caused the name of the said Barney Thlocco to be stricken from the roll of citizens by blood of the Creek nation opposite No. 8592 on the said roll, and the said Barney Thlocco is not an enrolled citizen by blood or otherwise of the Creek nation,

and is not now, and has never been, entitled to an allotment of land therein because he has never been a lawfully enrolled citizen thereof, and because he died prior to April 1, 1899.

XI. Plaintiff further shows that by reason of the error committed by the commission to the five civilized tribes by means and by reason of which an allotment was purported to be made to and in the name of the said Barney Thlocco, and the said allotment certificate was issued and the said patents executed and approved, and by reason of the recording of the said instruments in the office of the commission to the five civilized tribes, said instruments and proceedings constitute a cloud upon the Creek nation's title to the said land, and the existence of the said cloud on the said title and the existence of the said allotment certificate and patents hinders and delays complainant in the performance of the duty imposed on it by law to allot and otherwise dispose of the lands, and to wind up the affairs of the Creek nation.

XII. Plaintiff further shows that it is informed and believes, and therefore avers the truth to be, that all and singular the defendants named in the caption hereof claim some right, title, interest or estate in and to the lands aforesaid, either by reason of being heirs at law of the said Barney Thlocco, deceased, or by reason of being guardians, grantees or lessees of the heirs or some of them, such claims being adverse to complainant and the Creek nation, but the precise nature and extent of them being unknown to plaintiff; but plaintiff alleges the truth to be that none of the said defendants has, either at law or in equity, any right, title, interest or estate in or to the said land or any part thereof.

(1) For as much as complainant has no adequate remedy at law and can have no adequate relief except from a court of equity, and to the end, therefore, that the defendants may, if they can, show cause why complainant should not have the relief prayed for, plaintiff prays (subpoenas having been heretofore issued and served upon the said defendants and their appearance entered herein) that the defendants be required to make a full disclosure and discovery of the matters aforesaid

according to the best and utmost of their knowledge, remembrance, information and belief, and true, direct and perfect answers make to the matters hereinbefore charged, but not under oath, answer under oath being hereby expressly waived.

Plaintiff further prays that this court decree that the allotment certificate and patents attached hereto as Exhibits "A," "B" and "C" are void and of no effect as instruments of conveyance, and that the same be cancelled; that all the defendants be decreed to have no right, title, interest or estate in and to the said land, and that the title to said land be quieted in complainant and the Creek nation of Indians, and that whatever cloud is cast upon the title to the said land by reason of any of the matters aforesaid, be decreed by this court to be dissolved and that said land be decreed to be a part of the public and unallotted tribal land of the Creek nation, subject to disposition by complainant in accordance with law, and that the enrollment of the said Barney Thlocco be cancelled, and that he, or any person claiming by, through or under him, including these defendants, be decreed by this court to be not entitled to participate in the disposition of the lands, moneys and other property of the Creek nation, and that the defendants, all and singular, be forever enjoined from asserting any claim of title to or interest in the tract of land hereinbefore described, adverse to the complainant and the Creek nation, and that complainant have such other relief as the court shall deem equitable, premises considered.

D. H. LINEBAUGH,
U. S. Attorney, Eastern District of Oklahoma,

C. C. HERNDON,
Special Assistant to U. S. Attorney,
Solicitors for Complainant.

(1) Foster's Fed. Prac., 5th ed., Sec. 79.

This paragraph is in strict accord with the older pleading, but is rendered unnecessary by the new rules. Eq. Rule 25.

No. 452.**To Remove a Cloud on the Title (Amended Bill).****[Caption.]**

The California Land Company, a corporation organized and existing under and by virtue of the laws of the state of Idaho and a citizen of said state, brings this its bill of complaint against F. F. Doane, a citizen of the state of California, and a resident of the city of Los Angeles in the state of California and in the southern district of California. And for its cause of action plaintiff states:

1. That the amount in controversy herein exceeds the sum of \$3,000, exclusive of interest and costs.

2. That the complainant is the owner in fee in the possession and entitled to the possession of the following described lands, to-wit: [*Here follows description.*]

3. That the defendant, F. F. Doane, claims an estate therein adverse to this complainant. That such claim is wholly unfounded and invalid in law or equity, and that the assertion depreciates the value of its title and property and prevents it from using or selling the property and otherwise harasses and annoys it in its possession and ownership. That the claim of said defendant is without any right whatever, and said defendant has no estate, right, title or interest whatever in said lands or premises or any part thereof. That the claim of said defendant operates as, and is, a cloud upon the title of said complainant to said lands and premises and causes complainant irreparable injury, and defendant threatens to continue, and does continue, to set up and claim said title to said land and premises adverse to this complainant.

Complainant therefore prays that the defendant may be required to answer and to set forth the grounds and nature of his claims and pretensions, and that this court may determine each of them and that it may be adjudged that they are unfounded in law and equity, and that the complainant is the owner of said premises and entitled to their possession, and

for such other and further relief as may be just and equitable.

A. B.,

Solicitor for Complainant.

[*Verification.*]

(1) Amendment of the bill, as of course, may be made before answer, according to Equity Rule 28, with provision for payment of cost of copies of amended bill filed after copy of original has been furnished from the clerk's office.

If defendant has filed a pleading then plaintiff may amend only by consent of defendant or leave of the court or a judge.

The Equity Rules contain other provisions concerning amendment; Rule 19 provides for amendment to any process, proceeding, pleading or record, or the setting forth of material supplemental matter, at the discretion of the court at any time, upon terms; Rule 43 provides for amendment at discretion of the court where defendant has suggested a defect of parties and the plaintiff has proceeded to a hearing notwithstanding the objection; Rule 45 provides for amendment by order of court on motion to revive.

In *Western Union Telegraph Co. v. Atlanta and West Point Railroad Co.*, 238 Fed. 36, the bill of complaint set out a claim to irrevocable, perpetual, and assignable easements or rights for the construction and maintenance of telegraph lines over the right of way of defendant railway, but set out no facts to support the claim. The bill was dismissed and on appeal the decree was modified by making the dismissal conditional upon the filing of amendments in the trial court within a designated time after the filing of the mandate below.

In *Whitaker et al. v. Whitaker Iron Co. et al.*, 238 Fed. 980, at p. 991, the court holds that an amendment introducing matter known at the filing of the bill is within the discretion of the court under Rule 19.

In *Whitney Central Trust & Sav. Bk. v. General Fire Extinguisher Co.*, 240 Fed. 631, an intervening petitioner was decreed a lien on certain movables and also on other property, and on appeal the decree ordering a lien on other property was reversed; the portion of the decree awarding a lien on movables because of a vendor's privilege was attacked because the petition did not set out facts creating a vendor's privilege; the appellate court ordered that petitioner be given an opportunity in the lower court to make appropriate amendment.

In *Jennings v. Smith*, 242 Fed. 561, held that where certain persons are shown to have an interest in the subject of the action, see Equity Rule 37, the bill may be amended to make them parties, at the discretion of the court, at any time, under Equity Rule 28.

In *Schaum and Uhlinger v. Copley Plaza Co.*, 243 Fed. 924, the bill of complaint for patent infringement did not allege that the patent in suit was (a) issued in the name of the United States; (b) under seal of the patent office, or (c) was signed by the commissioner of patents; copy of

patent was not annexed and profert was not made. Held, plaintiff may amend by making profert. See Equity Rule 19.

An amendment to a bill of complaint must conform to Rule 25, governing bills of complaint; hence, statements of law, statutory and customary, and argumentative expressions of a multitude of legal conclusions, accompanied by copious references to and comments upon court decisions, are out of place in an amendment.

No. 453.

For Lien on Cattle and Decree of Sale.

[Caption.]

The plaintiff, The Union Stock Yards National Bank, of Wichita, Kansas, states that it is a corporation duly created, organized and existing under and by virtue of the laws of the United States of America, commonly called the national bank acts (and the several acts amendatory thereof), and is a citizen of the state of Kansas, having its principal office at and in Wichita, Kansas, Sedwick county, and there engaged in the banking business, with power and authority to contract and be contracted with, to sue and to be sued, and to loan money and secure the payment thereof by mortgages on personal property.

The plaintiff states that the defendant, Fred Hamilton, is a citizen of the state of Kentucky, residing at Owensboro, in Daviess county, Kentucky; and that the defendant, James S. Cruse, is a citizen of the state of Kentucky, residing at Owensboro, in Daviess county, Kentucky; and that the defendant, Bushrod J. Milton, is a citizen of the state of Kentucky, residing at Owensboro, in Daviess county, Kentucky; and each one of said defendants is an inhabitant of the western district of Kentucky, and they are now, and were on all of the dates herein mentioned, partners trading in and buying cattle, and doing business as cattle dealers in the city of Owensboro, Daviess county, and in the state of Kentucky, by and under the firm name of Hamilton Cattle Company.

The plaintiff states that on the 11th day of November, 1914, one Roy E. Westbrook borrowed of it, and it delivered to him, in cash, in Wichita, Kansas, at its banking house in and at that

place, the sum of \$3,265.25, for which the said Roy E. Westbrook then and there signed, executed and delivered to it his certain promissory note, whereby and wherein he promised to pay to its order, at its said bank in Wichita, Kansas, on the 11th day of March, 1915, the sum of \$3,265.25, with interest thereon at the rate of ten per centum per annum, after the maturity of said note, until paid. No part of said note has ever been paid and a copy thereof is filed herewith and made a part hereof, marked "Exhibit A."

Plaintiff states that simultaneously with the execution of said note, and for the purpose of securing the prompt and faithful payment thereof, at its maturity, the said Roy E. Westbrook signed, executed and delivered to it a mortgage, whereby and wherein he, the said Roy E. Westbrook, sold, assigned and delivered unto it:

Seventy-four (74) head of coming two (2) year old native steers. Ninety per cent. (90) of which were red and the balance were mixed colors; the average weight of said cattle was about 690 pounds; and were branded W on the right hip.

Plaintiff further states that it accepted said mortgage, and same is filed herewith, as part hereof, marked "Exhibit B," and as provided by law on the 19th day of November, 1914, A. D., at eight o'clock a. m., it deposited a true copy of said mortgage in the office of the register of deeds for Marion county, Kansas, and the said register of deeds endorsed on the back of said copy of said mortgage the time of receiving same, to-wit, November 19, 1914, eight o'clock a. m., and did file said copy in his office, and has kept the same in his said office for the inspection of all persons interested, from and after the date of receiving same, and said register of deeds did enter a minute of said mortgage in a book kept for that purpose in his office, giving the time of the reception of said mortgage, the name of the mortgagor, the name of the mortgagee, and a general description of the place and property where located, as is provided for under the general statutes of the state of Kansas.

Plaintiff further states that at the time of the execution and delivery of said mortgage to plaintiff, said above described cattle were located on the northwest quarter of section 16, township 22, range 4 east, in Peabody township, Marion county, Kansas, where, under the terms of said mortgage, said cattle were to remain during the life of the loan so made to the said Roy E. Westbrook, and said county of Marion in the state of Kansas was, at the time said mortgage was so executed and delivered, the county and state of the residence of said Roy E.

Plaintiff further states that said cattle, described in said mortgage, were, by the said Roy E. Westbrook, in the month of December, 1914, transported to Kansas City in the state of Missouri, and there sold and delivered to the defendants, doing business as the Hamilton Cattle Company, and from thence were transported by the defendants to Owensboro in Daviess county, Kentucky, where they are now in possession of the defendants, on the property of the Green River Distilling Company, about one mile west of Owensboro, and in Daviess county, Kentucky.

Plaintiff states that the amount in controversy herein is in excess of \$3,000, exclusive of interest and costs, and that the fair, reasonable market value of said cattle is now, and was during the month of December, 1914, and at the time said cattle were sold and delivered to the defendants, as hereinabove stated, in excess of \$4,000.

Plaintiff further states that it was agreed by and between it and the said Roy E. Westbrook, and was expressed in writing in said mortgage, that upon the failure of said Roy E. Westbrook to conform or to comply with any of the conditions or agreements mentioned in said mortgage, then the whole sum of money secured by said mortgage should, at the option of the legal holder of said mortgage, become due and payable at once without notice, and that in case of sale or disposal, or attempt to sell or dispose of any of the cattle mortgaged, or a removal of or attempt to remove the same from the county of Marion in Kansas, or an unreasonable depreciation in value, or

if from any other cause the security should become inadequate, or the plaintiff should deem itself insecure, then and thenceforth it should be lawful for the plaintiff, or its authorized agent, to enter upon the premises of the said Roy E. Westbrook, or any other place or places wherein said cattle might be, and to remove and dispose of the same, and all of the equity redemption of the said Roy E. Westbrook sold at public auction or private sale in the county where said cattle was found, and out of the avails thereof to retain the full amount of the note set out in said mortgage, with interest thereon according to the conditions of said note, together with all reasonable costs and expenses attending the same, rendering to the said Roy E. Westbrook the surplus money, if any there should be, anything in said mortgage to the contrary notwithstanding. It is further provided by and in said mortgage that if the said Roy E. Westbrook should pay, or caused to be paid, unto the plaintiff the said sum of \$3,265.25, with interest thereon at the rate of ten per centum per annum from the maturity of said note, then said mortgage and everything contained therein should be void, anything in said mortgage to the contrary notwithstanding.

Now, the plaintiff states that the said Roy E. Westbrook violated the terms and conditions of said mortgage in this, that he removed said cattle from the northwest quarter of section 16, township 22, range 4 east, in Peabody township, Marion county, Kansas, where they were, and were to remain during the life of the lien secured by said mortgage, and transported them to Kansas City, Missouri, where they were sold and delivered to the defendants.

And the plaintiff now hereby elects to and does exercise its option to treat said note as due, and said note by and under the terms of said mortgage has become due, and no part thereof, or any of the interest thereon, has ever been paid.

Plaintiff further states that it has, by virtue of the signing, execution and delivery to it of said mortgage by the said Roy E. Westbrook, and the depositing of said mortgage by it in the county of Marion, Kansas, as aforesaid, a lien on the above

described cattle to secure it in the payment of the sum of \$3,265.25, with interest thereon at the rate of ten per centum per annum from the 11th day of March, 1915, until paid, and its costs expended in this action, a valid and subsisting lien on said cattle, prior and superior to any interest that the defendants may have in and to said mortgaged property; and no one other than the plaintiff and the defendants have any lien upon or any interest in said cattle.

The plaintiff further states that the said Roy E. Westbrook is not now within the jurisdiction of this court, and is not therefore made a party hereto.

Wherefore plaintiff prays the court that its said mortgage lien upon said cattle be recognized, established and enforced; and that this court decree a sale of said cattle, and that the same, or the required number thereof, be sold to satisfy its said mortgage debt, the interest thereon, and the costs of this action; and plaintiff further prays for all such equitable relief as it may show itself entitled.

E. B. ANDERSON,
CLARENCE FINN,
Attorneys for Plaintiff.

No. 454.

To Enforce a Lien Against a Distillery.

The District Court of the United States in and for
the ——— District of ———.

| | |
|---|--------------|
| The United States of America, Plaintiffs, | } In Equity. |
| vs. | |
| C. D., Defendant. | |

To the Honorable Judge of the District Court of the United
States for the ——— District of ———.

The plaintiffs, the United States of America, respectfully show unto your honor that C. D. was engaged in the business of a distiller in the year of ———, in ——— county, in the ——— collection district of the state of ———; and as such distiller

made returns to the assessor of said district of spirits by him produced during the month of —, 1894. And the assessor of said district, proceeding to inquire and determine if said C. D. had accounted for all the spirits produced by him during said month of —, 1894, under and by virtue of Section 20 of the act of Congress approved July 20, 1868, ascertained that the quantity of spirits returned by the said C. D., as produced by him during said month, was less than eighty per centum of the producing capacity of his said distillery as estimated under the provisions of the act aforesaid. And thereupon the said assessor made an assessment upon said C. D. for deficiency, amounting to — dollars, which was thereupon placed in the hands of the collector of said district, and payment thereof demanded of the said C. D., yet the said assessment still remains due and unpaid, and is a lien upon the distillery and the lot of land upon which the same was situated, to-wit: [*Here set forth description of the property in full.*]

The plaintiffs further show that G. B., E. P. and S. G. have a mortgage lien upon the said premises, but on the — day of —, 18—, they gave their consent in writing, duly acknowledged, that the lien of the United States for taxes and penalties should have priority of their said mortgage.

Wherefore plaintiffs pray that due process issue, requiring said C. D. and A. D., his wife, G. B., E. P. and S. G. to appear and answer this bill of complaint; that the said distillery and lot of land above described may be sold to satisfy said lien, and that plaintiff may have such other and further relief as may be just and equitable.

J. H.,

United States Attorney, Solicitor for Plaintiffs.

No. 455.

**Of Interpleader(1). (Old English Form.) Bill by a Lessee
Against Different Persons, Claiming the Rents by
Different Titles, to Have Them Interplead.**

[Caption and address.]

Humbly complaining, sheweth unto your lordship your orator A. B., of, etc., that the mayor, citizens, and commonalty of the city of C., being seized as of fee, of and in the perpetual curacy of D., by indenture, etc. *[State the demise from the corporation to the Reverend E. D., etc., clerk, a defendant hereinafter named, for life; and state the demise of the tithes from the said E. D. to the complainant; and also state a subsequent grant of an annuity out of the profits of the said perpetual curacy by the said E. D. to F. G., another defendant hereinafter named.]* And your orator further sheweth unto your lordship that the said E. D., at the time of making the said last-mentioned indenture or grant of annuity to the said F. G., and on or about the — day of —, in the year —, was actually a prisoner in his majesty's King's Bench prison for debt, at the suit of one L. M., and others his creditors; and that on the — day of —, in the year —, at a session then held at Horse-monger Lane, in the parish of St. Mary's, Newington, in and for the county of Surrey, the said E. D. applied to be discharged and exonerated under and by virtue of a certain act of Parliament made and passed in the fifty-first year of the reign of his late majesty, entitled "An act for the relief of certain insolvent 'debtors'"; and the justices of the peace present at such sessions adjudged the said E. D. to be set at liberty, and he was discharged accordingly; and by virtue of the said act of Parliament, all the real and personal estate of the said E. D. was immediately after such adjudication thereby, and now is, vested in N. O., of, etc., Esq., the clerk of the peace of the said county of Surrey (another defendant hereinafter named), upon the trust, and for the purposes in the said act mentioned, but the said N. O. has not hitherto made

any conveyance or assignment thereof. And your orator further sheweth unto your lordship that your orator, in pursuance of the said indenture of demise so made by the said E. D., as aforesaid, duly paid the said rent of £——, thereby reserved for the said tithes, up to the —— day of —— last; and your orator has always been ready and desirous to pay the rent for the said tithes, which has become due since that period, to the person or persons duly entitled to receive the same; and your orator hoped he should have been able so to have paid the said rent, and that no dispute could have arisen concerning the same, or at least that no suit would have been commenced against your orator in respect to the said rent; and that the said E. D., F. G. and N. O. would have settled between themselves their differences respecting the right to receive the said rent. But now so it is, may it please your lordship, the said E. D., F. G. and N. O., respectively, claim to be entitled to the said rent; and the said E. D. has lately commenced an action in his majesty's court of common pleas at Westminster, for the recovery of the sum of £——, on account of the said rent, due from your orator since —— aforesaid. And the said E. D. pretends that he is discharged from the said annuity so granted by him as aforesaid, in consequence of his having taken the benefit of the said insolvent act, and that the interest of him, the said E. D., does not vest in the said N. O. as such clerk of the peace as aforesaid, by the operation of that act; and the said F. G. insists that he ought to be paid his said annuity out of the said rent now due from your orator, and that the said E. D. is not discharged from such annuity under or by virtue of such insolvent act, but that the said annual rent, payable by your orator, still remains liable to the payment of such annuity, and he threatens and intends to proceed at law against your orator, unless the said annuity be paid by him out of such rent. And the said N. O. pretends and insists that all the said estate, right and interest in the said tithes vested in him, the said N. O., as such clerk of the peace as aforesaid, by the operation of the said insolvent act, and that he is therefore entitled to receive the said rent of £——, payable by your

orator, which he insists is no longer liable to the payment of the said annuity. And your orator, under the circumstances aforesaid, is in danger of being greatly harassed on account of the said rent, and can not safely pay the same without the aid of this honorable court. And that the said E. D., and F. G., and N. O., respectively, may set forth to whom the said rent is due and payable, and may be decreed to interplead and adjust the said several claims and demands between themselves, your orator hereby offering to account for and pay the arrears of the said rent now due from him to such of them, the said E. D., F. G., and N. O., as the same shall appear of right to belong and be payable, on being indemnified by this honorable court in so doing, or to pay the same into the hands of the accountant-general of this honorable court, to be disposed of as this honorable court shall direct. And that the said E. D. may be restrained by the order and injunction of this honorable court from further prosecution of the said action so commenced by him against your orator as aforesaid, and that he, and the said F. G. and N. O., respectively, may in like manner be restrained from all other proceedings at law whatsoever, touching the matters in question in this suit, or any of them. [*And for general relief.*] May it please, etc. [*End with praying an injunction in the terms of the prayer, and also a subpoena against the said E. D., F. G., and N. O.*]

(b) Where two or more persons whose titles are connected by reason of one being derived from the other, or of both being derived from a common source, claim the same thing, debt, or duty by different or separate interests from a third person, and he, not knowing to which one of the claimants he ought of right to render the debt or duty, or to deliver the thing, fears that he may be hurt by some of them, he may maintain a suit and obtain against them the remedy of interpleader. In his bill of complaint he must state his own rights and their several claims, and pray that they may interplead, so that the court may adjudge to whom the debt, thing, or duty belongs, and he may be indemnified. If any suits at law have been brought against him he may pray that such proceedings be restrained until the right be determined. Mitford's Eq. Pl., pp. 58, 59. If the party has in any way made himself liable, even for the same demand, to two claimants, he can not have a bill of interpleader; for it is absolutely necessary to enable him to file the bill that he should be liable to one of the two claimants. *Crawford v. Fisher*, 1 Hare 436-441; *East & West*

India Dock Co. v. Littledale, 7 Hare 57-60; *Greene v. Mumford*, 4 R. I., 313; *Pfister v. Wade*, 56 Cal. 43.

For particulars with reference to Bills of Interpleader in Federal Practice. See *Beach's Modern Eq. Prac.*, Sec. 141 et seq.; *Foster's Eq. Prac.*, 5th ed., Secs. 157 and 158.

No. 456.

Stipulation for Interpleader.

[Caption.]

Whereas the defendants herein, Annie M. Phillips and Murray Phillips, have filed their answer to the plaintiff's petition, and whereas said answer has been duly considered by the counsel both for the plaintiff and for the defendants;

It is now, therefore, stipulated and agreed, by the counsel for the parties, both plaintiff and defendants, that for the purposes of this action said answer of the said defendants shall be taken as setting forth grounds for an interpleader to be filed in this cause by the Commercial Bank of New Madrid, Missouri, the claimant named in the said answer of the said defendants.

Wherefore the parties, plaintiff and defendants, do by their counsel request this honorable court to make an order commanding the defendants, Annie M. Phillips and Murray Phillips, to pay into court the sum of money set forth in their answer and commanding the said Commercial Bank of New Madrid, Missouri, a corporation, to come in and show cause, if any, why said sum so paid into this court by the said defendants should not be paid over to the plaintiff in accordance with the petition filed by the plaintiff in these proceedings.

Dated at St. Louis, Mo., this 12th day of January, 1916.

CHAS. CLAFLIN ALLEN and
GEO. BREAKER,

Attorneys for Plaintiff.

RILEY & RILEY and
THOMAS GALLIVAN,

Attorneys for Defendant.

No. 457.**Order to Interplead, Etc.****[Caption.]**

The stipulation made and entered into by the parties, both plaintiff and defendants, in the above entitled cause, dated January —, 1916, having been duly considered by the court and the court being fully advised in the premises, does herewith order:

First. That the defendants, Annie M. Phillips and Murray Phillips, pay into the clerk of this court the sums called for in the petition filed by the plaintiff in this cause, together with interest thereon to the date of this order; said sum to remain in the hands of the clerk, abiding the orders and directions of this court.

Second. That the Commercial Bank of New Madrid, Missouri, a corporation duly organized and existing under the laws of the state of Missouri, and having its principal place of business in the town of New Madrid, and county of New Madrid, Missouri, be and is hereby ordered and commanded to interplead in this cause, and show cause, if any, why the money tendered into court in accordance with this order, and claimed by the plaintiff in his petition filed in this cause, should not be forthwith paid to the plaintiff, together with interest thereon in accordance with the terms and provisions of the note which is the subject-matter of this action.

Witness my hand this 19th day of January, 1916.

DAVID P. DYER, Judge.

No. 458.**Interplea in Suit on Promissory Notes.****[Caption.]*****First Count.***

Comes now the Commercial Bank, a corporation of New Madrid, Missouri, leave of court first had and obtained, and files this its interplea in this cause.

Interpleader states that it was at all times hereinafter mentioned, and now is, a corporation duly organized and existing and doing business at New Madrid, Missouri, under and by virtue of the laws of the state of Missouri, and admits that Lloyd England is the duly appointed and acting receiver of the State National Bank of Little Rock, Arkansas.

And further pleading this interpleader states that on the — day of September, 1913, it was, and still is, the owner of a certain promissory note in the principal sum of ten thousand dollars (\$10,000), made, executed and delivered to it for a valuable consideration by Murray Phillips, Jr., and Annie M. Phillips, it being the note described in, and upon which this plaintiff instituted, this action.

This interpleader further states that the State National Bank of Little Rock, Arkansas, plaintiff herein, made and entered into an agreement with this interpleader, by the terms of which said agreement the said State National Bank of Little Rock, Arkansas, was to take the promissory note above described and hold the same until requested by the interpleader to return it to interpleader, and to deliver to this interpleader one of its notes for like amount and of equal value to be held by the interpleader until the note delivered to said bank was returned to this interpleader. The note to be delivered by the said bank to this interpleader was to be a solvent note.

Interpleader further states that under said agreement so entered into as above set out between interpleader and the State National Bank of Little Rock, Arkansas, and for no other consideration whatever, it sent the note herein sued on to the State National Bank of Little Rock, Arkansas, and said bank received said note and acknowledged receipt of the same. And said State National Bank of Little Rock, Arkansas, sent this interpleader, in lieu of the note herein sued on, and so sent to said bank by interpleader, and interpleader believed in accordance with the terms of said agreement, a note in the sum of \$10,000, executed by the State Trust Company, a corporation of Little Rock, Arkansas; that this

interpleader believed and the State National Bank of Little Rock, Arkansas, knew that this interpleader believed and accepted said note, believing that said note so forwarded to it by the said State National Bank of Little Rock, Arkansas, was the property of said bank and had been passed upon by its discount board, and that it was a solvent note, and accepted the same believing that said transaction was in full compliance with the agreement entered into as aforesaid, and believing the representations of the State National Bank of Little Rock, Arkansas, that said note was its property and was a solvent note, and that Murray Phillips, Jr., and Annie M. Phillips note would be returned to interpleader by the said State National Bank of Little Rock, Arkansas, upon request and the return of the State Trust Company note to said bank by said interpleader. All of which the State National Bank of Little Rock, Arkansas, at the time said transaction was so made knew was untrue and false, but that the interpleader was believing the same to be true, and said representations were so made by said State National Bank of Little Rock, Arkansas, to interpleader with the intent to cheat and defraud interpleader out of said note; that this interpleader in good faith returned said note and collateral to the State National Bank of Little Rock, Arkansas, before the filing of this suit and demanded the return of the note herein sued on to it in accordance with said agreement, and that said bank in furtherance of its said purpose to cheat and defraud interpleader herein, refused to accept said note and return the Murray Phillips, Jr., and Annie M. Phillips note to interpleader herein, as it had agreed to do, and informed interpleader that said note was never the property of the State National Bank of Little Rock, Arkansas; and until so informed the interpleader did not know that said note had never been the property of the State National Bank of Little Rock, Arkansas, and did not know that said note was worthless, all of which the State National Bank of Little Rock, Arkansas, at all times well knew; that said note of the State Trust Company of Little Rock, Arkansas, and collateral be-

longing thereto is filed herewith, made a part hereof, marked Exhibit "A"; that this interpleader immediately upon learning the facts above set out again tendered said note and collateral to the State National Bank of Little Rock, Arkansas, and demanded the return of the Murray Phillips, Jr., and the Annie M. Phillips note herein sued on, and it was again, by the said State National Bank of Little Rock, Arkansas, refused, and interpleader now tenders said note and collateral belonging thereto filed herewith, into court to be returned to the receiver representing said State National Bank of Little Rock, Arkansas. And the State National Bank of Little Rock, Arkansas, now fraudulently and in furtherance of its fraudulent intent to cheat and defraud this interpleader out of said Murray Phillips, Jr., and Annie M. Phillips note, claims to own the same under the conditions above set out.

Wherefore interpleader prays that it may be adjudged to be the owner of said Murray Phillips, Jr., and Annie M. Phillips note at the institution of this action, and that the court order the proceeds of this note heretofore paid into court, paid to this interpleader and for his costs in this behalf expended.

Second Count.

And for a further cause of action this interpleader says it is a corporation duly organized, existing and doing a general banking business under the laws of the state of Missouri, and admits that Lloyd England is the duly appointed and acting receiver of the State National Bank of Little Rock, Arkansas.

Interpleader further says that the note sued on herein was made, executed and delivered to the Commercial Bank of New Madrid, Missouri, by Murray Phillips and Annie M. Phillips, for a valuable consideration, and that said note is now the property of this interpleader and that said note was delivered to the State National Bank of Little Rock, Arkansas, by interpleader herein without any consideration whatever passing from the plaintiff herein, or the State National Bank of Little Rock, Arkansas, to the interpleader herein;

and interpleader says that there was no consideration whatever for the transfer of said note to the State National Bank of Little Rock, Arkansas, and that interpleader is the owner and entitled to the proceeds of the Murray Phillips and Annie M. Phillips note, being the note sued on herein by plaintiff.

Wherefore interpleader prays the court that it be adjudged the owner of the Murray Phillips, Jr., and Annie M. Phillips note herein sued on, and that the proceeds thereof heretofore paid into court be ordered paid to this interpleader herein.

Third Count.

And for further cause of action this interpleader says it is a corporation duly organized, existing and doing a general banking business under the laws of the state of Missouri; and admits that Lloyd England is the duly appointed and acting receiver of the State National Bank of Little Rock, Arkansas, but denies each and every other allegation in plaintiff's petition contained, and having fully answered prays to be dismissed with its costs.

A. B. and C. D.,
Attorneys for Interpleader.

No. 459.

Prayer of a Bill of Interpleader.

And that the said several defendants may be decreed to interplead touching their said several claims, and that plaintiff may be at liberty to pay the several sums now justly and fairly due from him for the rent of the said messuage or tenement and premises into the bank, in the name and with the privity of the accountant general of this honorable court, in trust for the benefit of the persons or person entitled thereto, subject to the further order of this court, after deducting thereout in the first place the aforesaid sum of £36, to be allowed unto plaintiff, for repairs pursuant to the said

agreement, together with all sums of money expended and advanced by plaintiff for land tax and other necessary outgoings in respect of the said premises. And that plaintiff may be at liberty to quit the possession of the said premises, and that possession thereof may be delivered up to such person or persons as this honorable court shall direct or appoint. And that plaintiff may have a satisfaction or allowance made unto him out of the rent of the said premises for the several articles hereinbefore and in the said first agreement particularly mentioned, which have been provided by plaintiff at his own expense for the said premises. And that in the meantime the said defendants, S. O. and T. C., may be restrained by the order or injunction of this honorable court from all further proceedings in the aforesaid action of ejectment brought against plaintiff, and that they and all the said other defendants may be in like manner restrained from making any distresses or distress upon the said messuage or tenement and premises, and from commencing or prosecuting any action or actions at law against plaintiff to recover the rent of the said premises, or to turn plaintiff out of possession thereof, or otherwise from proceeding at law against plaintiff touching any one of the matters aforesaid. And that all proper and necessary directions may be given for the purposes aforesaid. [*And for further relief.*]

No. 460.

Form of Affidavit to be Annexed to a Bill of Interpleader.

The said J. C. maketh oath and saith that he has exhibited his bill of interpleader against the defendants in this cause without any fraud or collusion between him and the said defendants, or any or either of them; and that he, the said J. C., hath not exhibited his said bill at the request of the said defendants, or of any or of either of them, and that he is not

indemnified by the said defendants, or by any or either of them, and saith that he has exhibited his said bill with no other intent but to avoid being sued or molested by the said defendants, who are proceeding or threaten to proceed at law against him for the recovery of the rent of the said tithes in the said bill mentioned.

J. C.

Sworn, etc.

No. 461.

Another Form of Affidavit.

A. B., the above-named plaintiff, maketh oath and saith that he doth not in any respect collude with either of the above-named defendants touching the matters in question in this cause, nor is he in any manner indemnified by the said defendants, or either of them, nor hath he exhibited his said bill of interpleader at the request of them, or either of them, but merely of his own free will, and to avoid being sued or molested touching the matters contained in his said bill.

Sworn, etc.

A. B.

No. 462.

Still Another Form.

I, A. B., the above-named plaintiff, make oath and say that the bill in this suit [*or*, the bill hereunto annexed] is not filed by me in collusion with any or either of the defendants in the said bill named, but such bill is filed by me of my own accord for relief in this honorable court.

Sworn, etc.

A. B.

No. 463.**Against an Agent for Mismanagement.***[Caption and introduction.]*

That in the month of — he was the owner of a certain ship or vessel called the —, then lying in the port of —, bound on a voyage to —, in the state of —, and that being desirous to procure a cargo of goods and merchandise to be carried to said —, in said vessel on freight, he applied to said C. & D., who were engaged in that line of business, to obtain a cargo for said vessel on freight, and, as a compensation for their services in so doing, agreed to pay them a commission of five per centum on the amount of the freight and primage of such goods and merchandise as they should procure to be shipped on board of the said ship, in consideration of which they agreed to act as his agents in the premises, and to make use of their knowledge, skill and ability to procure a full cargo for said vessel on freight, and that accordingly the lading and procurement of freight were intrusted to them, and in said month of —, and the ensuing months of — and —, they did procure a cargo for said vessel, and in the month of — she set sail and departed on her voyage for said —.

That on or about the — day of said —, said C. & D. sent to plaintiff a freight list, or statement of the amount of merchandise laden on board of the said vessel, and of the rates of freight thereof, and of the sums of money to be earned and paid on the carriage and delivery thereof at said port of — (which said freight list plaintiff prays leave to file in court as a part of this bill), by which it appears that all the merchandise laden on board of the said ship was shipped at specific rates of freight therein set down, and that the total amount of freight, including primage, was the sum of — dollars, upon which sum the said C. & D. claimed of plaintiff, and he paid to them, a commission of five per centum, amounting to the sum of — dollars, together with

other charges for advertising, and so forth, as by their bill herewith also filed, in the full belief, and relying on the assurance of the said C. & D., made by sending him the said freight list and otherwise, that the merchandise therein mentioned had been actually laden on board of the said vessel, to be carried and delivered at and for the rates of freight therein specified.

That the said ship was consigned to certain persons doing business at said —, under the firm of S. & M., who, upon the arrival of said vessel in the month of —, attended to the unloading and discharge of the cargo, the collection of the freight and the remittance thereof to plaintiff. That upon such discharge and delivery it appeared that fifty-seven $\frac{1379}{2340}$ tons of pig-iron, which in the said freight list were specified as shipped at the rate of — dollars per ton, and the freight of which was therein stated to amount to — dollars, and one hundred and thirty-three nests tubs, two hundred nests tubs, and seventy-five dozen pails, which in said freight list were specified as shipped at and for the freight or compensation of — dollars, were not shipped at such rates of freight, but the rate of freight specified therefor, in the bills of lading thereof (which were not signed by the master of said ship, but by the said C. D., who assumed to act as his agent in that behalf without his knowledge or consent) was "*one-half net profits over costs and charges*"; that the said iron, tubs and pails, as plaintiff is informed and alleges, could not be sold at any profit, and that the said S. & M. did not collect, and plaintiff has not received, any freight or compensation for the carriage and delivery thereof at said —.

That upon receiving information from the said S. & M. of the fact that said iron, tubs and pails were shipped on half profits instead of the rates of freight stated in said freight list, plaintiff immediately advised the said C. & D. that he held them responsible for the amount of freight at which they had represented that the same were shipped, and upon which they had charged and been paid their full commission,

and requested payment thereof, which they refused to make.

That the commission, agency and trust, for which plaintiff retained said C. & D., was to procure a cargo for said vessel to be carried and delivered on payment of freight in money at specified rates, and not upon half profits; that the said C. & D. represented to plaintiff that they had obtained and shipped a cargo, upon the delivery of which plaintiff would be entitled to receive the sums of money as freight thereof specified in the said freight list; that said C. & D. demanded of plaintiff a commission on the amount thereof, as so shipped, and that plaintiff paid them said commission, in the full belief and relying upon their assurance, contained in said freight list, that the various articles therein mentioned were shipped at the rates of freight therein specified, and that upon the safe delivery thereof plaintiff would be entitled to receive the same in money.

That the said iron, tubs and pails were safely carried to —, and delivered to the consignees thereof, and that upon such delivery plaintiff had earned and was entitled to be paid for such service the rates of freight and sums of money specified in the said freight list, the same being the usual and current rates of freight upon the amounts of which, as such, the said C. & D. charged their commissions as afore-said; that by reason of their undertaking to carry and deliver the same upon half profits instead of on freight plaintiff has lost the sums of money to which he should have been entitled, and to which the said C. & D. represented that he would be entitled, on the delivery thereof, and has not received and is not entitled to claim, by reason of their said doings, any compensation from the owners or consignees of the said goods and merchandise for the cost and expense of their transportation and delivery; and that by reason of the premises, and of the representation made that the said goods and merchandise were shipped at the rates of freight specified in the said freight list, the said C. & D. are bound to make good the loss plaintiff has suffered by their said doings, and to pay him the

sums of money which he would have received if the said goods and merchandise had been shipped at the rates specified in said freight list, and plaintiff has repeatedly requested them so to do; but the said C. & D. absolutely refuse to comply with such request.

To the end, therefore, that they, the said C. & D., may be decreed to pay to plaintiff the said sums of — dollars, and —(1) dollars, and such losses, damages and interest as he has suffered by reason of the premises, and that plaintiff may have such other relief as the nature of his case may require, and that the said C. & D. may, if they can, show why plaintiff should not have the relief hereby prayed, and may upon their several corporal oaths, and to the best of their knowledge and belief, make answer to all and singular the premises.

X. & X., Solicitors for Plaintiff.

A. B.

[*Verification.*]

(1) See Judicial Code, Sec. 24, for jurisdictional amount.

No. 464.

Bill to Enjoin a Combination Under Sherman Anti-Trust Act.(1)

The Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

In Equity.

To the Judges of the Circuit Court of the United States for the — Division of the — District of —.

The United States, by the Attorney General of the United States, and J. H., the United States Attorney for the — District of —, brings this its petition

against

The Addyston Pipe & Steel Company, a corporation chartered by and doing business under the laws of the state of

Ohio, and a resident of said state, with its principal office in the city of Cincinnati, in said state; Dennis Long & Co., a corporation (or partnership) chartered by and doing business under the laws of the state of Kentucky, a resident of said state, with its principal office in the city of Louisville, Kentucky; Howard-Harrison Iron Company, a corporation chartered by and doing business under the laws of the state of Alabama, and a resident of said state, with its principal office at Bessemer, Alabama; Anniston Pipe & Foundry Company, a corporation chartered by and doing business under the laws of the state of Alabama, and a resident of said state, with its principal office at Anniston, Alabama; South Pittsburg Pipe Works, a corporation chartered by and doing business under the laws of the state of Tennessee, and a resident of said state, with its principal office at South Pittsburg, Tennessee; Chattanooga Foundry & Pipe Works, a corporation chartered by and doing business under the laws of the state of Tennessee, and a resident of said state, with its principal office at Chattanooga, Tennessee.

Petitioner charges:

First. That defendants, and each of them are and have been for several years engaged in the manufacture of cast iron pipe, a commodity in general use by the public throughout the country, and necessary for drainage and sewerage purposes, and used especially by gas and water companies and by municipal corporations.

Second. Defendants are all residents of that portion of the country where pig iron and fuel and all elements entering into the production of cast iron pipe are cheaper, and where said cast iron pipe can be made at less cost to the manufacturer than any place else.

Third. Petitioner further charges that defendants are the only persons engaged in the manufacture of cast iron pipe, and who have capacity to supply the demand and fulfill the

contracts, in the following states and territories, to wit: Alabama, Arizona, California, Colorado, North Dakota, South Dakota, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Indian Territory, North Carolina, South Carolina, New Mexico, Minnesota, Michigan, Tennessee, Texas, Illinois, Wyoming, Indiana, Ohio, Utah, Washington, Oregon, Iowa, West Virginia, Nevada, Oklahoma and Wisconsin, being 36 states and territories, and embracing that portion of the United States that is most rapidly developing, and where said cast iron pipe is most largely used. There are a few other pipe works located in the above territory, but for want of capacity they are unable to compete with defendants, and by reason of the conduct on the part of defendants hereinafter mentioned, they have been practically driven out of the market in said territory.

Fourth. Petitioner charges, upon information that it believes to be true, that defendants, in order to monopolize the trade in cast iron pipe, especially in the above-named states and territories, and force the price of the same to an unreasonable and exorbitant rate, and destroy all competition in regard thereto, and force the public to pay exorbitant and unreasonable prices for said cast iron pipe, did, on or about the 28th day of December, 1894, in the city of Chattanooga, Tennessee, by and through their regular appointed and qualified officers, agents and representatives, enter into a contract or combination, in the form of trust or conspiracy, in restraint of trade or commerce among the several states and territories above named, in regard to the manufacture and sale of said cast iron pipe, which said fraudulent and criminal conspiracy was entered into in violation of law, and in defiance of the same, and was intended by defendants to enable them to defraud the public in the purchase and use of the pipe manufactured by them. The name of this criminal and unlawful conspiracy is the "Associated Pipe Works," and its members

are the defendants above named. Petitioner charges, upon information and belief, that defendants are now, and have been since said 28th day of December, 1894, operating their shops in obedience to and according to the agreement entered into on said date, and are now engaged in selling and shipping from their shops said cast iron pipe into other states and territories than the states and territories in which defendants reside, and under contracts entered into with citizens of such other states and territories.

Fifth. Petitioner further charges that it was a part of said fraudulent and criminal combination and conspiracy aforesaid, that there should be no competition among defendants as to any work done or pipe furnished in any of the states and territories above named, and in order to make effectual this criminal purpose, it was agreed that upon all work done in the territory named, a "bonus" should be charged on every ton of pipe sold, the amount of said "bonus" being determined by how much the combination could force the customer to pay, and petitioner here charges that defendants have collected a "bonus" ranging from three to nine dollars on every ton of pipe sold since the date the trust was formed. The "bonus" represents the amount charged for pipe over and above a reasonable and fair price for same, and above the price that defendants would be willing to sell for, if the trust or combination did not exist, and they have to compete with each other for the work.

Petitioner charges that the output of the shops belonging to the six defendants above named, amounts to about 220,000 tons of pipe annually, and this multiplied by the average "bonus" received, of six dollars per ton, amounts to one million three hundred and twenty thousand dollars, so your honors may get some idea of the immense benefits derived by defendants from their fraudulent, criminal and unlawful combination, and see to what extent the public has been, and is

being, robbed and plundered by reason of the existence of the trust aforesaid.

Petitioner is informed and believes, and upon such information charges, that the amount of pipe sold and shipped by defendants for this year, 1896, will exceed said amount of 220,000 tons, nearly all of which has been sold and shipped according to the terms and under the agreement entered into between defendants on said 28th day of December, 1894; and defendants are still and now engaged in the sale and shipment of the same to the states and territories other than in which they reside.

Sixth. The above-named states and territories were designated by defendants in their conspiracy as "pay territory" and all territory not included in the above was called "free territory." In "pay territory," except as to certain cities, known as "reserved cities" where all the pipe was to be furnished, by some particular shop, a "bonus" of so much per ton was fixed on all pipe sold and either of defendants were allowed to solicit work and furnish pipe at any price it saw proper, but it had to account to the pool or trust, for the "bonus" agreed upon for that particular state. It made no difference at what price the work was done, and these "bonuses" were remitted from one to another every two weeks, each sharing in the profit represented by the "bonus," although they may have had nothing to do with the work. This arrangement kept one from competing with the other, the incentive not to do so being that they would divide the "bonus" received, and, as petitioner charges, prevented the public from obtaining the pipe at a fair and reasonable price.

Seventh. To make said fraudulent and unlawful criminal conspiracy effectual, and in order to deprive the public of their right to obtain said cast iron pipe at a fair and reasonable price, petitioner further charges that it was a part of the agreement that defendant should, at once, notify all parties to whom they had made quotations, withdrawing the same, and

accept no orders after that date on quotations sent out before the conspiracy was entered into, and petitioner charges that said defendants did, at once, withdraw said quotations where they had sent them out, and at once prepared new quotations for the territory embraced in their combine, advancing the price of pipe from three to nine dollars on every ton, and this too, at a time of untold financial depression, and when there had been no increase in the wages of labor, or the cost of any of the materials used in the manufacture of said pipe, and they have been receiving this price for their pipe from that date to the present time.

Eighth. It was furthermore a part of said fraudulent combination, which petitioner avers has been strictly carried out, that all the pipe for certain cities in the above-named territory was to be divided between defendants. For instance, An-niston Pipe Works was to supply Atlanta; Howard-Harrison Iron Company, Birmingham and St. Louis; Chattanooga Foundry & Pipe Works, Chattanooga and New Orleans; South Pittsburg Pipe Works, Omaha; Dennis Long & Co., Louisville and certain cities in Indiana; while Addyston Pipe & Steel Co. was to supply Cincinnati and certain other cities in Ohio and Kentucky. Petitioner does not pretend to give all the cities allotted under said criminal agreement.

Petitioner charges that when an inquiry was received by defendants for work in any of the "reserved cities" they, of course, knowing which of defendants was to have the job, would at once ask the defendant to whom the city was allotted what price to "protect," as it was called, meaning thereby to ask said shop to notify it what its bid would be, so that a higher bid might be sent in. On receipt of such an inquiry the defendant that was to do the work would at once notify all the other defendants the price it intended to bid, or at which it wanted "protection," and the other defendants would each send in a bid at some higher figures, insuring the job to the defendant agreed upon, and insuring to themselves

a division of a large "bonus" and making the price to the consumer unfair and unreasonable, and destroying all competition in regard thereto.

Ninth. Petitioner further shows and charges that the kinds of contracts secured by defendants are, in the main, contracts to furnish pipe to gas and water companies, and to municipal corporations for sewerage and other purposes, which said contracts, after advertisements for bids, are let to the lowest bidders. Petitioner would show to the court that said gas and water companies and said municipal corporations, together with the public generally, being entirely ignorant of the fraudulent and unlawful manner by which defendants make their bids and secure said contracts, and having been so ignorant since said combination was entered into, and having no knowledge of such combination, have been applying in good faith to each of defendants to furnish a bid at which it would do certain work, and since said date of Dec. 28th, 1894, said defendants have been fraudulently and criminally securing about the entire work in the territory named, and at the exorbitant and unreasonable prices above mentioned.

Tenth. Petitioner charges upon information it believes to be true, that there are no other pipe works in the territory where the conspiracy exists between defendants, that were able to handle the large contracts for pipe which defendants have secured since the combination existed, by reason of the want of capacity and money to carry on said work on the part of such shops not in the combination.

Petitioner further shows and charges that defendants have large sums of money, aggregating many millions of dollars, invested in the manufacture of pipe, and are able, many of them alone, to fill contracts of any size, and in fact have furnished pipe where the job amounted to over one hundred thousand dollars, and by reason of the fraudulent and unlawful manner in which they secured the contract, have divided a "bonus" of not less than seven dollars on each ton of pipe

furnished in said large contracts, so petitioner charges that by reason of the great wealth of defendants, and the inability of any and all others engaged in manufacturing pipe in the territory above named, and by reason of the unlawful means resorted to by defendants, they have created a monopoly in the sale of cast iron pipe in said territory and have crippled and destroyed all smaller concerns engaged in the manufacture of pipe.

Eleventh. Petitioner would further show to the court, and charge that defendants, on or about the 27th day of May, 1895, to enable them to realize greater profits to themselves on the sale of their pipe, and to make the monopoly in their territory on the use and sale of the same, more complete, and to more fully effectuate the conspiracy entered into on said 28th day of December, 1894, adopted what they called the "Auction Pool" plan for bidding on work in the "pay territory." To carry this out, each of defendants selected one man, and the six men selected constituted an executive committee, which said committee was to be located in some central city, at present at Chicago, to whom all inquiries for pipe were to be referred. On receipt of such inquiry, this committee, in a room with no one present but themselves, secretly and fraudulently bid for the job, the one agreeing to pay the greatest amount of "bonus" of course to receive it. By this secret, and fraudulent and criminal manner, petitioner charges all the work done by defendants since June 1, 1895, has been secured. After this "auction pool" was over, as to each particular job, each of the defendants was notified whose representative had bid the most, and the amount of the bid, and this bid was sent by the defendant securing the job at the "auction pool" to the party wanting the pipe, the other defendants all sending in a bid for a higher price, carrying out their criminal agreement to "protect" each other, and securing the job to the highest bidder at the "auction pool," thus reversing the order of things, by giving the job to the highest,

instead of the lowest bidder, the deluded customer of course being ignorant as to the manner in which he is being swindled.

Twelfth. As an example of the unequaled and unmitigated criminal conduct on the part of defendants, and the great amounts of money they have swindled the public out of, by reason of their trust and criminal conspiracy, petitioner will give one instance, among the many hundred, which it charges to be true in every particular: The municipal corporation of the city of St. Louis, Mo., wanted about 5,000 tons of cast iron pipe during the early part of the present year of 1896. Under the "auction pool" system, as petitioner is informed and believes, and so charges, the "reserved cities," hereinbefore mentioned were left practically the same as under the fixed "bonus" system, there being a different arrangement agreed upon as to the "bonus," in some way, but the pipe for the particular cities named to be supplied as originally agreed upon. Under the agreement, the pipe for the city of St. Louis was still to be furnished by defendants, Hoard-Harrison Iron Company. Allowing a reasonable and fair profit, the price of the pipe wanted by St. Louis was at that time, at the shops at Bessemer, Ala., from \$13 to \$15 per ton. The freight to St. Louis from Bessemer was \$3 per ton, so that defendant, Howard-Harrison Iron Company, could afford to sell said 5,000 tons of pipe delivered in St. Louis at from \$16 to \$18 per ton. The city of St. Louis made inquiry of defendants for the pipe, and requested them to send in bids for the work, and when said inquiries were received by defendants they were at once forwarded to the "auction pool" for the mysterious action of the executive committee aforesaid, acting for defendants. The character of the bidding at this "auction pool," and behind closed doors, is not known to petitioner, and whether the same was free, fair (?) and open, and very animated, and whether each defendant, as represented by its member of said executive committee, was taking care of itself, or whether all were bent and united on swindling the city of

St. Louis to their common profit, may never be known; but one thing is certain, and petitioner so charges, defendant, Howard-Harrison Iron Company was the highest bidder at the "auction pool" and the job was knocked down to it at the price of \$24 per ton, and thereupon it sent in its bid at this price. All the other defendants sent in bids of "protection" at a higher figure. Petitioner further charges that when the bids were received by the city of St. Louis, they were opened and compared, in good faith, by a committee that represented the people of the city of St. Louis, and who were anxious to procure the pipe for this large contract at as low price as possible; and petitioner charges that said city of St. Louis was utterly ignorant as to the conspiracy between defendants and is ignorant of the fraudulent and corrupt means adopted by them, whereby all competition in bidding for the job had been destroyed, and ignorant of the complete monopoly that defendants had brought about in the territory above named, which said monopoly petitioner charges was so complete and brought about by the means aforesaid, as to prevent other persons and corporations from engaging in fair competition with them in the sale of said cast iron pipe, and insured to defendants almost the exclusive right of dealing in the same, and appropriating to themselves said exclusive privilege, and restricting and restraining others in the exercise of the right that was open to them before this criminal conspiracy and unlawful and unauthorized trust was entered into between defendants. So that the contract was awarded to defendant Howard-Harrison Iron Company at the price of \$24 per ton delivered in the city of St. Louis. Petitioner charges that a fair and reasonable price for this pipe was only \$16 to \$18 per ton at that time, and in fact defendants were selling the same at this price in "free territory," where they had competition, and where that conspiracy did not exist, on the identical date at which the sale was made to the city of St. Louis.

Petitioner shows to the court and charges that the extor-

tion in this single contract, and the profit realized to defendants in the shape of "bonus," which was divided between them, amounted to between \$30,000 and \$40,000, and this is only one contract among the hundred which petitioner charges were secured in the same way. Petitioner charges that the pipe for this contract was shipped from Bessemer in the state of Alabama to St. Louis in the state of Missouri, and defendants are now severally engaged in shipping pipe to other states than the states in which they reside under and in pursuance of the conspiracy aforesaid.

Thirteenth. Petitioner charges upon information that it believes to be true, that the defendants, Howard-Harrison Iron Company, Anniston Pipe & Foundry Company, South Pittsburg Pipe Works, and Chattanooga Foundry & Pipe Works, some time prior to December 28, 1894, had entered into a contract or combination in the form of a trust or conspiracy in restraint of trade and commerce between the several states, which was similar in terms to the conspiracy entered into on said 28th day of December, 1894, and the four defendants last named had been operating under the same prior to that date, but in order to make their monopoly complete the two other defendants were admitted to the trust on said 28th day of December, 1894, and the purpose of admitting them was to destroy all competition between them and insure a complete monopoly in the sale of pipe, and all of defendants herein are now operating under said trust.

Fourteenth. Petitioner charges that the contract, combination, trust or conspiracy aforesaid, under which defendants are now operating is in restraint of trade and commerce between and among the several states and has resulted in a monopoly to them in the manufacture and sale of cast iron pipe in the territory named; is an unlawful combination, trust and conspiracy, and in open violation of the Act of Congress of July 2, 1890, and petitioner brings this suit to restrain the violation hereinbefore set forth and prevent defendants

from continuing the sale and transportation of said cast iron pipe from the states in which they reside into other states and for the purposes of having any of said cast iron pipe, belonging to either of said defendants and being in course of transportation by them or either of them from one state to another, forfeited to petitioner and seized and confiscated as provided by law.

Fifteenth. Petitioner further charges that inasmuch as the conspiracy aforesaid was entered into in this division and district of your honor's court and defendants are all parties to the same, that the ends of justice require that they each be brought before the court in answer to this petition.

Wherefore your petitioner prays:

First. That it be allowed to file this petition, and upon the filing of the same, that under the fiat of your honor an injunction or restraining order be granted enjoining and restraining defendants or either of them from selling and transporting cast iron pipe into other than the states in, which they reside under any contract or agreement, entered into with citizens of such other states, by virtue of the combination, trust or conspiracy now existing between the defendants.

Second. That each of the defendants be made parties hereto, by subpoena directed to the marshal of the district where they reside, accompanied with a copy of such injunction or restraining order as your honor may grant.

Third. That defendants be required to answer this petition fully but not on oath, as their answers under oath are waived.

Fourth. That all cast iron pipe sold and transported by defendants after this date, under and in pursuance of the combination, trust and conspiracy, charged in this petition, to any other state than the state in which the defendant so selling and transporting said cast iron pipe resides, be forfeited to your petitioner, and seized and confiscated in the manner provided by law.

Fifth. And upon the hearing let a decree pass dissolving

the trust, combination and unlawful conspiracy now existing between defendants and perpetually enjoining them from operating under the same and from selling and transporting said cast-iron pipe into other states than in which they reside.

Petitioner prays for general relief, and states that this is the first application for extraordinary process in this cause.

J. H.,

U. S. Attorney for the ——— District of ———.

State of ———,

——— County.

J. H. makes oath that the facts stated in the foregoing petition as of his own knowledge are true, and those stated on information he believes to be true, and that he brings this petition under the direction of the Hon. Judson Harmon, attorney general of the United States.

J. H.

Sworn to and subscribed before me this ——— day of ———,
A. D. ———.

F. X.,

[Seal.]

Notary Public.

(1) Taken from the record in *Addyston Pipe & Steel Co. v. U. S.* 175, U. S. 211.

Cases decided under the Sherman Anti-Trust Law, or relating thereto (Act of July 2, 1890, 26 Stat. at L. 209), are collected in four volumes, covering the period 1890 to 1912, compiled by the United States Department of Justice, under the title, "Federal Anti-Trust Decisions."

The Sherman Anti-Trust Act was thoroughly considered and its purposes restated and the rules of construction clarified and affirmed in *Standard Oil Co. v. U. S.*, 221 U. S. 1; and *U. S. v. American Tobacco Co.*, 221 U. S. 106, in which the court took the view that the Act should be construed in the light of reason, and hence the Act "prohibits all contracts and combinations which amount to an unreasonable or undue restraint of trade in interstate commerce," and necessarily limiting and qualifying the earlier great decisions.

A further consideration of this Act is found in *U. S. v. United Shoe Machinery Co.*, 247 U. S. 32 (1918).

In 38 Stat. L. 730, Act of October 15, 1914, is found the so-called Clayton Act, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes;" this relates to price discrimination, one corporation acquiring stock in another corporation,

interlocking directorates, and some other matters, besides prescribing regulations and limitations upon injunctions.

Suit for violation may be brought by the person injured in any district court of the United States in any district where the defendant resides or has an agent or is found, and there is no jurisdictional amount, and making a corporation suable wherever it does business. *Frey v. Cudahy Packing Co.*, 228 Fed. 209.

The Act provides that compliance therewith may be enforced in the Interstate Commerce Commission, where common carriers are involved; in the Federal Reserve Board, where banks are involved, and in the Federal Trade Commission where any other character of commerce is involved.

Under this Act all that is necessary to state a case is "to charge that the defendants committed the named acts prohibited by the statute and that the acts tend substantially to lessen competition or create a monopoly in interstate commerce." *U. S. v. United Shoe Machinery Co.*, 234 Fed. 127, and see page 150, for statement of sufficiency of allegations; and further, on page 150, the court says that Congress intended that the construction of the Sherman Act should not control the Clayton Act, inasmuch as the latter Act enumerates specific acts of conduct which are prohibited while in the Sherman Act the conduct prohibited is stated in general terms.

The reasoning on this point was satisfactory to the court in *Standard Fashion Co. v. Magrane Houston Co.*, 254 Fed. 493, at pp. 498 and 499; but the circuit court of appeals, in affirming the judgment of this case below expressly declined to express an opinion upon the application of the Clayton Act therein. *Standard Fashion Co. v. Magrane Houston Co.*, 251 Fed. 559.

No. 465.

**To Permit One Competitor to Sell Out to Another, Both
Having Previously Been Found Guilty of Violating
the Sherman Law.**

[Caption.]

The plaintiffs, American Press Association, a corporation organized under the laws of the state of New York; American Press Association, a corporation organized under the laws of the state of West Virginia; Courtland Smith, William G. Brogan and Maurice F. Germond, by Edgar A. Bancroft and Charles A. Brodek, their solicitors, for their bill of complaint against the defendants, Western Newspaper Union of Maine, Western Newspaper Union of New York, John F.

Cramer, H. H. Fish, M. H. McMillen and The United States of America, allege and show :

1. That American Press Association is a corporation organized under the laws of the state of New York, with its principal office in New York City, and a citizen and resident of the state of New York. That the other plaintiff, American Press Association, is a corporation organized under the laws of the state of West Virginia, with its principal office in that state at Charleston, and a citizen and resident of said state, and that said company has the same officers as plaintiff, American Press Association, organized under the laws of the state of New York. The plant and other properties hereinafter referred to as belonging to American Press Association are the properties of the former corporation bearing that name, but the same are leased to and the business is conducted by the latter corporation, and when the American Press Association is herein mentioned or referred to reference is had to both of said corporations or the one to which the allegation is appropriate. That the plaintiffs, Courtland Smith, William G. Brogan and Maurice F. Germond, are residents and citizens of the state of New York.

2. That the Western Newspaper Union of Maine is a corporation organized under the laws of the state of Maine, with its principal office in that state at Augusta, and is a citizen and resident of said state. Upon information and belief that the defendant, John F. Cramer, is a resident and citizen of the state of Wisconsin; that the defendant, H. H. Fish, is a resident and citizen of the state of Nebraska, and that the defendant, M. H. McMillen, is a resident and citizen of the state of Illinois.

2a. That the amount involved in this controversy in this suit, exclusive of costs and interests, exceeds the sum of five thousand dollars (\$5,000).

3. That on the 3rd day of August, 1912, the United States of America, by James H. Wilkerson, its attorney for the northern district of Illinois, acting under the direction of its attorney general, filed in the United States district court for

the northern district of Illinois, a petition in equity under the act of July 2, 1890, known as the Sherman law, against the plaintiffs, the defendants, Western Newspaper Union, a corporation of Illinois, which has since been dissolved; Western Newspaper Union of New York, which has since transferred all of its assets to said Western Newspaper Union of Maine, and is no longer engaged in business; John F. Cramer, H. H. Fish and M. H. McMillen, and against Central-West Publishing Company, whose name has since been changed to Western Newspaper Union, a corporation of Maine, and which is made a party defendant hereto under said last-mentioned name, and one George A. Joslyn, who has died since the filing of said petition; that a copy of said petition in equity is hereto annexed as part hereof, and marked "Exhibit A." That on the day said petition in equity was filed answers were filed by the several defendants in said cause, and that immediately thereafter said cause came on for hearing before the Hon. K. M. Landis, district judge of the said court, and the United States, petitioners, appeared by its district attorney, James H. Wilkerson, and by William T. Chantland, special assistant to the attorney general, and moved the court for an injunction in accordance with the prayer of its petition. That by agreement between the government and the counsel representing the several defendants, a decree was rendered and entered in said cause on the 3rd day of August, 1912. That a copy of the said decree is hereto annexed as part hereof, and marked "Exhibit B." That since the filing of said petition said Western Newspaper Union of New York has transferred its assets to said Western Newspaper Union of Maine and is no longer engaged in business.

4. That at the time of the rendition of the aforesaid decree of August 3, 1912, the American Press Association and the Western Newspaper Union were engaged in the business of furnishing matter in plate form and in ready-print form to a large number of the smaller or so-called "country newspapers" of the United States. That such services were known in the newspaper world respectively as (1) plate service and (2)

ready-print service. That plate service consists in furnishing matter in the form of metal type plates cast in newspaper column lengths and shipped from the various distributing points of the plate concern to the issuing offices of the newspapers using it. That ready-print is the furnishing of newspapers partly printed and for home or local printing partly blank. That the ready-print service must be put out in full pages upon the back of which, and upon additional pages the newspapers print additional matter, while plate service is put out in columns which may be used as sent out or may be sawed up and rearranged in the newspaper offices. That the ready-prints furnished by the Western Newspaper Union contain advertisements, but the ready-prints furnished by the American Press Association contain no advertisements and were consequently known as adless ready-prints.

5. That the industry of furnishing matter to the country press in plate form and in ready-print form was organized and developed because the very limited circulation of each separate country newspaper makes it impossible for any one of them to go to the large expense of gathering the matter for its particular use, whereas one concern gathering the matter can distribute it to a number of newspapers at a price which the individual country newspaper can afford to pay.

6. That at the time of the rendition of the said decree of August 3, 1912, the Western Newspaper Union supplied more than eighty per cent. of the ready-print service in the United States, and the American Press Association supplied a small fraction with adless ready-prints; but at that time the plate business of the American Press Association was substantially greater than that of the Western Newspaper Union. That shortly after the entry of said decree, and in or about October, 1912, the American Press Association ceased its efforts to expand its ready-print service because it reached the conclusion that an adless ready-print service was unprofitable, but it continued to serve a constantly diminishing number of customers with adless ready-prints until at the present time there are only about fifty papers receiving its service, and that

service now is negligible, being not more than one per cent. of the total ready-print business in the United States.

7. That following the rendition of the said decree, and up to 1914, the most important business of the American Press Association was its plate department. That in 1910 the American Press Association started an advertising department to represent country newspapers in placing and advising with respect to foreign (*i. e.*, non-local) advertising with them. That it was not until 1914 that any substantial progress was made with publishers, advertisers or advertising agents, but since that time progress has been steady. That in 1912 the advertising department of the American Press Association represented about two thousand newspapers, but the volume of foreign advertising business placed with such papers was nominal. That at the present time the advertising department of the American Press Association represents 5,230 papers and the foreign advertising business placed with them by it is the most important part of their foreign advertising revenue. That as yet the country newspapers have no other agency or influence working for them to develop foreign advertising, which is the country publishers' one unlimited field for profitable income. That the only other sources of income open to country publishers are income from circulation, which is always a loss, and income from local advertising and from job-work, both of which are limited by the size and business of each publisher's town and immediate vicinity.

8. That since the rendition of the said decree conditions that obtained among the country newspapers of the United States have undergone a marked change, in that foreign (*i. e.*, non-local) advertising in 1912 was of little, if any, importance in the revenue producing sense to publishers of country newspapers, whereas to-day it is the subject that engrosses their attention to the exclusion of every other question, except, for the time being, the scarcity of print paper, for the reason that it is the only growing and unlimited field of revenue open to the country publishers, so that if five years ago the

'American Press Association had gone out of the plate business it could not, in all probability, have continued its advertising department, for the reason that the publishers of country newspapers did not know or appreciate the American Press Association as their advertising representative. That at the present time, notwithstanding the fact that it has dealt with the publishers of country newspapers for thirty-five years in the plate business, the American Press Association is better known and more thoroughly appreciated by the publishers of country newspapers as their advertising representative than as a manufacturer of plates. That the American Press Association did not have, and has not now, the capital necessary to a rapid development and expansion of its advertising department, inasmuch as practically all of its available capital has been and is invested in its original and now non-profitable business, to-wit: its plate service.

9. That the practical disappearance of the ready-print department of the American Press Association had the effect of concentrating all the important items of overhead on the plate department, so that plate service became a sole and direct product of the American Press Association. That, as stated in the case of the Western Newspaper Union, its ready-print service is, and for many years has been, its more important and profitable service, and inasmuch as the maintenance and development of both ready-print and plate services require practically the same organization, the overhead of the Western Newspaper Union is distributed over both plate and ready-print services, and the plate service is treated by it as the by-product of the more important and profitable ready-print service.

10. That since the rendition of the said decree the cost of labor and of materials, and of many items of overhead of plate service, has greatly increased, but the American Press Association has not increased the price of its plate service to the newspapers because the Western Newspaper Union adheres to the old price, so that any increase in price by the American Press Association would have resulted inevitably

in a serious, if not complete, loss of business. That the net result to the American Press Association of the enforced continuance of the old prices has been that the plate service of the American Press Association, notwithstanding the most rigid economy and the efforts to increase business, has established an impossibility to increase the volume of sales, and has resulted in a loss from the time of the entry of the said decree until the present time, a period of almost five years.

11. That the distribution of plate matter by the Western Newspaper Union as a by-product enabled that company not only to refrain from raising its prices, but in January, 1917, apparently enabled it to reduce the price of miscellaneous plate matter of various kinds from \$1 to 75 cents a page, and of serials from \$1.50 to \$1 a page; that immediately after knowledge of such reduction came into possession of the American Press Association, it appeared with its counsel before the department of justice to protest against such reduction as a violation of the provisions of said decree of August 3, 1912, and more particularly the provisions of III(c) thereof, whereby the Western Newspaper Union and its affiliated defendants were enjoined "from selling any of their product or services at less than a fair and reasonable profit, or at cost or less than cost, with the purpose or intent of injuring or destroying the interstate trade and commerce of the American Press Association, or any other competitor," and the American Press Association asked that proceedings be taken forthwith to punish the Western Newspaper Union and its affiliated defendants for a violation of said decree and to restrain the continuance of such violation. That an investigation by the department of justice resulted in a finding by it of the fact that the reduced prices of the Western Newspaper Union, as aforesaid, were not in violation of the decree of August 3, 1912, and more particularly paragraph III(c) thereof, hereinbefore quoted.

12. That the scarcity and consequent high price of print paper has had a serious effect in diminishing the aggregate demand for plate service, in that very few, if any, newspapers

are being started, more are discontinuing, and those that remain in business are using every effort to minimize the quantity of print paper used. That this substantial diminution of the field for plate service, combined with the aforesaid reduction in the price of plates, has resulted in a serious shrinkage in the volume of plate sales by the American Press Association, and in transforming its non-profitable plate business into a business involving serious financial losses. That the total plate sales of the American Press Association in the year 1916 amounted to \$731,000, while its sales from January 1, 1917, to April 1, 1917, were at the rate of \$600,000 for the year—a loss in sales of \$131,000, without taking into consideration the naturally progressive rate of loss. That the sale of plate matter by the American Press Association during the first three months of 1917 involved a loss of approximately \$9,500, or at the rate of about \$40,000 a year, without making any allowance for depreciation or for loss of metal.

13. That with the print-paper market in normal condition the plate business of the United States is necessarily limited, inasmuch as no additional newspapers can be caused to be started merely to obtain plate service, nor can any effort expand to any material extent the amount of space which the editors devote to plate matter, while at the present time the field is shrinking through the efforts of the publishers to economize in the use of print paper. That even if capital were available and the print-paper market normal, it would be futile for the American Press Association to attempt to obtain a larger percentage of the plate business against the competition of a by-product of the Western Newspaper Union. That the only commercially sound manner of putting the plate business of the American Press Association on an economically equal basis with the plate business of the Western Newspaper Union, would be to transform it likewise into a by-product by engaging on a vast scale, as does the Western Newspaper Union, in the ready-print business. That such a plan is utterly impossible, not merely because no capital is available or procurable for the purpose, but because the situ-

ation in the print-paper industry is such that the paper for a ready-print service is not obtainable.

14. That the officers and controlling stockholders of the American Press Association concluded, therefore, that nothing remained but to wind up the business of the American Press Association, sell its assets for the benefit of its creditors, and divide the excess, if any, among its stockholders. That the discontinuance of its plate business necessarily involves the liquidation of the entire affairs of the American Press Association, for the reason that on such a sale the plant, metal and other tangible assets would have to be sacrificed. That the machinery is special and worth little as second-hand machinery. That part of the metal outstanding would not be returned by publishers, and the part returned would come in slowly and be an expense to the American Press Association to collect. That the large quantity of metal outstanding in the form of metal bases, though absolutely necessary in the plate business, could only be sold as metal junk. That in addition the accounts receivable, consisting of small amounts due from numerous country publishers, would take a year or more to collect in so far as they proved collectible. That such a disposition of the tangible assets would not realize enough money to enable or justify continuing the advertising department, so that the officers and controlling stockholders of the American Press Association have concluded, after careful consideration, that to attempt to continue the advertising department on a scale that would render the necessary service to the country newspapers of the United States, would require a sum materially in excess of what could be obtained on a sale in liquidation of the assets of the American Press Association. That such needed additional capital could not be procured by way of investment, nor could the company borrow the necessary funds because it would have divested itself of its tangible assets to realize thereon to best advantage and would consequently be without borrowing capacity. That therefore the stockholders of the American Press Association, having had no return on their investment

since 1912, would prefer to take a small dividend and wind up the business than to hazard the last dollar of their investment in the continuance of the advertising department under unfavorable conditions.

15. That the conditions hereinbefore set forth, which compel the retirement of the American Press Association from the plate business, and in consequence from all business, are not attributed or attributable to any unlawful acts by the Western Newspaper Union, but, as hereinbefore set forth, solely to economic conditions which are outside the statute law. That in discontinuing its plate service the American Press Association, unless it can sell that business complete, must sacrifice its assets with very great loss to its stockholders and with no gain whatever to the public, but a distinct loss in the interruption of a plate service to country newspapers throughout the United States.

16. That the purpose of this suit is to place the American Press Association in a position to avail itself of an alternative which will avoid the sacrifice of its assets and will permit it to continue in business as the advertising representative of country newspapers. That such alternative is based upon a suggestion by the plaintiff, Courtland Smith, president and general manager of the American Press Association, that in view of the desperate condition of the plate business of the American Press Association, the assets and business of its plate service be transferred to the Western Newspaper Union, provided legal permission be obtained. That the Western Newspaper Union subsequently signified its willingness, likewise subject to legal permission, to take over the assets and business of the plate service of the American Press Association on the basis of annual payments covering a period of twenty years; that the plaintiff, Courtland Smith, on behalf of the American Press Association, frankly disclosed to the Western Newspaper Union the condition of the American Press Association, and the other facts set forth in this bill of complaint, and that the aforesaid conditional expression of

willingness to purchase on the part of the Western Newspaper Union was made by it with such knowledge.

17. That in the opinion of the plaintiffs it would be advantageous to the Western Newspaper Union to acquire the plate department of the American Press Association as a going concern, if the transfer shall be permitted, for these reasons: that while the tangible assets of the American Press Association are in such shape that they have comparatively little value when disposed of as second-hand material, they have real value to a going concern; that upon the discontinuance of the plate business by the American Press Association the Western Newspaper Union would be in position of having this business forced upon it, for the newspapers must secure plate matter and practically their only source of supply would be the Western Newspaper Union; that this would immediately create a demand for Western Newspaper Union plate far in excess of its ability to supply with its present stock of metal; that to buy that metal at the present prices, when it can be bought at all, would be highly unprofitable; that the plates of the American Press Association and of the Western Newspaper Union are used with a metal base, the bases being retained by the newspaper publishers for continuous use; that the plates of the said two companies require special bases so that Western Newspaper Union plates can not be used on American Press Association bases, and consequently the Western Newspaper Union would be required at once to furnish a large number of metal bases to papers not now using their plates; that by reason of the material difference in the bases used by the said two companies respectively, the Western Newspaper Union would have to educate publishers in the use of their plates; that this would be a source of delay and extra cost to the Western Newspaper Union and a matter of inconvenience and necessarily increased cost to the customers, and a source of annoyance and irritation. That for these reasons plaintiffs are of the opinion that the Western Newspaper Union would naturally seek to secure the metal supply of the American Press Association,

- and also to secure the plant of the American Press Association, so that for the time being, at least, it could continue to manufacture the American Press Association style of plate for use by newspapers having American Press Association style of bases. That in regard to the accounts receivable the Western Newspaper Union would, in the opinion of the plaintiffs, consider it desirable to take such accounts over for the reason that it would provide a friendly and easy way of starting business relations with a number of newspapers that have not heretofore dealt with it. That finally, the plaintiffs believe, that if the American Press Association went out of business completely publishers would feel that in some way the American Press Association had been unfairly eliminated; that this would react on the Western Newspaper Union in such a way that there are many papers whose good will could not be secured for many years, if ever, so that the Western Newspaper Union, the plaintiffs believe, is apparently willing to assume its responsibility in such a way as that publishers may reasonably conclude that the situation was not of its making, and that it had not illegally put the American Press Association out of business, but that on the contrary the Western Newspaper Union had, in fact, made it possible for the American Press Association to continue in the one department that country publishers are now most vitally interested in, viz: the advertising department and special services of the American Press Association.

18. That the tentative plan of having the payments cover a period of twenty years, enables the American Press Association to continue in business for at least that time, and permits the concentration of its capital and efforts upon the advertising department and service, with the consequent benefits to the country newspapers of the United States by way of foreign advertising. That it is for the purpose of assuring the continuance of this service for the country newspapers that plaintiffs now present their bill of complaint. That in addition the American Press Association would thereby be

enabled to continue its newspaper, the American Press, which circulates among the editors of the country newspapers of the United States, and is, perhaps, the most valuable medium for trade information and advice for country editors and publishers.

19. That the discontinuance of the plate service by the American Press Association means that such must be supplied by the Western Newspaper Union, and that the Western Newspaper Union will be free to do so. That a concentration of the plate business in the hands of the Western Newspaper Union is inevitable through the natural process that must necessarily follow the abandonment of the field by the American Press Association. That the plaintiffs respectfully submit that the sale of the assets of the American Press Association as second-hand machinery and materials would benefit no one and result in injury to the public, through its effect upon the country newspapers of the United States, whereas the sale of the assets and business of its plate service as a going business to the Western Newspaper Union, the only possible customer, would avoid a great loss to the stockholders of the American Press Association from scrapping its assets and would result in a benefit to its customers and the public by the continuance by the Western Newspaper Union, without derangement of the service that the American Press Association had theretofore rendered. That this would not only be no injury to the public for the withdrawal of the American Press Association from the plate business, is inevitable, but would be a distinct gain to all who have had or may desire the plate service.

20. That equitable relief is asked for and is necessary because by the provision of the said decree of August 3, 1912, the Western Newspaper Union and its affiliated defendants are restrained permanently, paragraph III(c), "from combining or attempting to combine with said defendant, American Press Association, either by purchase, stock ownership or in any other manner."

21. That the government in its aforesaid petition, filed August 3, 1912, charged the defendants therein, said Western Newspaper Union and American Press Association, and their respective affiliated companies and officers therein named that were then competitors in the newspaper plate business, with committing acts in unfair competition against each other in violation of the Sherman anti-trust law; that, as stated in said petition of the government, one of the chief objects of said suit and of the injunctive relief therein prayed for and granted, was to prevent, through various designated methods of unfair competition, the probable destruction of the American Press Association as the financially weaker competitor.

22. That, as hereinbefore set forth, the conditions then existing in said plate business have since so changed that in spite of the relief then granted by this honorable court the American Press Association has been able since then to maintain itself as a competitor only by carrying on its business without profit; and that by reason of such changed conditions, which, since January 1, 1917, have caused an actual and heavy loss in carrying on its business, the American Press Association can no longer sustain such burden and loss and is compelled to withdraw from said plate business.

23. That said decree of August 3, 1912, which was intended to protect the American Press Association and continue it in said business, will, unless relief be granted as herein prayed, cause the destruction of its organization and service, the substantial loss of the value of its property, and the entire loss of its good will, built up during thirty-five years last past, with resulting injury to the public through the interruption of such plate service to the country newspapers which the American Press Association has heretofore served, and the loss of the great benefits of the form of foreign advertising service developed by the American Press Association since the rendition of said decree of August 3, 1912, as hereinbefore set forth.

24. That the said decree of August 3, 1912, has served its purposes, and the application of the provision of the said

decree hereinabove quoted to the facts now existing would be inequitable and unconscionable. That is, prohibition of any sale of assets by the American Press Association to the Western Newspaper Union serves no public interest, but would compel the useless sacrifice of the assets and business of the plate service of the American Press Association, with no gain to the public and without any change whatever in the result, so far as the competition of the American Press Association is concerned, for its retirement from the plate service is inevitable, and effective competition by the American Press Association with the Western Newspaper Union in the plate service is already practically at an end.

25. Plaintiffs further show that in the past eight months conditions have rapidly grown worse, and the situation of the American Press Association is so critical by reason of the unusual conditions with respect to the prices of print paper and of metal, and the resulting conditions of the country newspapers and in the country at large, that there is no prospect of improvement or relief, and that in the carefully considered judgment of the officers and controlling stockholders of the American Press Association it will be unable to carry on and develop its very important foreign advertising business, or to remain in business at all, beyond a very brief period, unless it can dispose of its plate business as a going concern, and thus obtain funds for the development and successful prosecution of its remaining business.

For as much, therefore, as plaintiffs are without relief in the premises, save only in a court of equity, they pray this honorable court that said American Press Association may be saved the loss of the value of its assets and business connected with said plate service, and may be permitted to sell and dispose of the same to the only possible purchaser thereof, the defendant, Western Newspaper Union, and that the parties hereto be placed in the same position with respect to the sale of such assets and business as if said decree of August 3, 1912, had not been entered, and that appropriate re-

lief be granted against the provisions of said decree prohibiting the American Press Association from selling any of its assets to the Western Newspaper Union so that the American Press Association shall be enabled to sell its assets and business pertaining to the plate service as a going concern to the Western Newspaper Union; and that complainants may have such other and further relief as this honorable court may deem meet and to equity shall appertain.

That a writ of subpoena be granted to plaintiffs in accordance with the equity rules of this court directed to the marshal of said court, commanding him that he summon the defendants, Western Newspaper Union, a corporation of the state of Maine; John F. Cramer, H. H. Fish, M. H. McMillen, and the United States of America, to appear herein upon a day certain and make answer hereto, but not under oath (answers under oath being hereby waived), and further to perform and abide by such order, direction and decree in the premises as the court shall seem meet, and plaintiffs will ever pray, etc.

AMERICAN PRESS ASSOCIATION, a corporation
organized under the laws of the state of
New York;

AMERICAN PRESS ASSOCIATION, a corporation
organized under the laws of the state of
West Virginia;

COURTLAND SMITH,
WILLIAM G. BROGAN and
MAURICE F. GERMOND.

By EDGAR A. BANCROFT,
Their Solicitor.
CHARLES A. BRODEK,
EDGAR A. BANCROFT,
Solicitors for Plaintiffs.

No. 468.**To Enjoin the Obstruction of a River.(1)**

The District Court of the United States,

— District of —.

The C. & D. Railroad Company, Defendant. }

vs. }

The United States of America, Plaintiffs, }

In Equity.

To the Honorable Judge of the District Court for the —
District of —, — Division.

The United States of America, by their attorney, J. H., and under the direction of the attorney general of the United States, the plaintiffs, respectfully show unto your honor that the defendant, the C. & D. Railroad Company is a corporation duly incorporated under the laws of the state of —, and is a citizen and inhabitant of the — district of —, and having its chief office of business in the city of —, in said state, where it is carrying on the business of a railroad company, transporting freight and passengers, is unlawfully creating an obstruction, not affirmatively authorized by law, to the navigable capacity of the — river, a public highway of commerce and intercourse between the states, and a river in respect to which the United States have jurisdiction.

Plaintiffs further say that the said corporation, defendant, is in possession of, occupies and uses a certain lot and tract of land along the river bank, between the [*city water works*] and the lower side of — street, in the city of —, county of —, and state of —, and which said lot of land runs south to the edge and low-water mark of the — river, and which said lot, with the buildings thereon, consisting of tracks, warehouses and other superstructures, is and are used for the business of said railroad company, and which said land and premises form the bank and shore of the waters of the — river.

Plaintiffs further show that the said corporation is casting, emptying, unloading and suffering and causing to be cast, emptied and unloaded, large quantities of slate, gravel, rubbish, slags, earth, cinders, waste, refuse and other materials

into the said — river, a navigable river of the United States, tending to impede and obstruct the navigation and the navigability of said waters of the United States; and the said defendant is depositing and causing to be deposited, and suffering to be deposited and placed, large quantities of slate, stone, gravel, earth, rubbish, wreck, refuse, waste and other materials on the shore and bank of said — river south of and upon the land occupied as the premises of the defendant, where the same is liable to be washed into the navigable waters of said — river by the ordinary floods and rises of said river, to the permanent obstruction and detriment of its navigation, and contrary to the provisions of Section 6 of an act entitled, "An act making appropriation for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved September 19, 1890(2), and to the irreparable injury, obstruction and detriment of the said river, for which plaintiffs have no adequate remedy at law.

And this casting, emptying and unloading of which plaintiffs complain is not for the purpose of being used in the building, repairing or keeping in repair any quay, pier, wharf, weir, bridge, building or other work lawfully erected or to be erected on the banks on sides of said navigable river, or to the casting out, unlading or depositing of any material excavated for the improvement of said river, or the depositing of any substance above mentioned under a permit from the secretary of war, in any place designated by him where navigation would not be obstructed, as allowed and permitted as set forth in the proviso to Section 6 of the act aforesaid.

Plaintiffs therefore pray a writ of injunction may issue to the said C. & D. Railroad Company, perpetually enjoining it from making said obstruction, and creating and continuing to create said unlawful obstruction to the navigability of the said waters of the — river, and perpetually enjoining it from filling and dumping said material along the river bank between the [*city water works*] and the lower side of — street, in said city, except so far as may be necessary to protect their railroad tracks from the wash of the river; and this

last-named filling not to exceed a width of six feet beyond the outer rail of the tracks of said railroad as now laid down; and if it shall be found by this honorable court that the defendant is creating and making the said unlawful obstruction to the navigability to the said waters of the ——— river, as set forth in this bill, that the defendant be also ordered to remove the same; and that a temporary restraining order may issue enjoining it from further dumping or depositing the material as aforesaid, as specifically set forth in this paragraph, until the final hearing of this cause, and for other and further relief as may be proper in the premises. J. H.,

United States Attorney for the
—— District of ——.

The United States of America,
—— District of ——, ss.

Now comes J. H., attorney for the United States, and says that he has read the foregoing bill of complaint, and believes the facts stated therein to be true. J. H.

Sworn to before me and subscribed in my presence this
—— day of ——, 1894. J. N.,

[Seal.]

United States Commissioner
for said District.

(1) Taken from the record in *U. S. v. The Louisville & Nashville Railroad Company*, in the Circuit (now District) Court of the United States for the Southern District of Ohio.

(2) See 26 Stat. L. 426.

No. 467.

Bill to Enjoin the Certification of Value of Telephone Company for Taxation.(1)

[Caption.]

To the Honorable, the Judge of the District Court(2) of the United States in and for the Middle District of Tennessee:

The East Tennessee Telephone Company, a corporation chartered and existing under and by virtue of the laws of the state of Kentucky and having its chief office or place of busi-

ness in Warren county, in said state, brings this, its bill of complaint, against Robert L. Taylor, Governor of Tennessee; E. B. Craig, Treasurer of Tennessee, and William S. Morgan, Secretary of State of Tennessee, all citizens of Tennessee.

Plaintiff respectfully represents and shows that it is a corporation of the state of Kentucky, engaged in the telephone business, with power to engage in the telegraph business. It has lines and exchanges in Tennessee and Kentucky, but its Tennessee plant is not physically connected with its Kentucky plant. It has filed its charter, or a certified copy thereof, with the secretary of state of Tennessee, and abstracts thereof have been duly recorded in the registers' offices of the counties of Tennessee in which it does business, and it has authority to do business in Tennessee. It does business and has exchanges and toll stations and lines in — counties in Tennessee and in municipal corporations in almost every one of the same. It pays a privilege tax for doing business in Tennessee, to the state, amounting to \$1,157.25. It has 2,135 miles of wire in Tennessee. It has been assessed at \$95 per mile on its lines, or \$2,031.10 in all. Less than one-half of the property is in Tennessee. It has no outstanding bonds and its stock has no market value; the company has not paid a dividend since 1894; its exchanges will average about fifty wires to the pole mile and have cost less than \$20 per wire mile to erect and can be reconstructed at the same price. Its entire plant, poles, wires, etc., can be reconstructed anew in Tennessee for less than seventy-five thousand dollars, and the said property, to wit, its poles, wires, batteries, etc., in Tennessee are worth less than \$55,000.00.

The net earnings of the company in Tennessee in 1896 were only four thousand dollars; the net earnings for the first half of 1897 were \$2,043.88. Its earnings in Kentucky for the last fiscal year were \$16,097.97. It has long-distance connection in that state with large cities like Cincinnati and

Louisville and is free from force and competition. It has competition of that character in Tennessee at two of its principal cities. Its rates are thirty dollars and thirty-six dollars for ground circuits at Lexington, Kentucky, its largest Kentucky exchange, and only eighteen and twenty-four at Knoxville, Tennessee, where said competition exists. Its property was valued for taxation and assessed last year in Tennessee for \$45,240, and never has been assessed at a higher rate. Telephone property is of a precarious rate, owing to the deleterious and destructive effect of the sulphur in coal smoke, telephone wires have to be renewed on an average every five years. Moreover, they are subject to great injury from storms and sleet. The stations, lines and exchanges of plaintiff are all situated in East Tennessee. The valuation of its property in Kentucky for taxation is about the same as that which has heretofore prevailed in Tennessee and the property is substantially of the same description and value.

Plaintiff now further shows that its said property in Tennessee, taxed as aforesaid, is all of the value of less than fifty-five thousand dollars. The capital stock of the company is three hundred thousand dollars, and is not worth its par value. There has been no market or sale of the same for years and if sold upon the market it could not be sold for fifty cents on the dollar.

Plaintiff now further shows and says that, in pursuance of Section 4, Chapter 5, of the Acts of Tennessee of 1897, providing for the assessment and collection of revenue for state, county and municipal purposes, whereby revenue is collected from the assessments of railroad, telephone and telegraph property in Tennessee, Hons. E. L. Bullock, F. M. Thompson and N. H. White were appointed commissioners by the governor of Tennessee to act as assessors under the said Act, and it shows that the said commissioners, acting as assessors thereunder, received from the comptroller the schedule required to be filed with him by the said Act and proceeded to

ascertain the value of said property for taxation. Plaintiff filed with it the schedules required by law. Said commissioners had before them as evidence of value the said schedules and also the deposition taken by plaintiff of J. W. Hunter, its secretary, and also the affidavits of evidence hereinafter mentioned.

Plaintiff further shows that Section 5 of said Act provides that the assessors in arriving at the valuation of the property to be assessed, shall have in view and look to, the capital stock, corporate property, franchises and gross receipts and the market value of the shares of stock and bonded debt. It is provided in Section 7 of said Act, that the franchises and choses in action and personal property of the company, having no actual *situs*, shall be known as distributable property and shall be valued separately from the other property, and after ascertaining the total value of such distributable property, wherever situated, and after having deducted from this value one thousand dollars, said assessors shall divide the remainder by the number of miles of the entire length of the telephone lines, and the result shall be the value per mile of such distributable property for the purposes of taxation, and the value per mile of such distributable property shall be multiplied by the number of miles in the state and the product thereof shall be the sum to be assessed against such property for state purposes; and the value so ascertained shall be multiplied by the number of miles in each county or incorporated city or town, and the product shall, be amount to, be assessed against such property by such counties, incorporated towns and cities, respectively.

Section 8 provides that for the assessment of that class of realty which does not form a part of the lines of the telephone proper. This bill of complaint, however, only has reference to the assessment of distributable property.

Upon all of said evidence the said assessors proceeded to assess, and did assess, the distributable property situated in

the state of Tennessee at three hundred dollars per mile or at about two hundred dollars per mile more than it had ever been assessed for in Tennessee, and about two hundred and fifty dollars per mile more than the other states it traverses assessed it for.

They assessed it for this valuation for the years 1897 and 1898, both. Plaintiff shows that all said properties were and are already lawfully assessed for the year 1897, and that the said assessments are yet in force and have never in any way been annulled and superseded and that they are judgments and enforceable as such by the state of Tennessee and the several counties, cities and towns, through which the said company's lines run in the state of Tennessee and that there is no authority in law for making another assessment of said property for 1897. The said assessment for 1897 was certified down to the counties and towns by the comptroller of the state as early as October, 1896. They were completed final assessments before the Act of 1897 was passed. The said Act of 1897 did not directly, nor by implication, repeal or set aside said assessments or have any retrospective effect upon them, neither does it contemplate or direct a reassessment for 1897 to be made.

In pursuance of Section 11 of said assessment Act, plaintiff appeared before said commission and filed exceptions to said assessments and the depositions of divers witnesses. They also filed in their behalf before said assessors a large number of affidavits, about 155 in all, made by tax assessors, trustees and other officials and real estate owners, which showed that within the counties through which plaintiff's lines ran and in the counties in Tennessee through which plaintiff's said telephone properties assessed by said assessors, ran, and in the counties in Tennessee through which other telephone properties assessed by said assessors, ran, real estate generally and systematically was assessed for taxation at from fifty to seventy per cent. of its value. These affidavits varied in form, but

the general tenor and result of them and the depositions taken, is to establish, and your plaintiff alleges it to be a fact, that property generally in Tennessee, other than telephone property, by assessments generally and purposely made, does not bear the burden of taxation at a greater proportion than an average of sixty per cent. of its market value.

Plaintiff further shows that it also filed the affidavits of Jos. H. Thompson, Wm. A. Goodwin, Samuel J. Keith and Edgar Jones, which establish that the quoted market value of stocks and bonds resting upon railroads, telephone and other property, represented by stocks and bonds, are not even approximately conclusive of the actual value of property covered by them, that the stock quotations of particular days, as they appear in the New York Financial Chronicle and similar papers are no actual criterion of the market value of stocks and bonds on those days; that it is not a correct or safe basis to take the earnings, either gross or net, of such property as a railroad or a telephone company, as approximately conclusive of the actual value of the property covered by them; that even if net earnings should be taken into consideration, it should not be assessed upon any such basis as the legal rate of interest in Tennessee, but should be, in order to give a proper allowance for the hazard of the investment, estimated on a basis of at least twelve per cent.

Plaintiff avers that these statements are facts and that they are all material and far-reaching in the matter of making these assessments and were attested by men of very large financial experience. A copy of said affidavits is attached hereto marked exhibit "B" as part hereof.

The said assessors admitted as competent evidence all of the affidavits of the class first referred to, but erroneously excluded as evidence the depositions of Thompson, Goodwin, Keith and Jones, and solely upon the ground that affiants were residents of Nashville, and for this reason should have been produced in person as witnesses before the commission. They

overruled all of petitioner's exceptions and let the assessments as made by them stand.

They filed with the comptroller, as provided for in Section 11, their said assessment, together with the record made up by them.

Plaintiff further shows that by Section 12 of said Act, the governor, treasurer and secretary of state, are made a board of equalization. It is made their duty as board of equalization to proceed to examine the assessments made by the assessors, and they are authorized and directed to increase or diminish the valuation placed upon any property and to require of said assessors any additional evidence touching any one or more of the same. The assessments are not to be deemed complete until corrected by the said board of equalization.

Plaintiff shows that under the former tax laws of the state of Tennessee for assessing such property as that of your orator, the governor, treasurer and secretary of state constituted a board of commissioners; it was not a board of equalization. Orator avers that under the Act of 1897 the said three officers are made a board of equalization and that, being officers sworn to uphold the constitution of the state, which requires that all taxes shall be equal and uniform and that no one species of property shall be taxed higher than other species of property of the same value, and being at the same time entrusted with the duty of assessing and equalizing taxes, they were not only authorized, but it was obligatory upon them to assess petitioner's property so that it would not bear more than its equal and just burden under the constitution as compared with other property in this state.

The comptroller delivered to the said equalizers the assessments and records made up by the said assessors and said equalizers, after considering said assessments, did, on the 16th day of November, 1897, conclude and determine as follows:

First. They excluded Poor's Manual as evidence.

Second. They excluded the affidavits of Thompson, Goodwin, Keith and Jones as evidence.

Third. They overruled plaintiff's exceptions to the depositions of Shepherd and Frazer and the Financial Chronicle exhibited with them and looked to the same as evidence.

Fourth. They overruled the exceptions to the assessment for 1897 and they affirmed the action of the assessors in overruling plaintiff's exceptions in assessing all of said property for the years 1897 and 1898 at the valuation stated above.

Fifth. They, after finding the valuation of said property, refused to make any deductions from the actual valuation as ascertained by them, on account of the assessment of their property in the state of Tennessee for less than its value and refused to equalize the property of plaintiff for taxation with other property in the state of Tennessee. Every of which actions was illegal and unauthorized.

In all other respects they affirmed the acts of the assessors.

Plaintiff avers that all of said assessments besides being improperly made and not according to law, are excessive, oppressive and illegal and that there is no competent evidence in the record on which to sustain them. The present assessments and of former years and the assessments of the same line in other states into which it extends have been heretofore shown.

Defendant, William S. Morgan, was secretary of state of Tennessee during the years 1895 and 1896, and E. B. Craig was treasurer at the same time. As *ex-officio* examiners for the year 1896, they assessed said telephone property at forty dollars per mile; there was no general rise of value of telephone property or any other property in the state of Tennessee between the times said assessments were so made by them and January 10, 1897. On the contrary, all property, including telephone property, was most severely depressed during 1896. There has been no increase in the taxable value

of other property in the state of Tennessee for 1897, as compared with the said preceding years.

In pursuance of said assessment Act, said board of equalizers will, as they have informed your plaintiff's counsel, unless prevented, at twelve o'clock, noon, November 20, 1897, certify to the comptroller the valuations so placed by them upon said property. The comptroller will proceed, after said assessments have been certified to him, according to the course of law, to collect for the state taxes so wrongfully assessed and will certify to the several towns, and cities and counties of the state through which said telephone lines pass, the said assessments and the said towns, cities and counties will proceed under said Act to collect the same. Under said Act taxes so assessed in behalf of the state, counties, town and cities will become a first lien upon the property from the 10th of January, 189—, of the year of which they are assessed. If the said taxes are not paid as assessed, distress warrants will issue against your plaintiff, and if it shall not pay the same, then the comptroller will, under said Act, advertise said property and sell the same for cash free from the equity of redemption and execute to the purchaser any deed or deeds.

Plaintiff charges and says that the action of the said board of assessors and the said board of equalizers was arbitrary, oppressive and in violation of the law, and will fix upon plaintiff a charge for which there is no proof before them to warrant and impose upon plaintiff a burden unjust and unequal as between its and other property throughout the state; that said board acted in violation of the letter and spirit of the constitution and not upon the proper authority, and erred as well in excluding competent evidence offered by petitioner, as in looking to and considering incompetent evidence adduced by the assessors.

Plaintiff further shows that Chapter 5 of the Acts of 1897, under which the assessors and commissioners aforesaid have

assumed to proceed, is unconstitutional and void in that it contains two subjects in its caption and its body, to wit: (1) Provides for the assessment and collection of revenue for state and county purposes. (2) And provides for the assessment and collection of revenue for municipal purposes. And for this reason, said assessments are null and void.

Recognizing the fact that throughout the state of Tennessee property has been systematically assessed for a time immemorial at a valuation for the purpose of taxation greatly less than its actual value and at a valuation ranging from fifty to about sixty-five per cent. thereof, the state of Tennessee, through its board of assessors and equalizers during the years of 1895 and 1896, endeavored to systematize the county assessments and bring them up to a common basis or standard of valuation. Accordingly, said board established as the basis for assessment for taxation, in all the counties of the state, seventy-five per cent. of the actual or true value of the lands or property to be assessed and raised the assessment in the various counties of the state for both said years, where they were less than seventy-five per cent. to seventy-five per cent.

Plaintiff further shows that the said board of assessors and equalizers was the first state board of equalizers in the state of Tennessee and its establishment was a legislative recognition of the systematic usage and custom of valuation prevailing and of the legislative purpose to render it uniform throughout the state.

Plaintiff further says that the said state board of assessors and equalizers was not only trusted with the power of equalizing assessments throughout the state, but also with the duty of assessing railroad, telegraph and telephone properties for taxation, and it avers and charges that the assessment, made by said board and valuations fixed upon said property were made by them at the rates fixed for the purpose of equalizing the assessments of such property with those of the lands in Tennessee.

Plaintiff is informed and believes and thereupon charges and says that the system of taxation, which has prevailed in Tennessee, viz.: of assessing property at less than its value, has also prevailed throughout the states of the Union and has been adopted and acted upon upon grounds of public policy, the idea being the government could be more economically administered and the public revenues better husbanded from extravagant appropriations by so adjusting the rate of taxation to the valuation of the property to be taxed as to require all demands for increase of public revenues to be met through a raising of the rate of taxation instead of the assessment. In this way the question of taxation can be and has been kept in a position to receive public consideration.

The value fixed by the said board is greatly in excess of the value shown in the proof in the record before said board. The system by which they proceeded to ascertain and the said value is erroneous, as hereinbefore shown. The said taxation is unequal, unconstitutional and void.

The aforesaid persons, to wit, R. L. Bullock, N. H. White and F. M. Thompson, who have assumed to make said assessment and assessments, were never appointed or qualified as tax assessors of railroads or other property for the state of Tennessee for the years 1897 and 1898 under and by virtue of the published Acts of Tennessee of 1897, Chapter V. They have assumed to exercise the authority of tax assessors and have made said assessments only as *ex-officio* commissioners by virtue of being commissioned railroad commissioners of the state of Tennessee, under and by virtue of authority under Chapter X. of the published Acts of Tennessee of 1897. The said Act is unconstitutional and void and said commissioners were illegally appointed and have no power to make said assessments or perform any acts under and by virtue of the said Act. Said Act is in contravention of the Constitution of the United States and of the state of Tennessee, and is void for the following reasons:

First. There are entirely different and distinct subjects embraced in the title and the body of the Act, namely. (a) the creation of a railroad commission and the defining of its powers and duties, with provisions to secure the due enforcement of the lawful orders, rules and regulations; (b) the prohibition of extortion, unjust discrimination and undue and unreasonable preferences by persons and companies operating railroads in their charges for transportation of freight and passengers, and making such acts, when committed by a railroad corporation, a misdemeanor, and imposing penalties for the same; (c) it provides adequate civil remedies to redress such extortions, unjust discriminations and undue and unreasonable preferences.

Second. Said Act provides that any railroad corporation that shall be guilty of extortion or unjust discriminations, or of giving any person, or locality, or of any discriminations in traffic, or any undue or unreasonable preferences or advantages, shall, upon conviction, be fined not less than five hundred dollars nor more than two thousand dollars. These penalties are confined to railroad corporations, and do not include persons or individuals or partnerships engaged in the same business, and the law is therefore partial, unequal and class legislation.

Third. The said Act provides that every witness who shall appear before the commission by its order shall receive his attendance and compensation as provided by law out of the state treasury, but provides that no witness summoned at the instance of a railroad, who is directly or indirectly interested in any stock, bond, mortgage, security or earnings of any such road, or who shall be the agent or employe of such road, shall be entitled to any witness fees or mileage for attendance. This classification is purely arbitrary. It is class legislation and unlawful discrimination, and not in accordance with the laws of the land.

Fourth. The title of the Act purports to make the provisions of the Act applicable to all railroad companies and other persons operating railroads in the state of Tennessee. Yet, while Section 15 applies to every common carrier (as defined in Section 14), the operation of Section 16 is confined to "railroad corporations" alone.

Again, Section 16 defines extortion as applied to a railroad corporation, but leaves it undefined as to all other "common carriers," namely, as to all other persons operating railroads in this state, thus making an unlawful discrimination and subjecting railroad corporations to penalties contrary to the constitution of the state of Tennessee and inconsistent with the law of the land.

Fifth. Section 17 makes it unlawful for any corporation, whether railroad corporation or not, to give an undue or unreasonable preference, but it does not apply to "persons operating railroads in this state," which may be individuals or partnerships, and not corporations. This section thus discriminates unlawfully against corporations. This is class legislation and unconstitutional.

Sixth. Again, Section 16 applies not only to persons and any other "common carrier," but Section 19 imposes upon railroad corporations alone a fine of not less than \$500, and not more than \$2,000 for "extortion," or for "unjust discrimination," or for "giving any person or locality or any description of traffic an undue or unreasonable preference or advantage." This is unlawful discrimination, class legislation and unconstitutional.

The title of the Act embraces both individuals and corporations, but the penalties apply only to corporations.

Seventh. Again, under said Act, indictments or presentments under this Act shall be preferred only upon recommendation or request of the railroad commission filed in the court having jurisdiction.

This delegates to the commission the power to suspend the

criminal law, and practically takes out of the hands of the grand juries and criminal courts of the state the power to investigate certain crimes and misdemeanors. Being an unlawful delegation of legislative authority, it is unconstitutional and void and makes said Act unconstitutional and void.

Eighth. Again, Section 18 prohibits the charging of any greater compensation for the transportation of passengers or property for a shorter than for a longer distance over the same line in the same direction, making it a misdemeanor and fixing the penalty at not less than \$100 and not more than \$500.

Section 33 provides that the commission, in its discretion, may suspend this law whenever they see proper to do so. This is a delegation of the legislative function, is not the law of the land, it is unconstitutional and the Act containing it is void.

Ninth. Section 28 provides that every railroad company that shall fail or refuse, under such regulations as may be prescribed by the commission, to receive and transport without delay and discrimination the passengers, tonnage and cars, loaded or empty of any connecting line of railroad or other common carrier by water or land, and every railroad which shall, under such regulations as may be prescribed by the commission, fail or refuse to transport and deliver without discrimination any passengers, tonnage and cars, loaded or empty, destined to any points over the line of any connecting railroad, or shall refuse to receive and transport without delay any freight consigned to any person, firm or corporation, or common carrier at any point on its line, or at any point on any other connecting line of railroad, shall be guilty of unjust discrimination.

This section permits the commission to make any sort of regulation, reasonable or unreasonable, with respect to the transportation of freight and passengers. The railroad is bound to accept and convey such freight under such regula-

tions. If it fails to do so it is guilty of "unjust discrimination," and the penalty, if the carrier so refusing, be a "railroad corporation," is a fine of not less than \$500, and not more than \$2,000.

The railroads have no opportunity of actively contesting the reasonableness of regulations prescribed by the commission, but irrespective of whether they be reasonable or unreasonable, a failure to convey freight or passengers in accordance therewith is, under Section 28, "unjust discrimination," which subjects the party, if a "railroad corporation," to the said fine.

This is not due process of law, is unconstitutional, is a confiscation of property and class legislation, and does not give the said corporations equal protection of the laws, but subjects them to undue, unusual, harsh and illegal and discriminating burdens.

Tenth. The provisions of said Act are so vague and indefinite as to render it unconstitutional and void. Section 10 defines extortion to be the collection of more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state and for the use of any railroad car upon its track, or upon any track it controls or has the right to use in this state. There is no definition by which a just and reasonable rate of toll or compensation may be determined; even if the commission fixes a regular schedule and the railroads shall comply therewith it may yet be subjected to indictment and be found by a jury to be guilty of extortion. There is no rule laid down by the said Act, or any other law of the state of Tennessee by which a jury shall be guided and the railroad company cannot know whether or not it is violating the law, and there is no standard by which it can know whether or not it is committing an offense. No citizen or property or business can be criminally subjected to such vague and indefinite rules and regulations and no statute subjecting a per-

son or corporation to prosecution and punishment by such vague and indefinite terms is valid.

Eleventh. The undue and unreasonable preference forbidden by Section 17 is so vague and indefinite that no railroad can know when it has violated the law until the jury in the particular instance, whether in a civil or criminal action, has passed upon the question. Upon the same state of facts one jury in the same place may, under the same law, find the railroad corporation guilty and another jury, upon the same set of facts, in the same place, and under the same law, find the defendant innocent. It leaves everything to the caprice of the jury.

Twelfth. Section 28 of the Act gives to the railroad commissioners power to give special rates to encourage infant manufacturing industries, or any other business or industry, or for the transportation of any perishable goods. This puts it in the power of the commission the right to discriminate between persons and places and classes of business. It is class legislation and the delegation of legislative power and it confers upon them the authority to suspend the criminal provisions of Section 19.

Thirteenth. Section 27 of said Act, without any provisions being made therefor in the caption, and the same being an entirely different subject from the main features of the bill, changes the order of business in the courts, and gives precedence to those suits arising out of the regulations made by said Act and orders them to be advanced upon the docket, thus making the Act embrace two subjects different in character.

Fourteenth. Section 28 legislates in regard to the failure to transport, without delay, persons and empty or loaded cars, which subject is not provided for in the caption and is a different subject from that set out in the caption and which is the general purpose of the bill and for such reason said Act is unconstitutional and void.

Premises considered, plaintiff asks leave to bring this bill against Robert L. Taylor, E. B. Craig and Wm. S. Morgan, *ex-officio* the board of equalization, the parties named in the caption as defendants hereto, and it prays for the writ of subpoena to issue to them, commanding them to appear by a day certain before this honorable court and to answer the allegations hereof, but not under oath, which is waived.

It prays for the writ of injunction to issue, enjoining them from and restraining the defendants aforesaid and each of them from certifying the record of their action in the matter in the premises mentioned or the valuation fixed by them as aforesaid or the assessments to the comptroller of the state of Tennessee, until further orders herein, to the end that the justice and validity of the said assessments may be determined.

It prays that the said injunction may be made perpetual, and may it please your honors to grant to plaintiff such other and further relief as the nature of the circumstances of its case may require, as in duty bound it will ever pray. This is the first application for a writ of injunction in this case.

X. & X.,

Solicitors and of Counsel.

State of ———,

——— County of ———.

I, W. H., do make oath and say that I am secretary of the East Tennessee Telephone Company, the plaintiff above named, and am acquainted with its affairs, and that the matters and facts stated in the foregoing bill are true to the best of my knowledge, information and belief:

Sworn to and subscribed before me, this the ——— day of ———,

A. R.,

[Seal.]

Notary Public.

(1) Taken from the case of Taylor v. The East Tennessee Telephone Company in the Circuit Court for the Eastern District of Tennessee (not reported).

(2) Under the Judicial Code provisions a similar case today would be brought in the District Court and the application for interlocutory injunction would be heard by three judges, under Sec. 266.

No. 468.**Bill by a Telephone Company to Enjoin a Competitor from Connecting with its Devices.(1)**

To the Honorable Judge of the District Court of the United States for the ——— Division of the ——— District of ———.

Your complainant, the A. B. Telephone Company, respectfully shows to the honorable court that; it is a corporation organized under the laws of the state of ——— and a citizen of said state; that it has complied with the statutes of this state; that it has been for many years engaged in transmitting intelligence by metallic wires, operating and maintaining exchanges and toll lines in the states of ——— and ———, and for the past ——— years has been operating an exchange in the city of ———, and attempting to give to its patrons and subscribers of ——— and the surrounding country a service second to none, known to the telephone business and its business has grown from a very small exchange to one of the largest in the country in cities the size of ———, and its patrons and subscribers now number eleven hundred, and that it has expended large amounts of money for the purpose of equipping this exchange with the most modern improved instruments and devices that it was able to procure in the markets of the country, and it is necessary, from time to time, to buy modern equipments and devices that is constantly being invented, requiring a great expenditure of money to maintain the high standard of service that it is now and has been furnishing to the people of ———.

Your complainant further shows to the honorable court; that some four and a half years ago that the defendant, C. D., conceived the idea of entering the telephone business in the city of ———, and organized the defendant, the C. D. Telephone company and duly incorporated the same under the laws of the state of ———, and a citizen of said state residing in the ——— district of ———, built and equipped what is known as the independent telephone system of ———, and equipped the same with

instruments or phones, that was in the opinion of your complainant very much inferior to the instruments and phones used by your complainant, and the defendant company has been an active competitor to your complainant in the telephone business in the city of —, and secured a strong foothold at first, upon the ground that it was a local corporation and that your complainant was a foreign corporation, and has done many things to harass and annoy your complainant. But your complainant was satisfied and its judgment has largely been verified, in that that the people would seek the telephone company and patronize the business of the one that gave to its subscribers the most efficient service, and it has been along these lines that your complainant has been able, for the past two years to almost double the patrons and subscribers of the defendant company.

Your complainant would further show to the honorable court, that some time ago that the defendant, C. D., through his employes and agents, over the protest and written request of your complainant, attempted to impair and greatly destroy the superior and efficient service of your complainant, and at the same time, derive revenue from this impairment for the defendant company, and without compensating your complainant for the use of its property by giving a double connection to the subscriber who had the phones of both the defendant and complainant companies, directly connecting your complainant's property with the property of the defendant company, by means of a switch that connects with a desk phone, by a wire running from the phone of the complainant company and one running from the phone or wires of the defendant company, and the complainant believes and charges that the instrument used, by means of this connection, with the wires and phones of your complainant, is defective and inferior. A diagram of this connection is filed with this bill and marked Exhibit "A."

Your complainant further shows to the honorable court, that the defendant company has been charging your complainant's subscribers extra compensation for the use and connection here described with the property of the complainant company, and this revenue is received by the defendants, greatly to the impairment and expense of your complainant, because that in the use of the instruments furnished, being inferior and defective, the defendant is unable, often to give the proper connection, and it is impossible for your complainant to give to its patrons and subscribers a good and efficient service, and especially is this true in the long distant connection, and if this is permitted, it will soon cause the service of your complainant to be dragged down to the same low standard as that now furnished by the defendant company to its patrons, and greatly damage the reputation and good standing of your complainant's efficient and good service.

Your complainant further shows to the honorable court, that notwithstanding two written appeals, to C. D., as manager, to desist and immediately stop giving or making these double connections, the defendant has persisted in contracting with your complainant's subscribers, but as to the exact number, your complainant is not advised, but believes and charges that the defendant has contracted with from ten to fifteen of your complainant's patrons, and is now engaged in soliciting and contracting with many others for this same double connection, and if not enjoined the defendant, will continue to contract with your complainant's subscribers, and in this way use your complainant's property, greatly to its damage, without any compensation to your complainant, and a revenue to the defendant company.

Therefore complainant prays:

That injunction be ordered by the honorable court, to inhibit and restrain the defendant, C. D., his agents or employes, directly or indirectly, from further connecting his

property with your complainant's property by means of wires or otherwise, his phones or switches or any other device.

Your complainant further prays that the defendants be enjoined from continuing and maintaining the connections heretofore made, and that are wrongfully being operated and maintained by the defendants, and that the defendants be required at once to disconnect all wires and instruments now connecting the wires or phones of the defendant company with the complainant company.

Your complainant further prays that it be awarded four thousand dollars damage for the wrongful connection heretofore made by the defendant.

THE A. B. TELEPHONE CO.

By R. X., Its Solicitor.

[*Verification.*]

(1) Taken from *People's Telephone & Telegraph Co. v. East Tennessee Telephone Co.*, 103 Fed. 212.

No. 469.

Bill to Enjoin the Transfer of Title to Patents Under a Partnership Agreement.(1)

To the Honorable Judge of the District Court of the United States for the — District of —, — Division:

R. C., of the city of —, and a citizen of the state of —, brings this his bill against B. E., of —, and J. E., of —, both citizens of the state of —, and inhabitants of the — division of the — district thereof, and says:

First. That for many years prior to March 1, 1897, he was a member of the partnership of J. W. & Son, manufacturers of clay-working machinery at —; that on or about said date, by transfer from the other members of said firm, he became the sole owner of the assets and property belonging thereto, including the demand herein sued upon, as well as all other rights, claims and demands of every nature whatsoever, both in law and in equity, belonging to said partnership.

Second. That the defendant, B. E., for about three years prior to —, was in the employ of said firm as a traveling salesman; that in September of said year said firm, being then the owner of a shop right under letters patent of the United States, numbered —, issued to D. B. on the — day of —, for an improvement in automatic brick-cutting machinery, and being desirous of purchasing the entire interest in said patent, and reposing great confidence in the integrity and fidelity of said defendant, B. E., requested and directed him while so in its employ to go to Dixon, Illinois, at its expense and as its agent to see said inventor, who was then the owner of said patent, and if possible obtain from him an option for the purchase thereof.

Third. That said defendant, while so acting as the agent and representative of said partnership, and in compliance with said instructions, did go to see said inventor, and did obtain from him a written option whereby he agreed to transfer said patent to said B. E. at any time before May, —, on payment of the sum of \$—, and to issue at any time prior to said date licenses to manufacture under said patent, at one point only, on payment of the sum of \$— for each license.

Fourth. That some time in the month of November, while still in the employ of said partnership, said defendant notified plaintiff that he had obtained said option, and was then directed and instructed to accept the terms of said option and to cause said patent to be assigned to him as soon as possible, taking title thereto in his own name, and thereupon to transfer and assign said patent to said partnership; that said defendant, intending to defraud said partnership, and to deprive it of the benefit of the ownership of said patent, did not formally accept the terms of said option and procure a transfer of said letters patent as so directed, but left the employ of said partnership on the first day of December, —, without having accepted said option or caused said letters patent to be so assigned, all of which was done, as plaintiff alleges, with the intent and purpose of cheating and defrauding said partnership out of the rights designed and intended to be secured

to it by said option, and of appropriating said letters patent and the rights thereby conferred to his own use and advantage; that shortly after leaving the employ of said partnership, and some time in December, —, as plaintiff is informed and believes, and therefore alleges, with the like intent and purpose of cheating and defrauding said partnership, and doing its business a great and irreparable injury, said defendant without any authority from said firm sold a shop right under said patent to C. W., of —, a competitor of plaintiff in said business, for the sum of \$—; that he concealed all knowledge of said sale from said partnership, and fraudulently and unlawfully appropriated the money arising therefrom to his own use; and plaintiff says that the interest so granted by said defendant in said patent was of the value of \$—, for which amount he claims said defendant is justly indebted to him.

Fifth. That said defendant thereafter, and some time in March, —, with the like intent and purpose, formally accepted the terms of said option and fraudulently procured said patent to be transferred and assigned to himself, paying therefor the price fixed by the terms of said option, to-wit, the sum of \$—, which option and assignment said defendant caused to be recorded as and when given, respectively, in the patent office at Washington.

Sixth. That at and prior to the time of accepting the terms of said option, the defendant, B. E., procured the said D. B. to execute and deliver to him an assignment of a shop right, or a license to manufacture under said patent, leaving the name of the grantee and the place at which said license was to be granted blank; that said defendant has said assignment now in his possession or under his control, and threatens to, and unless restrained by this honorable court will, complete the execution of such assignment by filling in said blanks, and dispose of the same to some party ignorant of the rightful interests of plaintiff therein.

Seventh. That said defendant has executed, but still has subject to his control, five additional assignments of shop

rights under said patent, which he maliciously threatens to issue and deliver to competitors of plaintiff in the business of building clay-working machinery, for the sole purpose of destroying the value of such patent to plaintiff and of doing him a great and irreparable injury; that plaintiff believes that said defendant will issue and deliver said assignments and transfers, and cause the same to be recorded in the patent office at Washington, unless enjoined from so doing by this honorable court. Plaintiff says that he has good reason to believe, and does believe, and for that reason alleges, that such executed assignments have been delivered by the said B. E. to the defendant, J. E., with instructions to deliver and cause the same to be recorded if any action is brought to recover the title to said patent.

Eighth. That with the intent and design to further cheat and defraud plaintiff and said partnership, said defendant, B. E., fraudulently and without consideration assigned and transferred to his brother, J. E., of —, on or about —, a license to manufacture at any places, and sell throughout the United States, said invention under said patent, said J. E. then having full knowledge of the rights of said partnership and of plaintiff in said patent, and of the fraudulent manner in which said defendant, B. E., had acquired his interest therein.

Ninth. Plaintiff further avers the fact to be that the said J. E., with such knowledge of the rights of plaintiff, is confederating and conspiring with the said B. E. to assist him in so cheating and defrauding plaintiff of his lawful interest in said patent, and to that end is holding said assignments and transfers of rights therein for the sole purpose of making delivery of the same immediately upon the bringing of proceedings by plaintiff to enforce his rights thereto so that such proceedings may be rendered ineffectual.

Tenth. That the said defendant, B. E., in direct disregard of his duty and obligations to plaintiff, has refused to assign said patent to him, although often requested so to do, to his

great and irreparable damage and injury, for which injury he says he has no adequate remedy at law. And plaintiff says that he can not safely give notice to said defendants or either of them of his purpose to apply for an order of injunction as herein prayed for, for the reason that said defendants would immediately and before such order could be issued deliver said assignments and dispose of their interests in said patent, thereby defeating the objects and purposes of said injunction.

Wherefore plaintiff prays the court now to grant him a writ of injunction restraining and enjoining the said defendants, and each of them, from in any manner disposing of said patent or any interest therein; from selling, giving, delivering, assigning or transferring any license, shop rights or other interest therein to any person or company, and from delivering or causing to be delivered any executed assignments, transfers, licenses or shop rights under said patent until the further order and decree of this court in the premises, and upon final hearing that said injunction may be made perpetual; that the defendant, B. E., be decreed to hold the title to said patent as trustee for plaintiff and be compelled to disclose what sum he paid therefor, and what sums, if any, he has received from the sale of interests therein; that an account may be taken of the value of the interests in said patent so disposed of by said defendant and a decree rendered in favor of plaintiff therefor; that upon final hearing hereof he may be decreed to assign said patent to plaintiff, and deliver to the clerk of this court for cancellation all assignments of any interests in said patent whether executed by himself or by the said D. B., which he now holds or over which he has any control; that the defendant, J. E., be decreed to hold all title and interest transferred to him in said patent, and all executed assignments of any interest in said patent, or rights thereunder, as trustee for plaintiff, and upon final hearing be ordered to assign any interests he may have in said patent to plaintiff, and to deliver such executed assignments to the clerk of this court for cancellation, and for such

other and further relief as the nature of the case may require
and to your honors may seem meet. R. C.

[*Verification.*]

(1) Taken from *Penfield v. La Dow*, 40 C. C. A. 684, 100 Fed. 1002.

No. 470.

**Bill to Enjoin Railroads from Refusing to Receive Freight
from Connecting Lines.**

To the Judge of the District Court of the United States for
the Northern District of Ohio, Western Division:

The Toledo, Ann Arbor & North Michigan Railway Company, a corporation of the state of Michigan, duly incorporated and organized under the laws of the said state, and a citizen of said state, brings this its bill against the Pennsylvania Company, a corporation of the state of Pennsylvania, duly incorporated under the laws of said state, and a citizen of Pennsylvania, and the Wheeling & Lake Erie Railway Company, a corporation duly organized under the laws of the state of Ohio, and a citizen of the said state of Ohio: Albert G. Blair, Jacob S. Morris, the Lake Shore & Michigan Southern Railway Company, the Michigan Central Railroad Company, the Cincinnati, Hamilton & Dayton Railroad Company, the Columbus, Hocking Valley & Toledo Railway Company, the Toledo & Ohio Central Railway Company, the Cincinnati, Jackson & Mackinaw Railway Company. All of said six last-named defendants being corporations created and organized under the laws of the state of Ohio, and citizens of said state of Ohio.

Plaintiff says that it is now the owner and operates a line of railroad extending from the city of Toledo, in the county of Lucas and state of Ohio, northerly and northwesterly through the said state of Michigan to a terminus at or near the village of Frankfort, in Benzie county, said state of Michigan; that said line of railroad is about three hundred miles long.

great and irreparable damage and injury, for which injury he says he has no adequate remedy at law. And plaintiff says that he can not safely give notice to said defendants or either of them of his purpose to apply for an order of injunction as herein prayed for, for the reason that said defendants would immediately and before such order could be issued deliver said assignments and dispose of their interests in said patent, thereby defeating the objects and purposes of said injunction.

Wherefore plaintiff prays the court now to grant him a writ of injunction restraining and enjoining the said defendants, and each of them, from in any manner disposing of said patent or any interest therein; from selling, giving, delivering, assigning or transferring any license, shop rights or other interest therein to any person or company, and from delivering or causing to be delivered any executed assignments, transfers, licenses or shop rights under said patent until the further order and decree of this court in the premises, and upon final hearing that said injunction may be made perpetual; that the defendant, B. E., be decreed to hold the title to said patent as trustee for plaintiff and be compelled to disclose what sum he paid therefor, and what sums, if any, he has received from the sale of interests therein; that an account may be taken of the value of the interests in said patent so disposed of by said defendant and a decree rendered in favor of plaintiff therefor; that upon final hearing hereof he may be decreed to assign said patent to plaintiff, and deliver to the clerk of this court for cancellation all assignments of any interests in said patent whether executed by himself or by the said D. B., which he now holds or over which he has any control; that the defendant, J. E., be decreed to hold all title and interest transferred to him in said patent, and all executed assignments of any interest in said patent, or rights thereunder, as trustee for plaintiff, and upon final hearing be ordered to assign any interests he may have in said patent to plaintiff, and to deliver such executed assignments to the clerk of this court for cancellation, and for such

other and further relief as the nature of the case may require and to your honors may seem meet. R. C.

[*Verification.*]

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No. 470.

Bill to Enjoin Railroads from Refusing to Receive Freight from Connecting Lines.

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The Toledo, Ann Arbor & North Michigan Railway Company, a corporation of the state of Michigan, duly incorporated and organized under the laws of the said state, and a citizen of said state, brings this its bill against the Pennsylvania Company, a corporation of the state of Pennsylvania, duly incorporated under the laws of said state, and a citizen of Pennsylvania, and the Wheeling & Lake Erie Railway Company, a corporation duly organized under the laws of the state of Ohio, and a citizen of the said state of Ohio: Albert G. Blair, Jacob S. Morris, the Lake Shore & Michigan Southern Railway Company, the Michigan Central Railroad Company, the Cincinnati, Hamilton & Dayton Railroad Company, the Columbus, Hocking Valley & Toledo Railway Company, the Toledo & Ohio Central Railway Company, the Cincinnati, Jackson & Mackinaw Railway Company. All of said six last-named defendants being corporations created and organized under the laws of the state of Ohio, and citizens of said state of Ohio.

Plaintiff says that it is now the owner and operates a line of railroad extending from the city of Toledo, in the county of Lucas and state of Ohio, northerly and northwesterly through the said state of Michigan to a terminus at or near the village of Frankfort, in Benzie county, said state of Michigan; that said line of railroad is about three hundred miles long.

great and irreparable damage and injury, for which injury he says he has no adequate remedy at law. And plaintiff says that he can not safely give notice to said defendants or either of them of his purpose to apply for an order of injunction as herein prayed for, for the reason that said defendants would immediately and before such order could be issued deliver said assignments and dispose of their interests in said patent, thereby defeating the objects and purposes of said injunction.

Wherefore plaintiff prays the court now to grant him a writ of injunction restraining and enjoining the said defendants, and each of them, from in any manner disposing of said patent or any interest therein; from selling, giving, delivering, assigning or transferring any license, shop rights or other interest therein to any person or company, and from delivering or causing to be delivered any executed assignments, transfers, licenses or shop rights under said patent until the further order and decree of this court in the premises, and upon final hearing that said injunction may be made perpetual; that the defendant, B. E., be decreed to hold the title to said patent as trustee for plaintiff and be compelled to disclose what sum he paid therefor, and what sums, if any, he has received from the sale of interests therein; that an account may be taken of the value of the interests in said patent so disposed of by said defendant and a decree rendered in favor of plaintiff therefor; that upon final hearing hereof he may be decreed to assign said patent to plaintiff, and deliver to the clerk of this court for cancellation all assignments of any interests in said patent whether executed by himself or by the said D. B., which he now holds or over which he has any control; that the defendant, J. E., be decreed to hold all title and interest transferred to him in said patent, and all executed assignments of any interest in said patent, or rights thereunder, as trustee for plaintiff, and upon final hearing be ordered to assign any interests he may have in said patent to plaintiff, and to deliver such executed assignments to the clerk of this court for cancellation, and for such

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To the Judge of the District Court of the United States for the Northern District of Ohio, Western Division:

The Toledo, Ann Arbor & North Michigan Railway Company, a corporation of the state of Michigan, duly incorporated and organized under the laws of the said state, and a citizen of said state, brings this its bill against the Pennsylvania Company, a corporation of the state of Pennsylvania, duly incorporated under the laws of said state, and a citizen of Pennsylvania, and the Wheeling & Lake Erie Railway Company, a corporation duly organized under the laws of the state of Ohio, and a citizen of the said state of Ohio: Albert G. Blair, Jacob S. Morris, the Lake Shore & Michigan Southern Railway Company, the Michigan Central Railroad Company, the Cincinnati, Hamilton & Dayton Railroad Company, the Columbus, Hocking Valley & Toledo Railway Company, the Toledo & Ohio Central Railway Company, the Cincinnati, Jackson & Mackinaw Railway Company. All of said six last-named defendants being corporations created and organized under the laws of the state of Ohio, and citizens of said state of Ohio.

Plaintiff says that it is now the owner and operates a line of railroad extending from the city of Toledo, in the county of Lucas and state of Ohio, northerly and northwesterly through the said state of Michigan to a terminus at or near the village of Frankfort, in Benzie county, said state of Michigan; that said line of railroad is about three hundred miles long.

Plaintiff also owns and operates a line of steam ferry-boats for the transportation of cars and trains from said village of Frankfort across Lake Michigan to the town of Kewaunee, in the state of Wisconsin, and that it is a common carrier of freight and passengers under the statutes of the United States of America and the states of Ohio and Michigan, aforesaid.

A large part of plaintiff's business consists of the transportation of cars of freight from points in the state of Michigan and other states west of Michigan into the state of Ohio, and also the transportation of cars and freight consigned from the states of Minnesota, Wisconsin and Michigan to points in the state of Ohio and other states east thereof, and as such common carrier as aforesaid it is engaged in a large amount of interstate commerce and traffic, which is regulated and controlled by the provisions of the acts of Congress in such case made and provided.

Said defendants, the Wheeling & Lake Erie Railway Company and the Pennsylvania Company, are likewise common carriers of freight and passengers, and as such the said defendant, the Wheeling & Lake Erie Railway Company, owns and operates a line of railroad extending from the city of Toledo aforesaid southeasterly through the state of Ohio to the city of Wheeling in the state of West Virginia, and controls and operates a line of railroad in Lucas county, Ohio, known as the Belt Railway, connecting plaintiff's road with the roads of the other defendant companies, all of whom own and operate lines of railroad extending easterly and southerly from said city of Toledo respectively, and that the said defendant, the Pennsylvania Company, owns and operates a line of railroad extending from said city of Toledo southeasterly through said state of Ohio to the city of Pittsburg in the state of Pennsylvania. All said defendant companies' lines of railroad connect with the line of plaintiff at a common grade in the county of Lucas and state of Ohio, convenient for the interchange of cars of freight.

That a very large and important part of the business of plaintiff consists in the interchange of said cars of freight between plaintiff and said defendant companies.

That substantially all the business transacted as aforesaid between plaintiff and said defendant companies consists of the interchange of cars containing freight consigned from points in one state to points in another state, and said business is therefore subject to all and singular the provisions of the acts of Congress of February 4, 1887, regulating commerce between the states, and the amendments thereto.

Plaintiff further says that all of said business of interchange of cars of freight as aforesaid between plaintiff and said defendant companies is transacted within said county of Lucas and state of Ohio, within the jurisdiction of this court.

That by the provisions of the act of Congress aforesaid, it is the duty of said defendant companies, according to their respective powers, to afford all reasonable, proper and equal facilities for the interchange of traffic with plaintiff, and to receive, forward and deliver cars of freight in the ordinary transaction of the business aforesaid from and to plaintiff without any discrimination.

That it is the duty of said defendant companies, under the statutes of the state of Ohio, to receive from plaintiff the cars of freight delivered to them in the ordinary transactions of the business aforesaid without any unnecessary delay, and to transport the same to their destination over their respective roads, and in like manner to deliver to plaintiff all cars of freight billed over plaintiff's road to be by plaintiff transported to their destination.

That the said defendant companies and their officials, agents and employes have since the 11th day of March, 1893, given out and threatened that they will refuse to receive from plaintiff cars offered or to be offered by plaintiff, and that they will not deliver to plaintiff cars billed over plaintiff's road for transportation by plaintiff to their destination, for the reason, as plaintiff is informed and believes and charges the fact to be, that because plaintiff has employed as locomo-

tive engineers in its service men who are not members of the Brotherhood of Locomotive Engineers, which plaintiff is informed is an irresponsible voluntary association of locomotive engineers, the locomotive engineers in the employ of the defendant companies have refused to handle cars to be interchanged with plaintiff's railroad. But plaintiff says that it is informed and believes that the defendants continue to afford to other railroads the full and free facilities for interchange of traffic as aforesaid, while refusing to transact such business with plaintiff, thereby discriminating illegally against plaintiff.

Plaintiff alleges the fact to be that no legal or reasonable ground exists why said defendant companies should refuse to transact the business of interchanging cars of freight as aforesaid, and that no excuse is alleged so far as plaintiff is advised for such refusal, other than the one hereinbefore set forth.

That if said defendant companies shall persist in their refusal to handle such interchange business as aforesaid, a very large and important part of plaintiff's business will come to a complete standstill. The transaction of said interstate commerce will be paralyzed, and the loss and injury to plaintiff and to the public will be irreparable and continuing.

The defendant, Albert G. Blair, is the general manager of said defendant, the Wheeling & Lake Erie Railway Company, and as such has general charge and control of all its business operations; and the defendant, Jacob S. Morris, is the superintendent of the defendant, the Pennsylvania Company, and as such has general charge and control of the business operations of said company in Lucas county, Ohio.

That unless the said defendants are restrained by the order of this court from refusing to perform their public duty as aforesaid, plaintiff will be unable to perform its public duty in the transportation of the cars between the state of Ohio and the state of Michigan; that the interests of the public will suffer by reason of the accumulation of cars on the line of plaintiff's road and connecting roads and inability of plaintiff to carry or deliver them; that from the nature of the

case the damages suffered by plaintiff would be difficult and impossible to estimate, and that plaintiff has no adequate remedy at law in the premises.

That the matter in dispute herein exceeds, exclusive of interests and costs, the sum of \$3,000, and that this suit arises under the constitution and laws of the United States.

Wherefore plaintiff prays that your honors may grant a writ of injunction issued out of and under the seal of this honorable court perpetually enjoining and restraining the said defendant companies, their officers, agents, servants and employes from refusing to offer all reasonable and proper and equal facilities to the interchange of traffic with plaintiff, and from refusing to receive from plaintiff, for transportation over their respective lines of railroad any and all cars of freight which may be tendered to them by plaintiff, and from refusing to deliver to plaintiff all cars of freight which may be billed over plaintiff's line of railroad from said defendant companies in like manner as heretofore; and restraining said individual defendants and each of them while remaining in the service and employment of said respective companies from refusing to perform the usual services required in their respective capacities for the interchange of cars and freight between plaintiff and said defendant in the same manner in which the same has been heretofore carried on, and for such other relief as to the court shall seem equitable and proper in the premises.

Plaintiff prays that a provisional or preliminary restraining order be issued to the same purport and effect as herein prayed for against said respective defendants to remain in full force until the further order of the court herein or until this suit shall be finally disposed of.

R. X.,

Solicitor for Complainant.

[*Verification.*]

(1) This bill was filed in Toledo, etc., R. Co. v. Pennsylvania R. Co., 54 Fed. 730.

No. 471.**Where Carrier Refuses to Accept Goods in Interstate Commerce.**

[Caption.]

Plaintiffs, doing business as a partnership, and all citizens of the state of Missouri, with offices located at Kansas City, in Jackson county, Missouri, bring this their bill against Missouri, Kansas & Texas Railway Company, a corporation and a citizen of Kansas and of the third division of the district of Kansas.

Plaintiffs state that this proceeding is between citizens of different states; that the amount involved exceeds the sum of three thousand (\$3,000) dollars, exclusive of interest and costs, and that this is a proceeding arising under a federal law regulating commerce.

Plaintiffs for their cause of action against defendant state that they are a co-partnership consisting of Dan Danciger, A. Danciger, Jack Danciger, Joseph Danciger and M. O. Danciger, and they do [business] under the following trade names: Danciger Bros., Harvest King Distilling Company, and Schiller Bros. Distilling Company; that they are engaged in the sale of beer, whiskey and other beverages, intoxicating and non-intoxicating, at Kansas City, Missouri, and have complied with all the laws of the United States and the state of Missouri, and all the rules and regulations promulgated thereunder affecting and relating to such sales.

That defendant, Missouri, Kansas & Texas Railway Company, is a corporation organized under and existing by virtue of the laws of the state of Kansas, and is a citizen of Kansas, and of the third division of the district of Kansas, and is in possession of and operates a line of railroad from Kansas City, Missouri, at which place it maintains an office and depot, to and through and for various points in Osage county, in the state of Oklahoma, at which points it maintains offices and depots, one of which points is Nelagoney, Osage county, Oklahoma, and one of which is Hominy, Osage county, Okla-

homa; that defendant is engaged in the business of transporting, hauling and conveying goods, wares and merchandise over its aforesaid line for hire, and is a common carrier; that the Midland Valley Railroad Company is a corporation and is in possession of and operates a line of railroad running through Osage county, Oklahoma, and maintains offices and depots at and for various points therein, to-wit, Osage City, Pawjaska, Foraker, Wynona, Avant, Big Heart, Prue, and said line of railroad passes through Nelagoney, Oklahoma, and other points in Osage county, Oklahoma, and at and for which points the Midland Valley Railroad Company maintains offices and depots; that last-named railroad company is engaged in the business of transporting, forwarding, hauling and conveying goods, wares and merchandise over said line of railroad for hire, and is a common carrier.

Plaintiffs state that defendant does now and has for a long time accepted for carriage goods, wares and merchandise and articles of interstate commerce consigned to various parties in Osage county, Oklahoma, and to Avant and towns heretofore named in Osage county, Oklahoma, billed and addressed as follows:

(Name of consignee), Missouri, Kansas & Texas
Railway Company via Midland Valley Railroad Company,

(Name of town), Oklahoma.

"....., Missouri, Kansas & Texas
Railway Company, (Name of town), Oklahoma."

That said defendant does now and has for a long time transported, hauled, conveyed and forwarded such merchandise and articles of interstate commerce either to destination, if upon its own line, or to aforementioned Midland Valley Railroad Company at Nelagoney, Oklahoma, if destination was on latter company's line, and defendant has always offered reasonable, proper and equal facilities for the interchange and transportation of such traffic; that said Midland

Valley Railroad Company does now and has for a long time accepted for carriage, goods, wares and merchandise and articles of interstate commerce billed and addressed, conveyed and forwarded as aforesaid, and does now and has for a long time forwarded same to points on its line in Osage county, Oklahoma, and to Avant, Osage county, Oklahoma, if Avant be the destination.

Plaintiffs state that defendant is a party to and has issued and publicly distributed and has sent to plaintiffs a printed circular in which it is stated in effect that defendant, its agents and employes will not accept for carriage shipments of intoxicating liquors in any quantity or under any condition consigned to parties and points in Osage county, Oklahoma; that defendant has refused and still refuses to accept shipments from plaintiffs under any condition of intoxicating liquors consigned to any point in Osage county, Oklahoma, all on the sole ground that all points in Osage county are "Indian Country."

Plaintiffs state that defendant has failed and refused and still fails and refuses to receive, accept, convey, haul, transport or forward any shipments of intoxicating liquors addressed as aforesaid over its line of railroad from Kansas City, Missouri, to any point in Osage county, Oklahoma, or to Nelagoney or Hominy or other towns heretofore named, in violation of its duty as a common carrier; that although defendant refuses to accept for carriage shipments of intoxicating liquor under any condition to any point in Osage county, Oklahoma, it does accept for carriage shipments of intoxicating liquor to any point in any other county in western Oklahoma.

Plaintiffs state that prior to the 9th day of June, 1914, they received through the mails in the regular course of their business *bona fide* written and signed orders for intoxicating liquors, each order being accompanied by the proper amount of cash in payment for the goods ordered, which orders were in substances as follows:

| Name. | Quantity, | Kind | Point shipment to be made to. |
|----------------------|-----------|---------|-------------------------------|
| 1-H. C. Hargis, | 1 cask | Beer | Pawhuska, Osage County, Okla. |
| 2-Lee Westbrook, | 1 cask | Beer | Hominy, " " " |
| | 1 gal. | Whiskey | |
| 3-G. W. Swift, | 1 cask | Beer | Big Heart, " " " |
| | 1 gal. | Whiskey | |
| 4-Fred Peters, | 1 gal. | Whiskey | Avant, " " " |
| 5-Fred Howard, | 1 cask | Beer | Nelagoney, " " " |
| 6-Grant Swank, | 1 cask | Beer | |
| | 1 gal. | Whiskey | Wynona, " " " |
| 7-J. H. Hieronyomes, | 1 cask | Beer | Foraker, " " " |
| 8-Y. B. Henegar, | 1 cask | Beer | Osage City, " " " |
| | 1 gal. | Whiskey | |
| 9-M. A. Turner, | 1 cask | Beer | Prue, " " " |

That each of said orders was also accompanied by an affidavit signed and sworn to by the parties set out above respectively, said affidavit being substantially as follows:

AFFIDAVIT.

State of Oklahoma, County of Osage, ss.

— [name of consignee], being first duly sworn, upon his oath states that he is a man of pure white (or negro) blood, and over the age of twenty-one years; that the shipments of intoxicating liquor ordered by him from Danciger Bros. on the — day of —, 1914, if shipped and transported by the railroad company, will not be used for any unlawful purpose, and that said liquor is intended for and will be used by affiant for his own personal or family consumption; that the place of destination, to-wit, — [name of town], Oklahoma, of said shipment is not "Indian Country" or Indian Territory, but that the original Indian title of the place to which said liquor will be taken has been extinguished; that this affidavit is made for the sole purpose of obtaining said shipment of liquor, and that affiant knows that everything stated herein is true.

(Signature.) —.

Subscribed and sworn to before me a notary public within and for the county and state aforesaid this — day of —, 1914.
—, Notary Public.

Plaintiffs state that all of aforesaid orders were accepted by them at Kansas City, Missouri, and that on the 9th day of June, 1914, they tendered with the lawful and scheduled freight charges to destination, to defendant for carriage at Kansas City, Missouri, nine shipments of intoxicating liquor billed and addressed to above-named parties respectively, to above-named points respectively, and containing the quantities set out above respectively; that shipments to those points heretofore alleged to be on the line of the Midland Valley Railroad Company were billed Missouri, Kansas & Texas Railway Company for Midland Valley Railroad Company, and those to points on defendant's line were billed direct on said line to said points; that said shipments were, each and every one, marked, labeled and branded as required by law, and were well and securely packed, and were sold in Kansas City, Missouri, where the sales were legal; that said shipments were for the personal use and private consumption of aforesaid parties and were not intended to be received, possessed, sold or used in violation of any law of the United States or of the state of Oklahoma; that the shipments were consigned to above-named points, and the original Indian title to the soil of, same had, prior to the time of shipment, been extinguished, and that said points were not Indian country; that the consignees of said shipments were all white men over twenty-one years of age, of no Indian blood, and laboring under no legal disabilities. Plaintiffs further state that defendant refused to receive, accept, convey, transport or deliver any of said shipments, all on account of the ruling in its aforesaid circular. Plaintiffs state that all shipments of liquor tendered to defendant for transportation to Osage county, Oklahoma, would and will fall within and comply with the description and condition set out in this paragraph as applicable to other shipments tendered, and would comply with all lawful and reasonable conditions imposed by defendants on such shipments.

That Osage county, Oklahoma, is not within the boundaries of Indian Territory, nor are the points in Osage

county, Oklahoma, to which shipments of intoxicating liquor were tendered for carriage, as aforesaid, and to which shipments of intoxicating liquor will be tendered for carriage, and to which plaintiffs sought and seek in this action to ship, Indian country, within the purview or meaning of any law of the United States prohibiting or relating to the introduction of intoxicating liquor into Indian country, but that such points and each of them in Osage county, Oklahoma, are places the original Indian title to the soil of which has been completely extinguished. That the receipt, acceptance, transportation, hauling, conveying or forwarding of such shipments of intoxicating liquor to said points in Osage county, Oklahoma, to which plaintiffs sought to make shipment and will seek to make shipment, would not have been, is not now, and will not be, so far as existent laws are concerned, in violation of any law of the United States or of the constitution, enabling act or any law of Oklahoma.

Plaintiffs further state that the depot and station of the Midland Valley Railroad Company and the Missouri, Kansas & Texas Railway Company at Nelagoney, Oklahoma, and the depot and station of the Missouri, Kansas & Texas Railway Company at Prue, Oklahoma, are not located within the limits and boundaries of said towns, but that they believe that the lines of railroads and the depots of above said companies, even though located without the city limits, are no longer Indian country, owing to an act of Congress commonly known as the Osage allotment act, relative to said railroad rights of way, and that even though said railroad rights of way and stations might be held to be Indian country, still said shipments aforesaid, being for lawful use, the delivery of same to consignees would not be unlawful.

Plaintiffs state that they have built up and established a large mail-order liquor business, and that they receive and have received numerous orders through the mails from western Oklahoma, and have a great number of customers in western Oklahoma, and also have a great number of customers in Osage county, Oklahoma, and formerly received and

filled a great number of mail orders for Osage county, Oklahoma, and would now and in the future have a great number of customers in Osage county, Oklahoma, and would receive many orders from said county but for the defendant's wrongful refusal to accept shipments of intoxicating liquor for carriage to customers or parties in Osage county, Oklahoma.

Plaintiffs state that they have refused and have been unable to fill many *bona fide* cash orders received from points in Osage county on account of defendant's wrongful refusal to perform services as aforesaid.

Plaintiffs state that in order to prevent any shipments of intoxicating liquor consigned to points in the Osage county, Oklahoma, from being delivered to Osage Indians, they require, with each order, an affidavit in form the same as those previously mentioned herein, signed by the consignee; that they also ascertain whether said consignee is enrolled as an Osage Indian, and if so they refuse to ship his order; that in order to prevent the use of fictitious names, their regular custom is and will be in regard to orders received from Osage county to send the original bills of lading for each shipment by freight of intoxicants to points in Osage county by registered mail in an envelope addressed to the consignee, with instructions to the post-office department to deliver said registered mail and letter only to the party to whom it is addressed, and plaintiffs also instruct and will instruct the railroad company not to deliver such shipments except upon presentation of the original bill of lading [therefor].

Plaintiffs state that the failure and refusal of defendant railway company to accept, receive, transport, convey, haul or forward such shipments of intoxicating liquor is a failure of the defendant to perform its common-law duties as a common carrier, and is an unlawful failure and refusal on the part of defendant to afford reasonable, proper and equal facilities for the interchange of traffic. Plaintiffs state that the continuous failure and refusal of said defendant to accept such shipments and transport and forward same has resulted, is now resulting and will result in enormous damage to plain-

tiffs, and is destroying a substantial portion of plaintiff's business and is preventing plaintiffs from doing a great volume of business.

Plaintiffs further state that the damage sustained by them by reason of the continuous wrongful refusal of defendants to accept shipments mentioned aforesaid is not and will not be susceptible of exact or even approximate ascertainment, so that an action at law could be prosecuted to redress the injury to plaintiffs. Plaintiffs further state that redress attempted at law would result in a multiplicity of suits and vexatious, expensive and endless litigation. Plaintiffs further state that they have a clear right to have such shipments to points in Osage county, no longer Indian country, transported, and a hardship is being worked upon them by defendant for which the only relief can come from this court of equity and for which there is no plain, adequate and complete remedy at law.

Wherefore plaintiffs pray that your honor may grant a writ of injunction issued out of and under the seal of this honorable court, perpetually enjoining and restraining the said defendant company and its officers, agents, servants and employes from refusing to accept, receive, convey, transport and deliver to consignees, if on its line, or to Midland Valley Railroad Company, if on latter company's line, shipments of intoxicating liquor consigned for personal use to persons at Avant, Prue, Pawhuska, Foraker, Nelagoney, Wynona, Osage City, Hominy, Big Heart, all in Osage county, Oklahoma, and also those shipments in this bill described, upon compliance by plaintiffs with defendants reasonable and lawful shipping regulations and upon prepayment of the lawful and scheduled freight charges, and upon deposit by plaintiffs with defendant of affidavits of consignee of each shipment tendered in form as heretofore provided, and under such other conditions as this court may impose.

Plaintiffs further pray that a provisional and preliminary and temporary injunction and restraining order be issued to the same purport and effect as herein prayed for a perpetual

injunction, to remain in full force until the further order of the court herein or until this suit may be finally disposed of.

Plaintiffs further pray for their costs in this action and for such other and further relief as to this court shall appear equitable and just.

Plaintiffs further pray your honor to grant unto them a writ of subpoena of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Missouri, Kansas & Texas Railway Company, commanding it on a day certain therein to be named and under certain penalty to be and appear before this honorable court, then and there to answer all and singular the premises and to stand and abide by such direction and final decree as may be made against it in the premises.

I. J. RINGOLSKY,
HARRY L. JACOBS,
Solicitors for Plaintiffs.

No. 472.

Where Railway Refuses to Carry Liquor into Dry Territory.

[Caption.]

I. The plaintiff(1), Theo. Hamm Brewing Company, is a corporation organized and existing under and by virtue of the laws of the state of Minnesota, and has its principal office and place of business in the city of St. Paul, Minnesota, and is a citizen and resident thereof. The plaintiff, the Minneapolis Brewing Company, is a corporation organized and existing under and by virtue of the laws of the state of Minnesota, and has its principal office and place of business in the city of Minneapolis, state of Minnesota, and is a citizen and resident thereof. The plaintiff, the G. Heileman Brewing Company, is a corporation organized and existing under and by virtue of the laws of the state of Wisconsin, and has its principal office and place of business in the city of La Crosse, Wisconsin, and is a citizen and resident thereof. The

plaintiff, Rock Island Brewing Company, is a corporation organized and existing under and by virtue of the laws of the state of Illinois, and has its principal office and place of business in the city of Rock Island, Illinois, and is a citizen and resident thereof. These plaintiffs bring this their bill of complaint against the Chicago, Rock Island & Pacific Railway Company, and the receivers thereof, which is a corporation organized and existing under and by virtue of the laws of the state of Illinois, and is a resident and citizen thereof, and owns, maintains and operates a line of railway in the states of Minnesota, Illinois and Iowa, and has an office and a principal place of business at Chicago, Illinois; St. Paul, Minnesota, and Rock Island, Illinois; that the defendants, Jacob M. Dickinson and Henry U. Mudge, are residents and citizens of the city of Chicago, Illinois, and that on or about April 20, 1915, they were, by the honorable district court of the United States for the northern district of Illinois, duly appointed receivers of all and singular the railroad lines, property, assets, rights and franchises of the Chicago, Rock Island & Pacific Railway Company, pursuant to which order the said receivers qualified and duly took possession of all and singular the said railroads and all its said property, and have ever since continued to be and are now the duly qualified and acting receivers of the said Chicago, Rock Island & Pacific Railway Company, and have ever since April 20, 1915, and are now operating the said line of railroads.

This is a suit arising under the laws and constitution of the United States, as will more fully appear from the facts hereinafter stated.

II. That each of the plaintiffs is now, and for more than five years last past, has been lawfully engaged in the business of manufacturing and selling beer and other fermented malt liquors at its respective principal place of business in the state of its incorporation, and in addition thereto now lawfully maintains and conducts and has during all of said time lawfully maintained and conducted a place for the sale of such beer and other fermented malt liquors in the city of

Rock Island, Illinois, and during all of said time has been and still is duly licensed and authorized by the United States to manufacture and sell beer and malt liquors as aforesaid, and has paid to the United States the internal revenue tax required by law and has in all respects complied with the laws of the United States and the laws of the states in which it does business.

III. The Chicago, Rock Island & Pacific Railway Company is a common carrier of freight and passengers for hire on lines of railway which it owns, maintains and operates in Minnesota, Iowa, Illinois and other states, and as such common carrier is now and for many years last past has been engaged in the transportation of interstate commerce between various points in the states of Illinois, Minnesota, Wisconsin and the state of Iowa, and between various points in the state of Illinois and the state of Iowa, and particularly between the cities of St. Paul and Minneapolis, Minnesota, and Rock Island in the state of Illinois and Sheffield, Waterloo, Ottumwa, Cedar Rapids, Wilkin, Atlantic, Prairie City, Columbus Junction, Colfax, Buxton, Melcher, Des Moines, Enterprise, Pella, Belta, Fairfield, Keokuk, Eddyville, and many other cities, towns and villages which are located on and near its line of railroad in the state of Iowa, and its line of railroad connects with the lines of railroad of many other railway companies in Iowa, by means of which commerce is transported between the said cities in Minnesota and Wisconsin, and particularly between Rock Island, Illinois, and hundreds of cities, towns and villages in the state of Iowa.

IV. For many years last past each of the above-named plaintiffs has had a large and profitable business in the lawful sale of beer and other malt liquors at its place of business in Minnesota, Wisconsin, and at its place of business in Rock Island, Illinois, to a large number of persons residing in the state of Iowa, at various cities, towns and villages therein, on and near the lines of railroad of the defendant company and on the lines of railroad of its connecting carriers in Iowa, which beer and other fermented liquors were sold by each

of the plaintiffs at its place of business in Minnesota and Wisconsin aforesaid, and particularly at its place of business in Rock Island, Illinois, and were, on the direction and orders of the purchasers thereof, delivered by the plaintiff to said defendant at its station in Minnesota and Illinois, and particularly at its station in Rock Island, Illinois, for transportation to the various cities, towns and villages in Iowa, where reside the purchasers aforesaid, and which said beer and other fermented malt liquors were purchased by said persons for their own personal use and private consumption; that each of the plaintiffs herein mentioned has a large number of customers in the towns and cities herein mentioned, as well as in other towns and cities in the state of Iowa; and that a number of said towns and cities, such as Buxton, Whiteberg, Maple and Seever, are located all the way from four to twelve miles from said railway's nearest railroad station in Iowa, and are inland towns; that each of the plaintiffs has a large number of customers in the said inland towns, and in other inland towns not herein mentioned, and that many of the purchasers of beer and fermented malt liquors from each of the plaintiffs, who reside in said inland towns, as well as other customers and purchasers of beer and fermented malt liquors from each of the plaintiffs residing within the towns and cities and villages through which the said railway company's line runs and at which it has places of business, have for many years past presented and given to the defendant at its various railway stations to which such shipments were billed, written orders in each instance and for each shipment, authorizing and directing the railway company to deliver such shipment to some drayman, or other person, whose name was in each instance in the order designated, for completion of the shipment of such beer and fermented malt liquors purchased by them, and for carriage thereof from said railway stations to the consignee and purchaser at his place of actual residence; that in each instance the purchaser and consignee giving and making such order has duly certi-

fied that the shipment of beer and fermented malt liquors purchased by him was for the personal use of the consignee and not intended by him or by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the state of Iowa; that the said railway company has heretofore and for a long time and until recently accepted for shipment, transported and delivered beer and other fermented malt liquors so sold by each of the plaintiffs as aforesaid to its purchasers at the places where they reside or to which the shipments were consigned, and has heretofore accepted such written orders of various and a large number of consignees of each of the plaintiffs and delivered such shipments to the persons designated therein upon such written order in each instance for each shipment as hereinbefore set forth, for completion of delivery to the actual and *bona fide* consignee; that in each case said beer and fermented malt liquors were plainly and correctly labeled and marked with the quantity and kind of liquor and the name of the consignee at the time of the delivery of said shipments to the said company for transportation as aforesaid and remained so marked and labeled until after delivery to the consignee.

That each of the plaintiffs for several years past has had a large and profitable business in the sale of beer and other fermented malt liquors to persons residing in numerous towns, cities and villages in Iowa, who purchased the same for their own personal use and private consumption and who personally consumed the same, and who have in the past given written orders in each instance and for each shipment for the delivery thereof to some drayman, or person, naming him, for the completion of delivery to the purchasers at their respective places of residence, and each of the plaintiffs has established a valuable and extensive trade and good will with and among such purchasers and consumers. The gross amount of the annual sales to such purchasers and consumers by each of the plaintiffs at Rock Island, Illinois, aforesaid, for several years last past has been more than twenty thou-

sand dollars per year, and the annual worth and value of such business and trade of each of the plaintiffs at that place has been and is more than three thousand dollars.

If the defendants, as they now threaten and intend to do, shall continue to refuse to transport any beer or other fermented malt liquors sold by the plaintiff at its places of business in Minnesota, Wisconsin and particularly at its place of business at Rock Island, Illinois, for private consumption and personal use in Iowa by the purchasers thereof, which is to be, as a matter of convenience and necessity, delivered to some drayman or other person upon a specific written order in each instance and for each shipment, by the *bona fide* consignees, all that class of business will within a very short time be utterly ruined and destroyed; that the value of the business of each of the plaintiffs so ruined and destroyed greatly exceeds the sum of three thousand dollars.

If, in the future, the defendant company does not refuse to perform its duties to the public as a common carrier, but shall, as it is required by law, continue to receive, transport and deliver beer and other fermented malt liquors which may be bought at its places of business, and especially at its place of business in Rock Island, Illinois, from each of the plaintiffs by purchasers residing in Iowa for their own personal use and private consumption therein, and who may desire to have the same transported and delivery thereof completed to them at their respective homes within the city in which they reside and there delivered to them in each instance upon their written order for each shipment, to deliver such shipments to some designated person or drayman solely for completion of delivery to the consignees giving such written order in each instance and for each shipment, each of the plaintiffs will continue to have in the future as it has in the past a large and profitable business in such sales of beer and other fermented malt liquors at its places of business in Minnesota, Wisconsin, and especially at its place of business in Rock Island, Illinois; but the continued refusal of the defendant company to discharge its duties as a common carrier of inter-

state commerce as aforesaid in the transportation of such beer and other fermented malt liquors will, as a direct, necessary and inevitable result, ruin and destroy a large amount of the business of each of the plaintiffs and will inflict upon it great damage and irreparable loss.

The matter of controversy between the plaintiffs and the defendants in this suit exceeds in behalf of each plaintiff, exclusive of interest and costs, the sum of three thousand dollars.

V. That it is not only inconvenient, but impossible, for many of the consignees, especially those who live in towns some distance from the stations on the defendants' line of railway in Iowa, to give up their time and business personally to go to such stations and personally receipt for such shipments and carry them away in person; that notwithstanding said railroad company is permitted by the act of March 4, 1909, chapter 321, section 239, 35 U. S. Statutes at Large, page 1136, to deliver intoxicating liquor upon the written order of the *bona fide* consignee, and notwithstanding the fact that it has for more than two years in the past recognized, received and delivered upon the written order, in each instance and for each shipment, of the *bona fide* consignee, many purchases of malt and fermented liquors sold by each of the plaintiffs to persons residing at and near many of the stations on the line of the defendants' railway to draymen or other carrier for completion of delivery upon the *bona fide* order of consignees in each instance, it does now wrongfully and unlawfully refuse to accept for transportation all shipments of intoxicating liquors, and all shipments of beer and fermented malt liquors made by each of the plaintiffs to all purchasers in the state of Iowa who desire and purchase said beer and fermented malt liquors for personal use and private consumption, where the consignee shall not personally appear at the railway station of the defendant to which said shipment was consigned and in person receipt for the same and personally carry said liquor away from said station. And the plaintiffs and each of them aver that the said defendant

refuses to accept and transport such liquors upon the sole and only ground that it is advised that such shipments may not lawfully be made, and that the transportation and delivery thereof as directed and requested and upon the written order in each instance and for each shipment of the *bona fide* consignee solely for carriage from the defendants' stations to the places of residence of the respective purchasers and consignees thereof, would be a violation of the laws of the United States and the laws of the state of Iowa, and because the defendant claims and asserts that all shipments of beer or other fermented liquors or intoxicating liquors into Iowa for the personal use of the consignee are prohibited unless said such consignee in person appears at the station and signs the record book provided for by the laws of the state of Iowa pursuant to provisions of Section 2421-A, Supplemental Supplement, 1915, which read as follows: [*Here follows the statute.*]

VI. All of the beer and other fermented malt liquors which the plaintiffs sell at their respective places of business aforesaid, and especially at Rock Island, Illinois, to purchasers in Iowa, who desire to have the same by the defendant railway company received, transported and delivered to them where they reside in Iowa, as hereinbefore set forth, constitutes and is interstate commerce, and if the said defendant shall continue to refuse to discharge its duties as a common carrier of interstate commerce by rail in the transportation of such beer and other fermented malt liquors, daily and constant losses will accrue to each of the plaintiffs, and such refusals will give rise daily and constantly to separate and numerous causes of action between each of the plaintiffs and the defendant company, and great multiplicity of causes of action will accrue in favor of each of the plaintiffs and against the defendant company. If each of the plaintiffs shall be compelled to resort to action at law to recover damages or secure other relief or remedy against the defendant company, great loss of sales, patronage and profits will be suffered and irreparable loss will result to each of the plaintiffs as the imme-

diate, direct and inevitable effect of such refusal of the defendant company to receive, transport and deliver such beer and other fermented malt liquors as aforesaid. By reason of the great difficulty of proving the loss of sales, patronage, profits and injury to and impairment of the business of the plaintiffs, and each of them, as well as the reputation and good will possessed by each of them, and the consequent impossibility of ascertaining or assessing the damages suffered by each of the plaintiffs as a result of such a refusal of the defendant company, the plaintiffs have no adequate remedy at law. Pending the commencement, trial and determination of actions at law to recover damages suffered by the plaintiffs, and each of them, on account of such refusal on the part of the defendant company, the business of each of the plaintiffs, its reputation and good will will be ruined and destroyed, and each will thereby suffer great damage and irreparable loss unless the said defendant, its receivers, officers, agents, servants and employes, be enjoined and restrained by order, by judgment and decree of this court as hereinafter prayed.

VII. No valid law of the state of Iowa or of the United States prohibits or prevents the defendant company from receiving and transporting from its various station in Minnesota or Illinois, including its station at Rock Island, Illinois, into Iowa, any shipment of beer or other fermented malt liquors for the personal use of the purchasers thereof, nor the delivery thereof to a person other than the consignee, upon the written order in each instance and for each shipment of the *bona fide* consignee, solely for the purpose of carrying said beer or other fermented malt liquors from the station of the defendant railway lines to the place of residence of the consignee, or the making or giving a written order in each instance for each shipment for that purpose, and the construction or application of any law of the state of Iowa in such manner as to prohibit the defendant from receiving such order or acting in accordance therewith would violate the constitution of the United States, and especially

the commerce clause of Section 8 of Article I thereof and also that provision of Section 1 of the fourteenth amendment thereto, which provides that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." And any construction or application of any act of Congress or law of the United States which would prohibit or prevent the defendant company from so doing would violate the constitution of the United States and especially that provision of Article V, which in substance provides that:

"Nor (shall any person) be deprived of life, liberty or property without due process of law," as well as the commerce clause thereof.

The plaintiffs, on information and belief, aver that the defendant receivers' company and its agents and servants have refused, and intend to continue to refuse, to accept, transport and deliver the shipments aforesaid upon the sole and only ground that, as they claim, such shipment, transportation or delivery would be a violation of the laws of the state of Iowa as hereinbefore set forth.

In consideration whereof and in as much as the plaintiffs have and each of the plaintiffs has a common cause in this litigation and each of said plaintiffs is without remedy in the premises by the strict rules of the common law and can only have relief in a court of equity where matters of this kind are properly cognizable and relievable, the plaintiffs pray:

1. The order, judgment and decree of this court forbidding and restraining the said defendants and defendant railway company from refusing or failing to accept, receive, transport, carry or deliver beer or other fermented malt liquors sold at its places of business, and especially at its place of business at Rock Island, Illinois, by either of the plaintiffs to persons residing in Iowa who have heretofore purchased, or who may hereafter purchase the same for their

personal use and private consumption, and who shall desire and direct that the same be transported into Iowa for delivery therein to the purchasers at the places where they reside, including such shipments of beer and fermented malt liquors in respect to which the purchaser may find it convenient or necessary or deem it expedient to authorize and direct, upon their written order in each instance and for each shipment, the delivery of the same to some specific person or drayman for completion of delivery to the purchasers at their places of residence, and also commanding and enjoining the said defendant company, the receivers, the officers, agents, servants and employes to accept, receive, transport and deliver all of such beer and fermented malt liquors upon lawful and reasonable conditions.

2. The order, judgment and decree of this court forbidding and restraining the defendant company, its receivers, officers, agents, servants and employes from applying or putting into any effect any rule or regulation made by said defendant company in so far as the same relate or purport to relate to the refusal to accept shipments of beer or other fermented liquors which are sold in Minnesota, Wisconsin or Illinois by plaintiffs and intended for the personal use of the purchaser and consignee and without any intent on the part of such consignee or any one interested in said liquors to receive, possess or use the same in violation of the laws of the state of Iowa.

3. That pending the trial and until the final determination of this suit by the interlocutory decree and temporary injunction of this court the said defendant company, its receivers, officers, agents, servants and employes be forbidden, restrained, enjoined and commanded as above prayed, and that by a temporary restraining order of this court it and they be so forbidden, restrained, enjoined and commanded until the plaintiffs' application for such interlocutory decree and temporary injunction shall have been heard and determined, and for such other and further relief as may be just and equitable.

And may it please your honors to grant unto the plaintiffs a writ of subpoena of the United States of America, issuing out of and under the seal of this honorable court, directed to the said defendants and the defendant company, commanding it on a day certain therein to be named and under a certain penalty to be and appear before this honorable court, then and there to answer, but not under oath (answer under oath being hereby expressly waived), all and singular the premises; and to stand to and perform and abide by such order, direction and decree as may be made against the defendants in the premises.

THEO. HAMM BREWING COMPANY.

By EDWARD C. NIPPOLT,
1st Vice-President.

(1) The parties plaintiff here have an interest in the subject of the action and in obtaining the relief demanded in accordance with the provision of Rule 37, and hence they may join in this suit.

Note the separation of the statements of the grounds of jurisdiction, the federal question in paragraph I and the jurisdictional amount in paragraph IV, while the detailed statement of the federal question is made in paragraph VII.

Note that though a temporary restraining order is prayed in paragraph VII, motion therefor is not made and no action on said prayer takes place.

Note also that the verification is made only by one plaintiff.

The right to sue a federal receiver without leave of the appointing court is granted in Judicial Code, Sec. 66, where the issue is his acts or transactions in conducting the business, as in this case.

No. 473.

Amendment to Bill to Enjoin a Strike, Bringing in New Parties.(1)

[Caption.]

To the Honorable, the Judges of said Court:

Plaintiff, by way of amendment to his bill of complaint herein, by leave of court first had and obtained, humbly complaining, says:

That it reaffirms and makes part hereof all and singular the allegations of the original bill herein: That each of said

defendant railway companies named in said bill has in its employment a large number of locomotive engineers who are members of the order or association known as the Brotherhood of Locomotive Engineers, an unincorporated association of railway locomotive engineers, and also a large number of firemen, who are in like manner members of an association or order known as the Brotherhood of Locomotive Firemen, which is as plaintiff is informed and believes, an unincorporated association of railway locomotive firemen; and that each of said associations is controlled, as plaintiff is informed, by certain rules, regulations and by-laws by which all its members have sworn to obey: that one P. M. Arthur, whose full first name is unknown to plaintiff, is the chief officer of said Brotherhood of Locomotive Engineers, and as such guides, directs and controls the actions of its members under the rules of said association, and as such exercises a controlling influence upon the actions of said members in all matters treated by said rules and regulations. That one F. P. Sargent, whose first name is unknown to plaintiff, is the chief officer of said Brotherhood of Locomotive Firemen and exercises a similar controlling influence upon the actions of its said members.

That one of the rules and regulations or laws, so-called, of said Brotherhood of Locomotive Engineers, as plaintiff is informed, requires all its members who are in the employ of any railway company, whenever order to that effect shall be given by its said chief officer, to refuse to receive, handle, or carry, or assist in receiving, handling or carrying, cars of freight from any other railway company whose employes, members of said association, have engaged in a "strike" so-called, against their employer company. That such "strike" has been declared against plaintiff by the locomotive engineers in its employment who are members of said brotherhood, by and with the consent and approval of said — Arthur and under his direction, and they have quit the service of plaintiff and are no longer in its employ.

And plaintiff says that said Arthur now gives out publicly and threatens that unless plaintiff shall submit to certain demands on the part of its said striking employes who have so quit its service and reinstate them in its employ and discharge the other engineers whom plaintiff has employed since said strike was inaugurated, he will order all members of said brotherhood, employes of the other railroad companies defendant herein whose lines of railroad connect with plaintiff's railroad to refuse to receive from or deliver any cars of freight to plaintiff, or to aid in any way in handling, carrying, or forwarding any cars which have been hauled over plaintiff's road.

That if said order be promulgated and continued, large numbers of the employes of defendant companies will refuse to obey the order of injunction heretofore issued herein and will in consequence thereof be compelled to quit the service of their respective companies as well as to be guilty of a violation of said order of injunction. That the result of the promulgation and continuance of said order will be to seriously interrupt and hamper the interstate traffic of large sections of the country and will entail enormous and incalculable losses upon the public and all the railway companies defendant herein, as well as to plaintiff, and also upon all of their employes. That said order or rule is in direct contravention of the Act of Congress in such cases made and provided, and is in fact intended and adapted to induce said employes of defendant companies to violate the law and orders of this honorable court.

Said defendant Sargent, as the chief officer of said Brotherhood of Locomotive Firemen, gives out and threatens that in case such order is made by said Arthur for said Brotherhood of Locomotive Engineers, he, the said Sargent, will promulgate a similar order which shall be binding on said Brotherhood of Locomotive Firemen. That by the means aforesaid said Arthur and Sargent are conspiring and confederating with one another and others whose names are unknown to plaintiff, to induce the employes of the defendant

companies to violate the law and the orders of this court; and for the purpose of inducing defendant companies and their officers and agents to injure plaintiff by refusing to interchange interstate freight.

Wherefore plaintiff prays that the said P. M. Arthur and said — Sargent may be made parties defendant hereto, as if joined in the original bill herein; that a provisional order may be issued out of and under the seal of this court, directed to said P. M. Arthur and — Sargent, enjoining and restraining them from issuing, promulgating or continuing in force any rule or order of any kind which shall require or command any employes of any of the defendant companies to refuse to receive, handle or deliver, or be in any way instrumental in refusing to receive, handle or deliver, any cars of freight from and to plaintiff, or from refusing to receive or handle cars of freight which have been hauled over plaintiff's road, and from in any way, directly or indirectly, endeavoring to persuade or induce any employes of the defendant companies not to extend the same facilities to plaintiff for interchange of traffic as are extended by their respective employes to other railway companies. And in case such rule or orders shall have been promulgated by said defendants, plaintiff prays the court to issue its mandatory injunction herein requiring said defendants, and each of them, to recall and rescind such orders and to instruct the members of said Brotherhood of Locomotive Engineers and Firemen, respectively to make no discrimination of any kind against plaintiff in the interchange of traffic as aforesaid; and for such other and further relief as to the court shall seem equitable and proper.

R. X.,

Solicitor for Complainant.

State of —,

County of —, ss.

Personally appeared before the undersigned, a notary public within and for — county, —, R. X., who being duly sworn says, that he is the solicitor and general counsel of the

complainant corporation. The Toledo, Ann Arbor & North Michigan Railway Company; that he has read the foregoing amendment to its bill of complaint and knows the contents thereof; that as to such matters and things therein as are alleged on information and belief, affiant believes them to be true, and the other matters and things therein stated are true in substance and in fact. R. X.

Sworn to before me and subscribed in my presence this — day of —, A. D. —.

B. R.,

Notary Public,

— County, —.

[Seal.]

(1) This amendment was made to bill in Toledo, etc., R. Co. v. Pennsylvania Co., see No 312, 54 Fed 730, to bring in officers of the labor unions ordering strike. In the matter of enjoining strikes see also Sec. 20 of the Clayton Act, Oct. 15, 1914, 38 Stat. L. 738, and Alaska Steamship Co. v. International Longshoremen's Assn., 236 Fed. 964.

No. 474.

Bill in Equity to Subject Property of Absent Defendant to Pay a Judgment.(1)

The District Court of the United States,
for the — District of —.

| | | |
|------------|---|-------------------|
| A. B. | } | In Equity. No. —. |
| <i>vs.</i> | | |
| C. D. | | |
| E. F. | | |
| G. H. | | |

To the Honorable Judge of the District Court of the United States within and for the — District of —:

A. B., of —, plaintiff herein, respectfully shows unto your honors that at the — term, 1894, of this court he recovered a judgment at law in cause No. —, for —

dollars, and costs amounting to — dollars, amounting in the aggregate to — dollars, against C. D., which said judgment is still in full force and unreversed.

That execution was duly issued upon said judgment to the marshal of said district on the — day of —, 1894, and levy was duly made upon the personal property of said C. D., and only the sum of — dollars made upon said writ of execution, and the same was returned unsatisfied on the — day of —, 1894, leaving unpaid and still due upon said judgment the sum of — dollars, with interest.

That plaintiff is informed and believes that the said C. D. has fled the country, and that certain property of his, to wit, money of or about the value of — dollars, sufficient to satisfy the judgment, is still in the possession and under the control of one E. F., but which plaintiff is unable to reach by process of law; and plaintiff is also informed that one G. H., an alien, residing in —, without this district and the jurisdiction of this court, claims some interest or right to the money aforesaid now in the possession of said E. F., and the property of said C. D.

Wherefore plaintiff prays that C. D., E. F., and G. H. be made parties defendant herein, and that process issue requiring them to appear and answer this bill of complaint; that said G. H. be required especially to answer by what right or title he claims the money aforesaid, and to set forth his claims in this suit; and that E. F. be required especially to answer how much money belonging to said C. D. he has now in his possession, and what is the indebtedness due to him from the said C. D., and that after payment of all lawful and equitable prior claims the said money may be applied to the judgment recovered by plaintiff against said C. D. until further order of this court, and for such other and further relief as may be proper, just, and equitable.

X. & X.,

Solicitors for Plaintiff.

A. B.,
Plaintiff.

[Verification.]

(1) As to proceedings in case of absent defendant in a federal court, see Desty's Fed. Proc., Sec. 25, and cases there cited, and R. S., Sec. 738, brought forward in Judicial Code, Sec. 57; see *Perez v. Fernandez*, 220 U. S. 224, and *Schultz v. Diehl*, 217 U. S. 594.

No. 475.

Where Postmaster Excludes Mail Matter Under the Act of June 15, 1917, 40 Stat. L., 230.

[*Caption.*]

The complainant above named brings this, his bill of complaint, against the defendant and complains and alleges as follows:

First. Complainant is and was at all times herein mentioned a corporation duly organized and existing under the laws of the state of New York, with its principal office and place of business at 34 Union Square, East, borough of Manhattan, city of New York, and engaged in the business of publishing, among other things, a monthly magazine known as "The Masses," owned by said complainant.

Second. The defendant is and was at all times herein mentioned the postmaster of the city of New York, in said state of New York, and in his official capacity as postmaster in said city of New York has the control of the receiving and distribution of mails in and through said post-office in the city of New York.

Third. The said magazine called "The Masses" is a monthly publication of about fifty (50) pages, with a circulation of from twenty to twenty-five thousand copies and circulates extensively through the city and state of New York, as well as other states, and that for a number of years last past the said magazine has so circulated and has been received freely at the post-office of the city of New York and elsewhere and transmitted through the same and circulated therefrom upon the payment to the postal authorities of the amount required upon second-class mail matter. It is absolutely

necessary to the maintenance of said magazine and to its continued publication and circulation that the said magazine should be freely received at and delivered and circulated from the said post-office in the city of New York and not be held up or discriminated against or the delivery thereof delayed by the said defendant or other person exercising control over the delivery of mail from said post-office. The retail price of said magazine is fifteen (\$.15) cents a copy and the subscription price one and 50/100 (\$1.50) dollars a year. For more particular description of said magazine, complainant begs leave to attach a copy of the August, 1917, number or issue of said magazine, more particularly hereafter referred to, and alleges that all other August, 1917, numbers of said magazine are identical with the copy hereto attached, and marked "Exhibit A."

Fourth. According to the usual course of business of said complainant in publishing its said magazine, called "The Masses," the said issues of the magazine designed for circulation through the mails, and particularly those intended for circulation in different portions of the United States, are delivered properly wrapped and postage paid at the post-office at the city of New York from the 1st to the 10th of each month. Pursuant to this course of business, the complainant caused to be delivered many hundred copies of said magazine of the August, 1917, number, identical with Exhibit A herein, to the defendant as postmaster of said city of New York on and between the 1st and 5th days of July, 1917, for the purpose of having the same transmitted through the mails to their destination, and that said magazines were properly wrapped and addressed in the usual way, and the postage thereon duly paid to the proper post-office official in said post-office, agent of said defendant, as required by law, which said money was duly received and has ever since been retained by said defendant in his said official capacity. Shortly after said magazines were received at said post-office for mailing and the postage paid thereon, as above stated, and on or about July 5, 1917, complainant received from said defendant the following letter:

In replying please refer to initials and date. SMC.

"OFFICE OF THE POSTMASTER, UNITED STATES POST-OFFICE.
"TFM New York, N. Y.

"Publishers of 'The Masses,' 34 Union Square, East, New
York, N. Y.

"Gentlemen: Confirming the information telephoned to you to-day, you are informed that according to advice from the Solicitor for the Post-office Department, the August, 1917, issue of 'The Masses' is non-mailable under the Act of June 15, 1917.

Very respectfully,

"T. J. PATTEN, Postmaster.

"Per THOS. F. MURPHY,

"Assistant Postmaster."

"M-jj

The reference in said letter to a telephone conversation is to a communication received by Merrill Rogers, the business manager of the complainant, over the telephone, from some assistant of the defendant in said post-office to the effect that said magazines would not be mailed or transmitted from said post-office, but said conversation adds nothing to the information contained in said letter. Although complainant has repeatedly applied to the defendant, his agents and representatives and to the solicitor for the post-office department to ascertain more definitely than is stated in said letter the grounds for the exclusion of said magazine from the mails, complainant has been able to obtain no further information upon said subject, but said magazines are still held at said post-office by order of the said defendant as postmaster and he refuses to permit the same to be delivered or transmitted therefrom.

Fifth. Complainant further shows that said magazines so held by said defendant and refused access to the mails, as above stated, are, as complainant is informed and verily believes, in every respect mailable under the act of June 15, 1917, and under any and all other laws of the United States, and that complainant has, in all respects, duly complied with all pro-

visions of the law to entitle complainant to have said numbers of said magazine duly mailed and transmitted through the post-office as ordinary second-class matter, and that the act and conduct of said defendant in refusing to mail said magazines and holding the same to be non-mailable is wrongful and unlawful and not authorized by law. Complainant further alleges that it was not and never has been accorded any opportunity to be heard in the matter of determining said magazines to be non-mailable either by said defendant or any other post-office official. The action of said defendant in treating said magazines as non-mailable matter and refusing to mail the same, if continued, will work irreparable injury to the complainant, will completely ruin the business thereof and damage said complainant in the sum of many thousands of dollars, and that said loss, damage and injury will amount to a sum far in excess of \$3,000, and that complainant is wholly without any remedy at law, in consideration whereof complainant is remediless in the premises by the rules of the common law and is relievable only in a court of equity in this suit.

Wherefore complainant prays that this honorable court will grant unto him due process of subpoena directed to said defendant commanding said defendant to appear herein and to answer, but not under oath, answer under oath being hereby expressly waived, and to abide and perform such directions and decrees as may be made in the premises; that an injunction forthwith issue enjoining and restraining the defendant, his agents, servants and employees and all persons whomsoever, from treating the August, 1917, issue of said magazine known as "The Masses" as non-mailable under the act of June 15, 1917, or any other act or law whatsoever, and that said defendant, his agents, servants and employees be forthwith commanded to transmit said magazines through the mail in the usual way and accord to complainant thereon the rights and privileges of second-class mail matter whereon the lawful postage has been duly paid and received by the proper post-office officials; that it be adjudged and determined by this honorable court that said magazines, particularly the August, 1917, issue

thereof, is mailable under the act of June 15, 1917. That an order to show cause forthwith issue requiring said defendant, at the time and place therein specified, to show cause why an injunction should not issue *pendente lite*, enjoining and restraining the defendant, his agents, servants and employees and all other persons whomsoever from treating the August, 1917, issue of said magazine, known as "The Masses," or any numbers thereof, as non-mailable, under the act of June 15, 1917, or any other act or law whatsoever, and that said defendant, his agent, servants and employees be forthwith commanded to transmit said magazines through the mail in the usual way and accord to the complainant thereon the rights and privileges of second-class mail matter whereon the lawful postage has been duly paid and received by the proper post-office officials. That it be adjudged and decreed that the said defendant was wholly without authority or jurisdiction to determine that said magazines were non-mailable and that the order and action of said defendant in the premises is wholly void. That complainant recover its costs and disbursements in this action and have such other further order, judgment or relief in the premises as may be just and proper.

G. E. R.,

Solicitor and of Counsel for Complainant.

[*Verification.*]

No. 476.

To Enjoin Enforcement of Order of State Railway Commission.

[*Caption.*]

The bill of complaint of the Mobile & Ohio Railroad Company against the Mississippi Railroad Commission, F. M. Sheppard, president and member of said commission; George R. Edwards and W. B. Wilson, members of said commission, and Ross A. Collins, attorney general of the state of Mississippi.

I. Complainant, Mobile & Ohio Railroad Company, respectfully shows that it is a corporation organized and existing

under the laws of the state of Alabama, owning and operating a main line of railroad, with certain branches, running between Mobile, Alabama, and East St. Louis, Illinois, through the state of Mississippi and other states, as a common carrier of freight and passengers.

Complainant further shows that the defendant, the Mississippi Railroad Commission, is duly organized under the laws of the state of Mississippi, and that its office is at Jackson, Mississippi, the capital and seat of government of the said state; that the defendant, F. M. Sheppard, is the president and a member of said commission, and a resident and citizen of the southern district of Mississippi; and that defendants, George R. Edwards and W. B. Wilson, are also members of said commission, and the said F. M. Sheppard, George R. Edwards and W. B. Wilson constitute the said railroad commission; that the said Edwards and the said Wilson are citizens and residents of the northern district of Mississippi, and that the official residence of F. M. Sheppard, Edwards and Wilson is at Jackson, Mississippi, in the southern district of said state; that defendant, Ross A. Collins, is attorney general of the state of Mississippi, whose domicile and office are both at Jackson, Mississippi, in the southern district thereof.

II. Complainant further shows that the matters in controversy in this suit, and the questions involved therein, are questions arising under the constitution and the laws of the United States, and that the matter in controversy exceeds the sum or value of three thousand dollars, exclusive of interest and costs.

III. Complainant further shows that on account of the war now being waged in Europe complainant's revenue decreased to such an extent that it became imperatively necessary, as will be more fully set out hereinafter, for complainant to economize rigidly in every particular, and to that end the vice-president and general manager of complainant wrote to the members of the defendant railroad commission and requested them to call a meeting at Jackson, Mississippi, on the 15th day of September, which they did, and at said meeting

the said vice-president and general manager informed the defendant railroad commission of the condition of the complainant's finances, and the necessity of economy, and invited suggestions from the commission as to the proper steps to take, but the commission was unable to suggest anything. The complainant's vice-president and general manager then stated to the commission that it was his purpose to discontinue all passenger trains then being run through the state of Mississippi on complainant's main line, except two daily trains each way.

The commission neither objected nor acquiesced by formal order to the discontinuance of said trains, but one of the commissioners moved that permission be granted complainant to discontinue said trains, which motion was seconded by another of the commissioners. The third commissioner then suggested that the matter be considered in executive session, and no vote was taken, and complainant heard nothing more from the commission concerning the matter. Thereafter the complainant gave notice to the public that at 12:01 a. m., Monday, September 28, 1914, it would discontinue two daily passenger trains each way running south of Meridian, Mississippi, and one daily passenger train running between Meridian, Mississippi, and Okolona, Mississippi, on the north, leaving two daily trains each way running between Meridian, Mississippi, and Mobile, Alabama, and three daily trains each way running north of Meridian beyond the Tennessee-Mississippi state line.

The said scheduled passenger trains were discontinued in accordance with the said notice to the public, but under an injunction secured by the attorney general of Mississippi from the chancellor of the chancery court of Lauderdale county, Mississippi, special trains were operated on the former schedules of said trains until the 5th day of October, 1914, on which date said chancery court dissolved said injunction on motion of defendant, your complainant herein. On the said 5th day of October, 1914, said special trains were discontinued.

IV. On the 28th day of September, 1914, the defendant, Mississippi Railroad Commission, caused to be issued a citation to this complainant, a copy of which is hereto attached, requiring it to appear before said commission at its office at Jackson, Mississippi, on the 7th day of October, 1914, and show cause, if any it could, why it should not be required to continue to operate between Corinth, Mississippi, and State Line, Mississippi, passenger trains known as Nos. 7, 8, 9, 10, 11 and 12, which were the trains that had been discontinued as above stated. In obedience to said citation, complainant appeared by its officers and agents before the commission on the 7th day of October, 1914, and protested against the entry of any order requiring complainant to run any trains in addition to those being run on that date; that is to say, two trains daily each way south of Meridian, Mississippi, and three trains daily each way north of Meridian, and complainant presented its case fully to the commission both as to the law and the facts.

But over complainant's protest the commission, on October 7, 1914, entered in the one case on the one citation six separate orders, requiring complainant to run, in addition to those run at that time, two trains each way daily from Meridian, Mississippi, to Waynesboro, Mississippi, and one train each way daily from Meridian, Mississippi, to Okolona, Mississippi, over complainant's main line. Certified copies of said order, marked "Exhibit A," are attached to this bill, and filed herewith as part hereof.

V. Complainant further avers that it suffered many severe losses in business during the fiscal year ending June 30, 1914, and at the end of that year its financial condition was not good, and it had no accumulated surplus out of which to pay losses during this period of depression. During the month of July, 1914, complainant's earnings were fair, but its expenses were exceedingly heavy. There was at that time, and had been for many months, a general business depression. On the second day of August, 1914, the war now being waged in Europe was begun, and this complainant, in common with

other business interest generally, suffered a severe reduction in its business and revenue. Complainant did not in the month of August, 1914, or the months of July and August, 1914, earn sufficient net money above its operating expenses to pay its fixed charges and taxes. During the month of September its earnings decreased, and its total earnings during the month of September were \$133,975.96 less than they were in September, 1913. During the period of the first two days of October, 1914, the earnings were \$21,461 less than they were during the corresponding days of October, 1913, or a loss of over \$10,000 per day. Unless complainant is permitted to economize in every possible way that is reasonable, in view of the condition of its business, as well as of the needs of the public which complainant serves, the outgo of complainant's money will be larger than its income, and it will have no means by which it can operate its road. Complainant has put into effect, and is putting into effect as fast as possible, every economy that it can, and still it has not yet been able to reduce its expenses to the point where they can be met from its income. Nor will all of the economies which it had determined on, but has not yet had time to put into effect, accomplish more than that result. The views of those who are best able to judge are that the war in Europe will last many months, and the complainant sees no hopes of improvement in its business so long as the war lasts.

Complainant delayed taking action to reduce its passenger service in the state of Mississippi until the necessity therefor became absolute. Complainant was not and is not confronted with the mere possibility or a mere probability that it will be unable to meet its expenses, but had and actually reached that point. The people of the state of Mississippi, and several states served by complainant, have ceased on account of the depression in business to bring to complainant the volume of business which they brought before the European war commenced, and have ceased to pay complainant the amount of money which they paid prior to that time; and complainant says that it is inequitable and morally wrong for them, or the

state of Mississippi, through the railroad commission, or any of its officers, to seek to compel the complainant to provide them with the same facilities when the amount of business which they bring to complainant will not enable it to do so and live. And complainant avers that the said orders of the commission, attempting to require the complainant to furnish the said passenger facilities as therein set out, when the complainant's income is less than its expenses, separately and collectively, deprives complainant of the equal protection of the laws of its property without the process of the law, in violation of the fourteenth amendment of the Constitution of the United States and of the constitution of Mississippi.

VI. Complainant further avers that the said trains which were discontinued did not pay anything above the cost to complainant of operating and maintaining them, but on the contrary their cost to complainant was greater than the income derived from them. Trains Nos. 7 and 8 were put on on November 7, 1909; Nos. 9 and 10 on November 26, 1911, and Nos. 11 and 12 on July 20, 1913. They were put on at the solicitation and request of citizens of Meridian and elsewhere, and it was believed by complainant's officers at the time they were put on that they would not pay, but when business was good, and when complainant was earning money above all of its expenses, complainant felt that it was justified in furnishing to the communities which it serves additional passenger facilities, even though the trains earned no money. But complainant says that there was no legal right in the public or in the state to require the inauguration and operation of said trains at a loss, and that the order of the railroad commission by which the state now seeks to require complainant to operate them, which can not be done except at a loss, deprives complainant of the equal protection of the laws and of its property, without due process of law, in violation of the fourteenth amendment to the Constitution of the United States and in violation of the constitution of Mississippi.

VII. Complainant files herewith, marked "Exhibit B," to this bill, schedules of all passenger trains running through

Meridian, Mississippi, between stations in Mississippi, which were in effect prior to September 28, 1914; and also the new schedules of all such trains which complainant put in effect on Monday, the 28th day of September, 1914. [*Here follows reference to schedules.*]

Complainant avers that the trains which it now operates under the new schedule are adequate and furnish reasonable service under the conditions existing at this time, and which will exist so far as can be seen for some time to come.

Complainant further avers that even if the people of the state of Mississippi and other persons traveling on complainant's main line in the state of Mississippi should be inconvenienced by the discontinuance of said trains, it is apparent that at most it is an inconvenience and could cause only a trifling loss to any one, and that the orders of the Mississippi Railroad Commission, which seek to require complainant to avoid inconvenience and trifling loss to such persons as desire to travel in the state of Mississippi on complainant's road, at the cost to complainant of the many thousand dollars which it will be required to expend, without any return, in the operation of said trains, is void for unreasonableness and deprives complainant of the equal protection of the laws and of its property, without due process of law, and especially is this true in the present condition of complainant's business and income, as is set out hereinabove.

VIII. Each of the many economies which this complainant had adopted, and is prepared to adopt, will bear more or less heavily upon various individuals, various employes, and various localities. It is necessary in order that there shall be no discrimination between these various individuals, employes and localities that the reduction of expenses shall be equitably distributed, and said distribution can be made only upon a comprehensive view of this complainant's entire business, and of the needs of the people served by its entire system. If the power of determining the means to be employed by complainant to bring its expenses within its income shall be taken from the complainant and lodged in the commission, the complain-

ant's ability to serve the public will be seriously impaired, and the attempt so to do deprives this complainant of its property without due process of law, contrary to the fourteenth amendment of the Constitution of the United States, and contrary to the constitution of Mississippi.

IX. Complainant further avers that by virtue of Section 3964 of the Revised Statutes of the United States, complainant's line is constituted a post road, and is required by the laws and contracts with the government of the United States to carry the mails and troops and munitions of war in interstate commerce; that by an act of Congress of the United States, approved the 20th day of September, 1850, entitled, "An act granting the right of way, and making the grant of land to the states of Illinois, Mississippi, and Alabama, in the aid of the construction of a railroad from Chicago to Mobile," certain lands were donated to the states of Alabama and Mississippi to aid in the construction of a railroad from Mobile, Alabama, to a point near the mouth of the Ohio river; and by appropriate acts of the legislatures of Mississippi and Alabama granted said land to this complainant. By Section 4 of the act of Congress, approved September 20, 1850, this complainant, the beneficiary under that act, is made a public highway for the use of the United States government, without charge, for the transportation of troops and property of the United States, and complainant is required thereunder to carry the mails at such price as Congress may fix.

Complainant says that while states have power to make reasonable regulations governing the intrastate business of interstate railroads, the order of the railroad commission in this case, which, if enforced, will endanger the life of this complainant, by reason of its lack of necessary income to meet the expense, is void as a burden upon interstate commerce and upon this instrument of the government of the United States for the carrying of its troops, property and material, the effect upon interstate commerce and this complainant, as an instrument of the United States government, being not merely indirect or incidental, but being an absolute destruc-

tion of complainant's ability to operate its road, in violation of the commerce clause of the Constitution of the United States.

X. Complainant avers that the railroad commission has no power under statutes or otherwise to regulate the number of trains run by railroads, and the said orders are void for that reason; yet the orders were made under the general power granted the commission by the state to make certain orders regulating railroads; and the commission and the attorney general are empowered by law to bring suits for penalties for violation of the commission's orders and to seek to compel by mandamus and injunction obedience to such orders; and the state of Mississippi leaves it to the commission and attorney general to determine whether such suits shall be brought; and complainant is informed and verily believes that the commission and attorney general have, in the exercise of the power of determining such matters granted them by the state, determined and are preparing to file suits against complainant for penalties in case complainant disobeys said orders, and will file other suits to compel complainant by injunction and mandamus to obey said void orders. The said suits will, if the commission and the attorney general are not restrained, harass and annoy the complainant and will cost complainant considerable sums of money to defend, and complainant believes and so avers that they will, if they can, obtain a mandatory injunction requiring the reinstatement and operation of the trains which have been discontinued, which in the present condition of complainant's finances will be ruinous.

Complainant avers that said six orders of the railroad commission, on the fact thereof, provide that complainant shall be penalized in the sum of \$500 in each case for each day's violation of said orders, the total penalty per day being \$3,000; and that said penalties, while believed to be not legal, are so excessive as for the risk of having to pay the amount thereof, to intimidate complainant, and since the ordinary method of testing said orders would subject the complainant to the risk of said enormous penalties, if in error, the said

orders deprive complainant of its property without due process of law, contrary to the fourteenth amendment of the Constitution of the United States, and complainant is without remedy except in this court of equity.

XI. Complainant avers that said orders fixing the termini of certain said trains are unreasonable, illegal and unwarranted interference with the management of this company's business, and will place a heavy burden upon this complainant, in that the short distance which certain of said trains will operate, namely, 52 miles, between Meridian and Waynesboro, Mississippi, will require complainant to expend a considerable sum of money each month in payment of wages of employes, who have a contract for a minimum mileage per day and per trip, this being true even if the same crews make a round trip between certain of the termini each day. Said orders, therefore, deprive this complainant of its property without due process of law, contrary to the Constitution of the United States.

XII. Complainant avers that the railroad commission of Mississippi issued to it but one citation in this case, heard the testimony as to all the trains at one time, all of the testimony applying to each of the trains as applicable, and that while the commission issued a separate order as to each train, the said orders are but parts of one decision on one subject-matter in one suit between the same parties.

And complainant avers that if the said orders shall be enforced against it in this case, complainant will be irreparably injured, because, so far as can be foreseen, complainant will have the greatest difficulty in meeting its obligations and running its road, even if it is allowed to economize in every particular which is reasonably possible, and if complainant's economies in the reduction of its passenger train service are not permitted to be put in effect, complainant can not continue to operate its road, and complainant is without any adequate relief except in a court of equity.

Prayer.

The premises considered, complainant prays that proper process issue, making parties against whom this bill is filed parties to this suit. And that in view of the irreparable injury which is about to be inflicted upon complainant, and the multiplicity of penalty suits to which complainant will become subjected but for the restraining process of this court, that a restraining order at once issue enjoining the Mississippi Railroad Commission, and the members thereof, and Ross A. Collins, attorney general, from enforcing or taking any steps to enforce compliance with those certain six orders of the railroad commission of Mississippi, or any of them, issued October 7, 1914, hereinbefore referred to; and from taking any steps whatsoever to collect the penalties provided in any and all of said six orders, and further enjoining any and all other parties from proceeding against complainant under any and all of said orders of the railroad commission of October 7, 1914.(1)

Complainant further prays that upon a hearing for a temporary injunction, a temporary injunction of like character issue, and that upon a final hearing said temporary injunction be made permanent.

Complainant prays for all such other, further, general and special relief as in equity it may be entitled to.

This is the first application for injunction in this cause.

MOBILE & OHIO RAILROAD COMPANY,

By S. R. PRINCE, General Counsel.

CARL FOX and J. M. BOONE,

Solicitors for Complainant.

(1) This proceeding is governed by the provisions of Federal Judicial Code, Sec. 266, annotated below, under Injunctions.

No. 477.**Suit by Trustee Against Bankrupts.****[Caption.]**

Edwin C. Day, of Chicago, Illinois, and a citizen of the state of Illinois, brings this his bill against C. H. Seegmiller, of Chicago and a citizen of the state of Illinois, and Fred J. Dennis, of Chicago and a citizen of the state of Illinois, under the provisions of section 23, act of July 1, 1898; amended February 5, 1903, and January 25, 1910.

And thereupon plaintiff complains and says that on October 3, 1913, a petition was filed in this court praying that Chicago Folding Box Company, a corporation, be declared a bankrupt; that on October 24, 1913, said corporation was adjudicated a bankrupt, and thereafter, to-wit, on November 21, 1913, plaintiff was appointed trustee of the Chicago Folding Box Company, bankrupt; that C. H. Seegmiller is and has been since January 1, A. D. 1905, a director and secretary of the above company; that Fred J. Dennis is and has been since the year 1889 a director of said company, and since January 1, A. D. 1905, has been president of said company; that said corporation was organized and exists under the laws of the state of Illinois and has its place of business in the city of Chicago; that on September 1, 1912, the corporation was capitalized at seventy-five thousand (75,000) dollars; that of this amount six hundred (600) shares, par value one hundred (100) dollars, of paid-up stock had been issued; that four hundred and seventy-three (473) shares were held by the said Fred J. Dennis and one hundred and thirty-seven (137) shares were held by the said C. H. Seegmiller; that on September 4, 1912, the capitalization of the company was increased to one hundred and fifty thousand (150,000) dollars, the shares of stock being one hundred (100) dollars par value; that of this amount seven hundred and ten (710) shares have been issued to and are now held by Fred J. Dennis as paid-up stock, and one hundred and ninety (190)

shares have been issued to and are held by C. H. Seegmiller as paid-up stock.

Plaintiff further shows that the claims filed against the above bankrupt estate exceed one hundred thousand (100,000) dollars; that the property of the bankrupt has been inventoried heretofore under the orders of this court and that the same has been appraised by appraisers appointed by the court at thirty-six thousand seven hundred and sixty-six dollars and nine cents (\$36,766.09); that upon a forced sale the said property and assets of the bankrupt will bring far short of this sum; that said assets and property have been held under the orders of the court for sale by the trustee as a going concern; that said trustee has endeavored to obtain bids for the same and that the best offer so far received is nine thousand (9,000) dollars; that upon the settlement of the estate, the creditors will receive not to exceed five per cent. in dividends; that during the period immediately preceding bankruptcy, to-wit, from August 31, 1912, until October 3, 1913, the said Fred J. Dennis and C. H. Seegmiller paid out to themselves large amounts as pretended dividends, without warrant of law; that during said period said respondents, acting as officers of the bankrupt corporation, purchased large amounts of strawboard and other raw materials used in the business of the company upon credit; that the same were manufactured by them into folding boxes and sold for cash; that the business was operated at a loss; that instead of paying debts incurred for material, said respondents herein appropriated the proceeds of sales to their own use, under the simulated form of dividends; that the liabilities of the corporation represented by the claims now filed were incurred in this manner; that there were no surpluses out of which to declare dividends; that the same were paid out of the capital stock of the corporation, and that it is to the interest of this estate to recover all said moneys so paid.

Plaintiff further shows that during the period of five and one-half years prior to bankruptcy, the said Seegmiller and Dennis, as officers of said corporation, represented that the

business of the company was being carried on at a profit, and that large surpluses were being accumulated; that by these representations and by fraudulent financial statements, the said Seegmiller and Dennis contrived to obtain credit in large amounts; that in fact said business was not run at a profit; that the actual operating losses for the year and eight months immediately preceding bankruptcy aggregated twenty-six thousand thirty-four dollars and eighty-nine cents (\$26,034.89); that in the face of said losses said respondents declared dividends during this period aggregating eighty-eight thousand eight hundred dollars (\$88,800); that the dividends and losses together aggregated one hundred and fourteen thousand eight hundred and thirty-four dollars and eighty-nine cents (\$114,834.89); that in order to conceal the actual losses during the years 1909, 1910, 1911 and the first nine months of 1912, the said Dennis and Seegmiller did not credit themselves on the books of the company with salary; that nevertheless during said years they drew large sums of money; that now said Dennis and Seegmiller claim that they are entitled to said sums as back wages; that it was due to representations that the business was operated at a profit, and not at a loss, that credit was obtained; that said Seegmiller and Dennis are not now entitled as against the creditors of the bankrupt corporation to claim said sums as wages.

Plaintiff further shows that the dividends complained of herein were declared by the said Fred J. Dennis and C. H. Seegmiller, together with John L. Hartke, a nominal third director, at the time and in the amounts as follows:

| | |
|----------------------------|-------------|
| On September 23, 1912..... | \$34,500.00 |
| On September 23, 1912..... | 30,000.00 |
| On May 2, 1913..... | 10,800.00 |
| On July 29, 1913..... | 13,500.00 |

That the pretended surpluses out of which said dividends were declared were fictitious and fraudulent and were created by the following devices:

(a) By increasing the valuation of the capital assets on August 31, 1912, from \$61,835.58 to \$143,747.92, without any reasonable grounds for so doing, and in the face of large operating losses.

(b) By crediting the corporation on January 31, 1913, with \$11,468.08, being a pretended claim against American Box Board Company for injury to loss and profit and good will due to the alleged failure of American Box Board Company to complete a contract, which claim was instituted to offset the debt of said bankrupt corporation to American Box Board Company for raw materials amounting to \$6,817.61.

(c) By crediting the company with the \$8,310.07, which had previously been entered as a liability to Beloit Box Board Company for raw material, and by carrying the same as a profit while judgment against said bankrupt company in favor of Beloit Box Board Company for \$9,762.50 in the United States circuit court remained unsatisfied.

(d) By crediting the corporation with four thousand (4,000) dollars as unearned profits, based on unfilled orders.

(e) By not charging off uncollectible accounts.

(f) By crediting amounts spent in operating as permanent additions to the capital assets.

(g) By neglecting in the twenty-five years of operation to charge off depreciation in machinery.

(h) By not crediting themselves with salary, although drawing large amounts on account.

Plaintiff further shows that on September 23 and on September 24, 1913, there was in the treasury of the Chicago Folding Box Company no accumulated surplus; that the declaration of the dividend of September 23, \$34,500, and the dividend of September 24, \$30,000, diminished the capital stock of the company in these amounts and was void as to the creditors and plaintiff herein; that the \$34,000 was drawn out partly in cash and was partly applied in cancelling the indebtedness of the said Fred J. Dennis and C. H. Seegmiller to the corporation, caused by overdrafts at various times prior thereto; that said respondents purported to turn back thirty

thousand (30,000) dollars of the amount in cash into the treasury in purchase of additional stock of the corporation; that the declaration of dividends on May 2, 1913, of \$10,000 and the declaration of dividends on July 29, 1913, of \$13,500 were made when there was no surplus in the treasury and in diminution of the capital stock; that a part of said dividends so declared was paid to the said Fred J. Dennis and C. H. Seegmiller when the company was insolvent, and within four months of the filing of petition in bankruptcy; that the financial condition of the company was at all times known to the said Seegmiller and Dennis; that a part of said dividends, to-wit, \$19,965.07, is still unpaid; that claims for said unpaid portion have been filed by the said Seegmiller and Dennis against the bankrupt estate; that the amounts paid during the four months immediately preceding the filing of the petition in bankruptcy and while insolvent were \$1,883.36, drawn by F. J. Dennis in excess of salary, and \$1,156 by C. H. Seegmiller in excess of salary; that not only was the capital stock of the company diminished to this extent by these amounts, but the same were void as to creditors and as to plaintiff, the same being preferences, and the said Seegmiller and Dennis having had reasonable grounds to know, at the time they were made, that these payments would be preferences and give them a larger percentage of these claims than other creditors; that the amounts actually drawn in cash as pretended dividends, prior to the four months' period, were \$21,262.73, by the said Fred J. Dennis, and \$8,232.84 by the said Charles H. Seegmiller.

Plaintiff further shows that the said C. H. Seegmiller, on September 24, subscribed for sixty-three (63) shares of stock in said corporation, and the said Fred J. Dennis subscribed for two hundred and thirty-seven (237) shares of stock; that the said C. H. Seegmiller and said Fred J. Dennis have paid nothing whatever for said stock; that the said Seegmiller and Dennis pretended to pay therefor thirty thousand (30,000) dollars in cash, par value of said stock; that their respective claims against the corporation for dividends declared Septem-

ber 24 were surrendered in lieu of cash; that said claims for dividends were null and void and utterly valueless; that said Seegmiller owes to plaintiff, as trustee, six thousand three hundred (6,300) dollars on said subscription, and the said Fred J. Dennis owes to plaintiff twenty-three thousand seven hundred (23,700) dollars on the said subscription.

Wherefore plaintiff prays that said pretended dividends be decreed to have been declared in fraud upon the creditors and upon plaintiff herein; that the said Fred J. Dennis be required to surrender the \$1,833.36 drawn within four months of bankruptcy and the \$21,262.73 within one year and a half prior to bankruptcy and be required to pay plaintiff the \$23,700 still due and unpaid on his subscription to the capital stock of said corporation; and that the said C. H. Seegmiller be ordered to repay to plaintiff the \$1,156 taken within four months of bankruptcy and the \$8,232.84 taken within one year and a half prior to bankruptcy, and \$6,300, his unpaid subscription to the capital stock of said corporation.

Plaintiff also prays for such other and further relief as the nature of the case may require and the court may deem proper in the premises.

To the end that each of said defendants may, if he can, show why your petitioner should not have the relief prayed for and may, according to his best and utmost knowledge, remembrance and belief, full, true, correct and perfect answer make to each and all matters in this petition alleged and contained, and that as fully as if the same here repeated paragraph by paragraph, and he were thereunto specially and severally interrogated, but not under oath, the answer under oath being hereby waived; and may it please your honors to grant to plaintiff a writ of subpoena, issued out of and under the seal of this court, directed to said defendants and each of them commanding them and each of them that on a day certain and under a certain penalty to be therein described, to appear before your honors in this court and then and there full, true, direct and perfect answer make to all and singular the premises herein set forth, and stand by, perform and abide

by said further order or decree as to your honors shall seem meet; and plaintiff will ever pray.(1)

EDWIN C. DAY, Trustee.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY,
Solicitors for said Trustee.

MITCHELL D. FOLLANSBEE and
WILLIAM H. LONG,
Of Counsel.

(1) All of the last paragraph in this Bill of Complaint could be omitted under the present equity rules; it merely illustrates the tendency of the bar to follow the old forms so long as not forbidden. There is a certain impressiveness and sonorousness about the verbose pleadings that continue to appeal.

No. 478.

Bill by the United States for Decree of No Interest Where Land Wrongfully Patented.

[Caption.]

The United States of America, by direction of James C. McReynolds, its attorney general, brings this its bill of complaint against Nellie N. Joyce, R. W. Nichols, whose true first name is to complainant unknown; Edward L. Boyle and John Helmer, all citizens and residents of the state and district of Minnesota, and thereupon plaintiff, complaining of the above-named defendants, alleges and shows unto your honors:

I. That in the month of April, 1892, and ever since, the following described land, situate in the county of St. Louis, state of Minnesota, to-wit, lots four (4), five (5) and six (6), section twenty-one (21), township sixty-three (63) north, range eighteen (18) west, the same being in the Duluth land district in said state, had been and is the property of the complainant in fee simple, and in said month of April, 1892, was a part of the unappropriated public domain of the United States.

II. That one John Wakemup, Sr., was a Chippewa Indian, a member of the band or tribe of Chippewa Indians residing

in the state of Minnesota, a ward of the government and in charge of an Indian agent.

III. That the act of Congress of July 4, 1884 (23 Stats. at Large, 76-86), entitled, "An act making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1885, and for other purposes," contains the following provision, to-wit:

"That such Indians as may be now located on public lands, or as may, under the direction of the secretary of the interior, or otherwise, hereafter, so located, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated, but no fees or commissions shall be charged on account of such entries or proofs. All patents therefor shall be of legal effect, and declare that the United States does and will hold the lands thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or in case of his decease, of his widow and heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States shall convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. * * *

IV. That pursuant to said act of July 4, 1884, and to avail himself of the rights, benefits and privileges therein contained for and in behalf of persons of Indian blood, said John Wakemup, Sr., under date of April 16, 1892, made an original homestead entry No. 6588 at the Duluth land office, Minnesota, of the above described land. The said entryman having died in the meantime, his heirs in due course on November 25, 1903, under and pursuant to said act of Congress, submitted to the proper officers of said Duluth land office

final proofs to establish the entry of said land by said Indian and to perfect their rights as to the heirs of said deceased Indian to a patent, as provided by said act of Congress, for the above described land. The final proofs so submitted were duly accepted and approved by the proper officers of said land office, and in conformity to the practice prevailing in the department of the interior of the complainant, said officers, under date of May 24, 1904, issued final certificate No. 5629 to the heirs at law of said deceased Indian, evidencing their right to the patent, as aforesaid. That the executive officers of complainant, under date of June 16, 1905, issued to said heirs at law a patent for said land which purported to be a patent in fee, executed pursuant to the act of Congress of May 20, 1862, and acts supplemental thereto. In issuing said patent in manner and form as aforesaid, the officers of complainant wholly disregarded the above-quoted provision of the act of July 4, 1884, in that they failed and neglected to embody in said patent the conditions, reservations and limitations upon the title to be granted as in said act specified, and which they are commanded to incorporate in all patents issued under said act of Congress, and complainant avers that said officers issued said patent inadvertently, erroneously, wrongfully and without authority of law, and that the same is void and of no effect, and that the executive officers who issued said patent could not and had not the power to dispense with the provisions of said act of Congress, as aforesaid.

V. That the said defendants, and each of them, claim an interest in said lands adverse to the title of complainant, but that the nature of said interest claimed by defendants is to complainant unknown; that the defendants' claims are, and each of them is, without any right whatsoever, and that none of the defendants has any estate, right, title in or lien upon said lands or any part thereof.

In consideration whereof, and in as much as the complainant can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why the complainant should not have the relief prayed, and

may make a full disclosure and discovery of all the matters aforesaid, and, according to the best and utmost of their remembrance, knowledge, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being expressly waived.

And complainant prays that your honors may decree that said defendants, and each of them, have no estate or interest whatsoever in or to said lands or premises, and that the title of the complainant is good and valid, save and except any and all rights acquired by the patentees under the aforesaid act of Congress, and that the said defendants, and each of them, be forever enjoined and restrained from asserting any claim whatsoever in and to said lands and premises adverse to the complainant, and for such other and further relief as the equity of the case may require and to your honors may seem meet.

May it please your honors to grant unto the complainant a writ of subpoena of the United States of America, directed to the said Nellie N. Joyce, R. W. Nichols, Edward L. Boyle and John Helmer, and to such other as shall in the discretion of your honors appear necessary to the hearing and determination of this cause, commanding them on a day certain to appear and answer unto this bill of complaint: and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.(1)

CHARLES C. HOUPPT.

U. S. Attorney and Solicitor for Complainant.

Endorsed: Filed in the district court on November 18, 1913.

(1) Foster's Fed. Prac., 5th ed., p. 333, note 31.

No. 479.**To Decree an Alley to be Private Property, to Remove Obstructions, and to Cancel a Deed Thereto.**

[Caption.]

The plaintiff states as follows:

1. That he is a citizen of the United States and a resident of the District of Columbia, and sues in his own right.

2. The defendants are husband and wife, are citizens of the United States and residents of the District of Columbia, and are sued in their own right.

3. Heretofore and prior to July 1, 1883, the title to block seven (7) in Todd and Brown's subdivision of the tracts of land known as "Pleasant Plains" and "Mount Pleasant" in the county of Washington, District of Columbia, as per plat recorded in Liber Levy Court No. 2, folio 24, of the records of the office of the surveyor of the District of Columbia, was vested in Algeron R. McChesney and Henry Bakersmith as trustees for the Enterprise Building Company, an unincorporated association, with power in said trustees to sell and convey in their discretion. The said block seven (7) fronted on Georgia avenue, then Seventh street road, extending westerly to Sherman avenue, being bounded on its southern boundary by Irving street, then Wallach street. A diagram showing the parcels into which lot one (1), block seven (7), were divided and the alleyway as laid out for their accommodation is herewith filed and made part hereof as plaintiff's exhibit No. 1.

4. For the purpose of sale said block seven (7) was divided into sundry parcels, and one of the lots in said block, to-wit, lot one (1), was divided into three parcels, two of those parcels fronting on Georgia avenue, immediately at the rear of which two parcels an alleyway ten (10) feet wide and extending from the north line of Irving street northerly fifty (50) feet to the north line of said lot one (1), was reserved for the benefit of the parcels into which said lot one (1) was subdivided. On the west side of said ten (10) foot alleyway

was another part of lot one (1) fronting forty (40) feet on Irving street by a depth of fifty (50) feet; and said alleyway was well defined, so that the fact of its existence as an easement appurtenant to said parcels of lot one (1) was apparent to any person dealing with said portions of lot one (1).

5. By deed dated June 13, 1883, recorded in Liber 1048, folio 247, of the land records of the District of Columbia, said McChesney and Bakersmith, trustees, conveyed to John W. Payne the following described portion of said lot one (1) in block seven (7), together with the alley easement hereinbefore referred to:

All that part or parcel of land known and being in block seven (7) and part of lot one (1) of Todd and Brown's subdivision of part of "Pleasant Plains" and "Mount Pleasant" as by recorded subdivision of said plat William Forsyth survey and subdivision April, 1868. Beginning for the part of the lot twenty (20) feet from the corner of Wallach street and Seventh street road, along Seventh street road, north, then one hundred (100) feet west to alley, then thirty (30) feet north, then one hundred (100) feet east, then thirty (30) feet south along Seventh street road to the place of beginning, containing 3,000 feet of ground, together with all the improvements, ways, easements, privileges, rights, appurtenances and hereditaments to the same belonging or in anywise appertaining.

6. By deed dated September 6, 1883, recorded in Liber 1053, folio 443, of said land records, said John W. Payne and wife conveyed the last aforesaid part of lot one (1) in block seven (7), and said alley easement, to the plaintiff, James B. Gallagher, the description in said deed reading as follows:

Part of lot one (1) in block seven (7), in Todd and Brown's recorded subdivision of "Pleasant Plains" and "Mount Pleasant," being the north thirty (30) feet of said lot one (1) by the depth of one hundred (100) feet. Beginning for the same twenty (20) feet north from the southeast corner of said lot and running thence north along the line of

Seventh street road thirty (30) feet, thence west one hundred (100) feet to an alley, thence south along said alley thirty (30) feet, thence east one hundred (100) feet to the place of beginning.

7. Upon the acquisition of the title to said last-mentioned part of lot one (1), block seven (7), and said alley easement, said Gallagher built a dwelling house on the front part of said lot, and in the rear thereof erected a shed having a door or gate running out into said alleyway.

8. After the said dwelling house had been completed, and by deed dated November 4, 1886, recorded in Liber No. 1211, folio 340, of said land records, the defendant, Edward O. Scaggs, acquired by purchase that part of said lot one (1), block seven (7), along the west of said alleyway, the description in said deed reading as follows:

Part of lot one (1), block seven (7), in Todd and Brown's subdivision of "Mount Pleasant" and "Pleasant Plains" and duly recorded in the land records for said district. Beginning for the same one hundred and ten (110) feet from the northwest corner of Seventh street road and Wallach street, and running thence north fifty (50) feet, thence west forty-one and 50/100 feet, thence south fifty (50) feet, thence east forty-one and 50/100 feet to the place of beginning.

9. After the conveyance aforesaid to said Scaggs he erected a dwelling upon said part of said lot so purchased by him, and in so building upon said part of said lot availed himself of the said alleyway and adjusted his buildings and fences thereto.

From the date of his acquisition of said part of lot one (1), block seven (7), said Scaggs, together with his said wife, occupied said part of lot one (1), block seven (7), purchased by said Edward O. Scaggs, and continuously from the date of such acquisition to, on or about August 19, 1914, used said alleyway as such and fully recognized its existence as the private alleyway set apart for the benefit of the three parts of said lot one (1), block seven (7), into which it had been divided and sold, and neither said Scaggs nor his said wife

ever claimed or asserted any right or interest in said strip ten (10) feet wide by fifty (50) feet deep other than as owners in common with the plaintiff and the other owner of the remaining part of said lot one (1), block seven (7), of the alley easement hereinbefore described; and the plaintiff avers that from a time prior to the purchase by said Scaggs of said part of said lot one (1), the said Edward O. Scaggs and Marion E. Scaggs had actual notice and knowledge that the said strip ten (10) feet wide by fifty (50) feet deep had been so set apart for an alleyway and that the same was subject to an easement for such alley use in favor of each of the three owners of the three parcels into which said lot one (1) had been subdivided.

10. On or about the 19th day of August, 1914, the said Edward O. Scaggs and Marion E. Scaggs called on Algeron R. McChesney and requested him to convey said alley strip to them as joint tenants, stating their purpose in asking for such conveyance to be their desire to maintain the said strip as an alleyway and to prevent embarrassment by tax sales thereof.

The said McChesney having been much annoyed by tax notices concerning taxes upon said alley strip which had remained assessed on the tax records of the District of Columbia to said McChesney and Bakersmith, trustees, and without any consideration being paid him by said Scaggs and wife, and solely for the purpose of perpetuating said strip for an alleyway for the benefit of said three parts of said lot one (1), block seven (7), said McChesney, describing himself as surviving trustee of the Enterprise Building Company, conveyed to said Edward O. Scaggs and Marion E. Scaggs, his wife, by deed dated August 19, 1914, recorded in Liber 3727, folio 255, of said land records, the said alley strip by the following description:

Part of lot one (1), in block seven (7), in Todd and Brown's subdivision of part of "Pleasant Plains" and "Mount Pleasant," as per plat recorded in Liber Levy Court No. 2, folio 24, of the records of the office of the surveyor of the District of Columbia, described as follows: Beginning for

the same on the north line of Irving street at a point distant forty-one and five-tenths (41.5) feet east of the southwest corner of said lot, running thence east ten (10) feet; thence north fifty (50) feet to the north line of said lot; thence west on said north line of said lot ten (10) feet; thence south fifty (50) feet to the point of beginning; being designated for taxation purposes on the books of the assessor of the District of Columbia as lot 802 in square 2891.

So far as plaintiff knows, the said Bakersmith is still living and the said McChesney was without any title or authority or right to describe himself as surviving trustee and to make said deed to said Scaggs and wife, nor were the trusts under which said block seven (7) was held by said McChesney and Bakersmith such as to authorize them or either of them to execute a voluntary conveyance of any part of said block seven (7).

11. After obtaining said deed the said Scaggs and wife commenced the erection of certain structures in said alleyway, whereupon plaintiff notified them that the said strip, as they well knew, was an alleyway and that they were without any title or authority in anywise to obstruct it, yet the said defendants, although they well knew that the statement of plaintiff was well founded, proceeded to erect certain structures of inconsiderable value and which were so erected as to obstruct the said alleyway and prevent plaintiff from utilizing it for the purpose for which it was set apart, so that he is by the erection of said structures cut off and prevented from having access to Irving street as was contemplated by the setting apart of the said ten (10) foot strip as an alleyway.

12. The maintenance, unobstructed, of the said alleyway is essential to the advantageous use of plaintiff's part of said lot one (1), block seven (7), and if he be deprived of that use the value of his said property will be greatly diminished, the price thereof depreciated and the opportunity to sell the same at an advantageous price destroyed. The use of his said premises will also be rendered extremely inconvenient,

because of the necessity which the obstruction of said alleyway will impose upon the plaintiff of carrying out all garbage and other refuse through the front of his lot and of bringing in coal and wood through the front thereof.

13. The structures erected by the defendants are of such a character that they can be removed with very trifling expense and their removal will leave the defendants in the enjoyment of exactly the same property which they purchased, with the same easement which they then acquired, and subject only to the easement in favor of other owners in the same lot and block, of which they had full notice and knowledge, both actual and constructive before they purchased.

14. Plaintiff avers that an action for damages for the obstruction of said alleyway would afford no adequate relief, and the manifestation and vindication of his rights at law would require constantly recurring suits, whereas the remedy in equity by mandatory injunction to compel the removal of said unauthorized obstructions of said alleyway would afford complete relief in the premises.

Plaintiff therefore prays:

1. That the said strip of land ten (10) feet wide by fifty (50) feet deep, set apart and designated as an alleyway as aforesaid, may be decreed to be a private alley, laid out and established for the common benefit of the plaintiff and the said two other owners of the remainder of said lot one (1).

2. That the said deed from said McChesney, as surviving trustee, to said Scaggs and wife be decreed to be null and void and be set aside.

- 3 That by the mandatory injunction of this court the defendants may be required to remove the said obstructions placed by them in said alleyway and to restore the same to the condition in which it was at the time when said obstructions were placed by the defendants in said alleyway.

4. That the defendants may be perpetually enjoined from hereafter erecting any other obstructions or structures in said alleyway.

5. That plaintiff may have such other and further relief as the nature of his case may require.

JAMES B. GALLAGHER.

OSCAR NAUCK,
JNO. RIDOUT,
Attorneys for Plaintiff.

[*Verification.*]

No. 480.

**Suit by Infant by Prochein Ami for Accounting and Payment
Over Under a Trust.**

[*Caption.*]

Plaintiff, by her *prochein ami*(1) and her solicitors, Krauthoff, Harmon & Mathewson, complaining of the defendant, alleges:

For a first cause of action:

I. That Marie Marjorie Ambrosius, the plaintiff herein, is an infant under the age of twenty-one years and was seventeen years of age on the 26th day of April, 1914, and is the daughter of Herman Z. Ambrosius by his first wife, and is and at all times herein referred to was a citizen and resident of the state of Illinois and resides in the city of Chicago, county of Cook, state of Illinois.

II. That on the 9th day of February, 1915, upon the petition of said Marie Marjorie Ambrosius, Kate Ambrosius was by an order of this court duly appointed the *prochein ami* of the plaintiff for the purposes of this action; that said Kate Ambrosius duly consented to act and is now acting as such *prochein ami*, (2) that said Kate Ambrosius is a citizen and resident of the state of Illinois and resides in the city of Chicago, county of Cook, state of Illinois.

III. That defendant Iva H. Ambrosius is a citizen and resident of the state of New York and resides in the borough of Brooklyn, county of Kings, state of New York, and in the eastern district of New York.

IV. That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of \$3,000, and the grounds upon which the court's jurisdiction depends are that the suit is of a civil nature between citizens of different states, and that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.

V. That said Herman Z. Ambrosius, father of the infant Marie Marjorie Ambrosius, died intestate on or about the 15th day of October, 1913, leaving an estate consisting of personal property, and at the time of his death was a resident of the county of Kings and state of New York.

VI. That on or about the 28th day of October, 1913, letters of administration of the goods, chattels and credits of said Herman Z. Ambrosius, deceased, were duly granted and issued to the defendant, Iva H. Ambrosius, by and out of the Surrogate's Court of the county of Kings, state of New York, which letters remain unrevoked and are in full force, and that said Iva H. Ambrosius has ever since the issuance of such letters been and is now acting as such administratrix.

VII. That at all times herein mentioned, the plaintiff resided with and was in charge and in the custody of her grandmother, Marie Ambrosius, in Chicago, state of Illinois.

VIII. That on or about the 26th day of September, 1905, said Herman Z. Ambrosius had in his possession or control the securities described, set forth and referred to in Exhibit A attached hereto and hereinafter referred to.

IX. That on or about the 26th day of September, 1905, said Herman Z. Ambrosius, while in possession or control of said securities as hereinbefore alleged, duly made and executed a declaration of trust in writing, a copy of which is annexed hereto marked "Exhibit A" and made a part hereof as if herein set forth at length, and at the same time made and executed a duplicate original of said declaration of trust by making a letterpress facsimile copy thereof, which said duplicate original said Herman Z. Ambrosius delivered in the city of Chicago, state of Illinois, to Marie Ambrosius, plaintiff's

grandmother, for and on behalf of this plaintiff, Marie Marjorie Ambrosius. That by said declaration of trust said Herman Z. Ambrosius assumed and undertook to hold and declared that he held the securities therein described, set forth and referred to in trust for said Marie Marjorie Ambrosius, and on and after said date said Herman Z. Ambrosius held such securities as trustee and in trust for said Marie Marjorie Ambrosius.

X. That Herman Z. Ambrosius while holding said property in trust as aforesaid, collected and received dividends, interest and income therefrom, the amount of which and the particulars of which are unknown to plaintiff.

XI. That said Herman Z. Ambrosius during the continuance of said trust sold part of said property constituting such trust estate and received the proceeds therefrom and made profits from the use and in connection with said trust estate, but plaintiff does not know the nature or amount of the property so sold and does not know the amount of the proceeds thereof or the profits therefrom nor the particulars in respect thereof.

XII. That said Herman Z. Ambrosius has never accounted for or paid over to plaintiff, or to any one for her, said property held by him in trust or the dividends, interest, income, proceeds and profits in respect thereof, and defendant has never accounted for or paid to plaintiff, or to any one for her, any of said property, dividends, interest, income, proceeds and profits.

XIII. That since the death of said Herman Z. Ambrosius, the estate theretofore held in trust by said Herman Z. Ambrosius for said Marie Marjorie Ambrosius, as aforesaid, came into and is in the possession of defendant.

XIV. That before bringing this action plaintiff duly demanded of defendant that she render an account of said property theretofore held in trust by said Herman Z. Ambrosius, and all dividends, income, proceeds and profits in respect thereof, and transfer and turn over same to the plaintiff, which the defendant has refused and failed to do.

For a second cause of action:

XV. Plaintiff repeats each and every allegation contained in paragraphs marked I, II, III, IV, V, and VI in the first cause of action hereinbefore set forth, and makes them a part hereof as though herein set forth at length.

XVI. That on or about the 10th day of September, 1907, said Herman Z. Ambrosius had in his possession or control the securities described, set forth and referred to in Exhibit B attached hereto and hereinafter referred to.

XVII. That on or about the 10th day of September, 1907, said Herman Z. Ambrosius while in possession or control of said securities as hereinbefore alleged, duly made and executed a declaration of trust in writing, a copy of which is annexed hereto marked Exhibit B and made a part hereof as though herein set forth at length, by which said Ambrosius assumed and undertook to hold and declared that he held the securities therein described, set forth and referred to in trust for said Marie Marjorie Ambrosius, and on and after said date said Herman Z. Ambrosius held said securities as trustee and in trust for said Marie Marjorie Ambrosius.

XVIII. That Herman Z. Ambrosius while holding said property in trust as aforesaid, collected and received dividends, interest and income therefrom, the amount of which and the particulars of which are unknown to plaintiff.

XIX. That said Herman Z. Ambrosius during the continuance of said trust sold part of said property constituting such trust estate and received the proceeds therefrom and made profits from the use and in connection with said trust estate, but plaintiff does not know the nature or amount of the property so sold and does not know the amount of the proceeds thereof or the profits therefrom, nor the particulars in respect thereof.

XX. That said Herman Z. Ambrosius has never accounted for or paid to plaintiff or to any one for her, said property held by him in trust or the dividends, interest, income, proceeds and profits in respect thereof, and defendant has never accounted for or paid to plaintiff, or to any one for her, any

of said property, dividends, interest, income, proceeds and profits.

XXI. That since the death of said Herman Z. Ambrosius, the estate theretofore held in trust by said Herman Z. Ambrosius for said Marie Marjorie Ambrosius, as aforesaid, came into and is in the possession of defendant.

XXII. That before bringing this action plaintiff duly demanded of defendant that she render an account of said property theretofore held in trust by said Herman Z. Ambrosius, and all dividends, income, proceeds and profits in respect thereof, and transfer and turn over same to the plaintiff, which the defendant has refused and failed to do.

Wherefore plaintiff, in as much as she is remediless in the premises according to the strict rules of the common law and can only have relief in a court of equity where matters of this kind are properly cognizable, files this bill of complaint and prays:

(1) That the defendant be compelled to account for said property, securities, dividends, interest, income, proceeds and profits; that the defendant may be decreed to transfer and turn over to and pay to plaintiff such property, securities and cash as on taking said accounting shall be found to be due from the defendant to plaintiff, together with the costs and disbursements of this action.

(2) That the plaintiff may have such other and further relief in the premises as the nature and circumstances of the case may require and as to this honorable court may seem just and proper.

A. B. and C. D.,

J. F. E., (3)

Solicitors for Plaintiff.

A member of the firm of A. B. and C. D. and one of the solicitors of record for the plaintiff.

(1) Rule 70 provides for suit by *prochein ami* for an infant, subject to the orders of the court.

(2) Citizenship of the infant here determines the jurisdiction; in *Blumenthal v. Craig*, 81 Fed. 320, it was held that the next friend is not a party to the action and his citizenship is not a test of jurisdiction of the federal courts.

(3) Note the separate signature of an individual member of the firm of solicitors, in accordance with Rule 24. Former Rule 24 required the

signature of counsel, hence the change to solicitor seems an intentional one.

Distinction between the rights of solicitors and counsel is made in *Goodwin Co. v. Eastman Co.*, 222 Fed. 249.

The rules of the United States Supreme Court name only attorneys and counselors; in the 6th Circuit Rule 1, "*Counsel*" includes attorneys, solicitors, proctors, and advocates. The 6th Rule in all Circuits forbids the clerk of the Circuit Court of Appeals to practice "either as attorney or counselor."

Rule 7 in all the Circuits deals with the qualifications for admission to practice before the respective Circuit Courts of Appeals of "Attorneys and Counselors," and the term "Solicitor" is not employed in the rules of any of the Circuits.

In the Equity Rules, Rule 52 employs both terms "Counsel or Solicitor," Rule 53 uses the term "Counsel;" Rule 57, also, likewise Rule 69, where it is provided that "Counsel" shall sign a petition for rehearing.

Rule 4, on Notice of Orders, employs the term "Solicitor" twice, and in Rule 24, under discussion, the subject heading is "Signature of Counsel;" Rule 28 provides for furnishing to the "Solicitor" a copy of a bill amended as of course; Rule 58 provides for copies of interrogatories for the "Solicitors" of record; Rule 60 calls for notice to "Solicitors" of proceedings before a master; Rule 76 provides for requiring "offending Solicitors" to pay costs in certain cases, and Rule 75 employs the term "Solicitor" in reference to the making up of the record on appeal.

A distinction in all these cases is impossible to make, but generally it would seem that proceedings before a court or examiner are presumed to be in the hands of "Counsel" while matters of a more formal nature or where the parties themselves are competent to act or receive action, such as giving or receiving notices, the solicitors are named in the rules.

However, drawing distinctions that are material is rather a fanciful matter.

Certainly some ground appears for believing that the Supreme Court is here perpetuating the old distinction between the functions of "Solicitors" and "Counsel."

The term "Attorney" instead of "Solicitor" is also in wide use.

No. 481.

Bill to Declare Present and Future Acquired Property of Street Railway Subject to a Trust Deed.

[*Caption.*]

To the Honorable District Court of the United States for the
Northern District of Texas, at Amarillo:(1)

Emile K. Boisot, a resident and citizen of the state of Illinois, hereinafter called the plaintiff, complaining of Amarillo

Street Railway Company, hereinafter called the defendant, represents and shows unto your honor:

First. That plaintiff, Emile K. Boisot, is now and was on all the days and dates hereinafter mentioned a resident and citizen of the state of Illinois, and an inhabitant of Chicago, in said state of Illinois; that the defendant, Amarillo Street Railway Company, is a corporation duly and legally organized and existing under and by virtue of the laws of the state of Texas, having its principal office and place of business in the city of Amarillo, Texas, in the northern district of Texas, Amarillo division, and was such corporation so existing and having its place of business aforesaid during all the days and dates hereinafter mentioned as aforesaid, and at such times was, and now is, a citizen and inhabitant of said state of Texas and northern district of Texas.

Second. That by an instrument of writing duly made and executed by the defendant, the Amarillo Street Railway Company, dated July 1, 1910, said defendant in the exercise of its powers under the laws of the state of Texas, and in accordance with resolutions duly passed by its stockholders and directors at respective meetings thereof duly called and had, authorized the issuance of a series of bonds to be executed under its corporate seal, by the hand of its president and attested by its secretary, to be issued in an amount not exceeding in the aggregate the principal sum of two hundred and fifty thousand dollars (\$250,000) at any one time outstanding, which bonds were required to be of the denomination of five hundred dollars (\$500) each, and all of said bonds to bear date the 1st day of July, 1910, to bear interest at the rate of six per cent. (6%) per annum, payable semi-annually; said bonds to be equally and ratably secured by a certain deed of trust or mortgage called an indenture; said bonds, in accordance with said resolutions of the stockholders and directors of defendant, being made payable on the 1st day of July, 1930, at the First Trust and Savings Bank of Chicago, to bearer or, if registered, to the registered holder of said bonds, each of said bonds being in the sum of five hun-

dred dollars (\$500) in gold coin of the United States of America, of or equal to the present standard of weight and fineness, and interest thereon from the 1st day of July, 1910, at the rate of six per cent. (6%) per annum in like gold coin, payable semi-annually on each 1st day of July and January in each year thereafter upon the presentation and surrender of the respective coupons for such interest thereto attached as they severally matured, and each of said bonds further provides that all payments upon such bonds both of principal and interest shall be made without deduction for any tax, which the company, its successors or assigns may be required to pay, deduct or retain therefrom under any present or future laws of the United States of America, or of any state, county or municipality thereof. That each of said bonds states upon its face that it is issued under and secured equally and ratably by and subject to a mortgage or deed of trust dated July 1, 1910, duly executed by said Amarillo Street Railway Company to the First Trust and Savings Bank and Emile K. Boisot, both of Chicago, as trustees, which is referred to as being recorded in the office of the county clerk of Potter county, Texas. The form and tenor of said bonds are fully set forth at large in the mortgage or deed of trust hereinafter referred to and described, a copy of which mortgage is hereto annexed and marked Exhibit "A" and made a part hereof.

Third. That by a certain deed of trust called an indenture, dated July 1, 1910, and referred to in said bonds, said Amarillo Street Railway Company, being thereunto duly authorized by appropriate action of its board of directors and by consent and express authority of its stockholders, at a meeting regularly called therefor, at which a quorum was present, of which meeting due and legal notice had been given to the stockholders thereof as required by law, duly made, executed and delivered to said the First Trust and Savings Bank in Chicago, and to Emile K. Boisot, as trustee, its certain mortgage or deed of trust dated July 1, 1910, wherein and whereby in order to secure the payment of the principal and inter-

est of all such bonds at any time issued and outstanding, and to secure the performance and observance of all the covenants and conditions in said mortgage contained, the said Amarillo Street Railway Company granted, bargained, sold, assigned, transferred, set over, released, conveyed and confirmed unto the said the First Trust and Savings Bank and Emile K. Boisot, as trustee, to its, his and their successors and assigns in said trust forever, all the following described real and personal property, lying, being and situated in the county of Potter and state of Texas, to-wit:

1. Beginning 40 feet north of the northeast corner of block 7, G. & S. addition to Amarillo, north line on First street, thence west on north line of said block 120 feet, thence north fifty feet on line parallel with east line of block 7; thence east parallel with north line of First street 120 feet to west line of Tyler street; thence south 50 feet along the west line of Tyler street to beginning, together with power plant, machinery and all equipment located there.

2. Lot three (3), block one hundred and seventy-four (174), G. & S. addition to Amarillo, as shown by recorded plat of said addition, including the car-barn and equipment located there.

3. The company's street railway in the city of Amarillo and additions thereto, including cars, poles, electric wires and all equipment therewith connected, including the company's franchise and franchise rights, together with all appurtenances thereto connected.

4. All property of every name and nature from time to time hereafter acquired by the company, it being the true intent of the parties hereto that this indenture shall convey all the property, real, personal and mixed of whatever name or nature now owned or held, or that may hereafter be owned, held or acquired by the company;

which said property is situated in the northern district of Texas, Amarillo division.

That said mortgage was duly executed by the hand of H. A. Nobles, president of said Amarillo Street Railway

Company, attested by its corporate seal and the hand of J. C. Paul, its secretary, said instrument being dated July 1, 1910, and acknowledged by said president and secretary as required by the laws of the state of Texas on the 30th day of November, 1910, and is duly recorded in the deed of trust records of Potter county, Texas, in volume 11, at pages 175 to 196, inclusive, to which record reference is here made for a more particular description of said deed of trust and of said bonds, a true copy of which said deed of trust is hereto attached and marked Exhibit "A" and made a part hereof as aforesaid.

Fourth. That the trustees accepted the trust created in said deed of trust and bonds, and thereby were fully authorized and empowered to take and hold in trust the property conveyed to them therein, and to execute the trust reposed in them under and by virtue of the provisions of said instruments, and by reason of the premises said Amarillo Street Railway Company became liable and promised to pay to said trustees, or bearer, the amount of money set forth in said bonds, with interest thereon in the amount and on the dates expressly set forth therein; and said bonds and indebtedness which they evidenced were secured by said deed of trust, so that said trustees and the holders of said bonds thereby acquired a good and valid lien on all the property hereinbefore described to secure the payment of said bonds with interest above stipulated, and to secure the faithful performance of all the obligations set forth in said bonds and deed of trust.

Fifth. That in pursuance of the actions and proceedings hereinabove referred to, said Amarillo Street Railway Company issued said bonds as above described in the aggregate sum of one hundred and twenty-five thousand dollars (\$125,000), each of which said bonds in said sum last named was delivered after execution as aforesaid to said trustees and the said trustees made the indorsement on each of said bonds required in the body thereof as set forth in copy of said bond incorporated in the mortgage hereto annexed, and in all respects complied with the terms and provisions of said bonds

and of said deed of trust for the proper and legal authentication of said bonds so as to make them negotiable and to perfect the rights and powers of said trustees to sell, assign and deliver the same. That said bonds aggregating one hundred and twenty-five thousand dollars (\$125,000) are each and all valid and outstanding obligations of the defendant, Amarillo Street Railway Company, and are entitled to the benefit of the security of said mortgage, and said trustees are still the regularly constituted, qualified and acting trustees for each and all of the holders of said bonds and are entitled at law and in equity to represent said bondholders in all matters arising under the terms, provisions and obligations set forth in said bonds and deed of trust, including the institution and prosecution of this suit. Provided, however, that said deed of trust by express provisions makes it unnecessary for the said Emile K. Boisot to act as trustee in performing any of the acts which said deed of trust authorized him to do except in cases where the First Trust and Savings Bank may be incompetent and unqualified or unwilling to act as such trustee, and plaintiff says that said First Trust and Savings Bank is unwilling to act as such trustee herein, so that it is necessary for plaintiff, Emile K. Boisot, to prosecute this suit alone; that this plaintiff has the right and elects to prosecute the same alone, under the express provisions of said deed of trust, and in accordance with the written request of said First Trust and Savings Bank.

Sixth. That said deed of trust or mortgage contains, among others, the following provision:

"Article No. 2: The company covenants, promises and agrees that it shall and will pay the interest on the said bonds to the several owners or holders thereof, when and as the same may become due and payable according to the tenor and effect of said bonds and coupons."

And said deed of trust also provides, among other things, that in case default shall be made in the payment of any interest accruing upon any one or more of the bonds secured or intended so to be according to the terms thereof, on any

day when the same shall become due and such default shall continue for sixty (60) days, then that said trustees may, and if so requested by the holders of fifty per cent. (50%) in amount of the amount then outstanding, shall declare the principal of all the bonds hereby secured and then outstanding to be due and payable immediately, and upon such declaration the same shall become and be due and payable immediately, anything in this indenture or in said bonds to the contrary notwithstanding.

Seventh. That by reason of the premises it became and was the duty of said Amarillo Street Railway Company to properly and regularly pay the interest on said bonds semi-annually on the 1st day of January and July in each and every year beginning January 1, 1911, according to the terms and provisions of said bonds and deed of trust, to said trustees or to the legal owners and holders of said bonds and interest coupons thereto attached, but that though said interest coupons payable January 1, 1911 to July 1, 1916, have long since matured and become payable, said defendant has wholly failed and refused, though often requested so to do, to pay any installment of interest on said bonds as aforesaid, so this plaintiff having elected to declare all of said bonds due by reason of said default, the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of three thousand dollars (\$3,000); and said deed of trust further provides, among other things, that said trustees may proceed to protect and enforce their rights and the rights of said stockholders under said indenture, by a suit or suits in equity, or by law, whether by the specific performance of any covenant or agreement contained therein or in aid of the execution of any power therein granted, or for any foreclosure therein, or for the enforcement or any other appropriate legal or equitable remedy as the trustees shall deem most effectual to protect and enforce the rights aforesaid.

Eighth. By reason of the premises and because of the default in the payment of said interest as provided for in said bonds and secured by said deed of trust, plaintiff has elected

because of having received instructions from a majority of the holders of the bonds outstanding to declare the whole principal and interest evidenced by said bonds to be due and payable at once; and plaintiff represents and shows to the court that because of such continued and repeated defaults in the payment of said interest a majority of said bondholders have, in accordance with the terms and provisions of said bonds and deed of trust, in writing expressly authorized and instructed plaintiff to declare the whole amount of indebtedness evidenced by said bonds and interest coupons and secured by said deed of trust to be due and payable immediately, and plaintiff has in accordance with said instructions declared and now declares the whole amount of indebtedness evidenced by said bonds in the principal sum of one hundred and twenty-five thousand dollars (\$125,000), together with said interest thereon, to be now due and payable.

Ninth. In addition to the default on the part of said Amarillo Street Railway Company, plaintiff further represents that said defendant has been unable to meet its outstanding indebtedness as it matured since the issuance and delivery of said bonds; that it has constantly and repeatedly failed to make sufficient revenue to pay its operating expenses in any year since said bonds were issued, but has steadily and continuously fallen behind so that the actual expenses necessarily incurred by said company in the operation and maintenance of its street cars and street railroad and other property necessarily incident thereto has been made by the incurring of added indebtedness beyond the indebtedness secured by said bonds, and it does not now appear that there is any prospect of said company earning its operating expenses in the future, to say nothing of a sufficient amount of net earnings to pay the interest on said bonds as the said interest matures from time to time; but in addition thereto plaintiff respectfully shows to the court that the city of Amarillo, Texas, in which said defendant's property is situated and operated, has through its duly constituted authorities, to-wit, its city commission, recently undertaken to pave Polk

street, along and over which one of the lines of defendant is situated, for a distance of about seven blocks, requiring in its ordinance that said defendant shall bear the cost of paving all the street between its rails and for a distance of two feet on the outside of each rail, so that the probable cost of such paving, which is now demanded, will be about the sum of six thousand dollars (\$6,000), according to the best information obtained by plaintiff, and said city of Amarillo is further threatening to increase said burden against said defendant by another levy upon its property for additional paving along said street to a greater depth than was at first provided for, which will, if said proceedings are perfected by said city, increase the burden of said defendant another six thousand dollars (\$6,000), or thereabouts, which indebtedness said city, is threatening to secure by issuing paving certificates against all the property of said defendant, secured by a lien on said property. If the threatened action of said city commission is carried out as contemplated by it, and if said paving liens shall be regularly and legally fixed, they will, so plaintiff is informed and believes, constitute first liens against the property of defendant, which will take precedence over the lien securing said bonds above described, unless by the action of this court or by the institution and prosecution of this suit the fixing of said lien or liens shall be prevented, and by reason of the failure and inability of said defendant to earn enough revenue to pay its operating expenses and fixed charges, and because of the added burden which said city of Amarillo is now seeking to place upon its property, plaintiff is informed and believes and so charges that said Amarillo Street Railway Company is about to discontinue the operation of its cars. That said defendant is wholly insolvent and unable to meet its indebtedness either in the regular course of its business or otherwise, and this without regard to the added burden which said city of Amarillo is threatening to place upon defendant in the way of street paving certificates and liens, so that it is necessary that the property of said defendant should be taken charge of by a receiver appointed

by your honor, whose duty it shall be to preserve and care for said property pending this litigation, and so that said receiver may, if possible by any means, operate said street cars, if the same can be done without loss according to the best judgment of the court and of said receiver, but unless said street car system can be operated without loss, then plaintiff prays that your honor make such orders as may be requisite and necessary, instructing said receiver to care for said property and to manage the same in the way best calculated to preserve the rights of said bondholders and to lessen as much as possible the loss they will sustain by reason of the inadequacy of their security; and in this connection plaintiff respectfully shows that said deed of trust expressly provides among other things that in case of any default on the part of defendant as provided in said deed of trust entitling the trustees to enter into possession of said property, or upon application of the trustees and with the consent of the company, if there be no subsisting default under said deed of trust, that a receiver may be appointed to take possession of and to operate, maintain and manage the whole or any part of said property wheresoever the same may be situated, with all the rights, powers and duties conferred upon the trustees, and that the company shall transfer and deliver to such receiver all such property in its possession wheresoever the same may be situated.

Tenth. Plaintiff alleges that no proceedings at law, or suits in equity, have been begun or commenced by plaintiff or, as plaintiff is informed and believes, by any holder of any of the bonds secured by said mortgage, or of any coupons thereto attached, to enforce the payment of the same so covenanted to be paid by said Amarillo Street Railway Company, under the terms of said mortgage.

The premises considered, plaintiff prays because he is remediless in the premises according to the strict rules of the common law and can only have relief in a court of equity, where matters of this kind are properly cognizable:

1. That said defendant may be required to answer unto all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were herein expressed and it thereunto particularly interrogated, but not under oath, answer under oath being expressly waived.

2. That an account be taken of all the property subject to the lien of said mortgage of July 1, 1910, and that said mortgage may be decreed to be a valid lien upon all and singular the real estate and personal property described in said mortgage, copy of which is hereto annexed and marked Exhibit "A," together with all of the rights under contracts, privileges and franchises thereto in anywise belonging or appertaining.

3. That said Amarillo Street Railway Company, and the present holders of all of said bonds issued or outstanding, be required to surrender the same for cancellation, or that in the event any of said bonds be in the hands of holders who do not surrender same that such holders may be made parties to this suit and abide by the further orders of this court should it be deemed by the court necessary that such holders should be made parties in order to properly protect and enforce their rights and complete the foreclosure and sale of all of the property of said defendant.

4. That it be decreed by this court that the whole of the principal sum of the bonds secured by said mortgage of July 1, 1910, is immediately due and payable and that an account be taken of the bonds now outstanding and secured by said mortgage of July 1, 1910, and of the amount due on said bonds for principal or interest or otherwise, and of the amount due the trustees in the execution of the trust thereby created, and defendant, Amarillo Street Railway Company, and all persons claiming under and through it may be forever barred and foreclosed of any and from any equity of redemption of any and all other rights, statutory or otherwise, or of claims of and in and to said property, franchises and privileges, conveyed to said trustees as described in said mortgage of July 1, 1910, and all other property that may

be declared by this court to be subject to the lien of said mortgage. That all and singular the property, franchises and premises mortgaged and pledged in said deed of trust, and all other property which may be decreed by this court to be subject to the lien of said mortgage may be sold in one parcel and as an entirety under decree of this honorable court, and that out of the proceeds of such sale the costs, expenses and allowances of this suit, including a reasonable attorney's fee for plaintiff's counsel, be paid; that out of the remainder of the money realized from said sale, the money found to be due the holders of the bonds secured by said mortgage be paid, and that in case of the insufficiency of such proceeds to pay in full such attorney's fees, costs and expenses of this suit, and the amount of the principal and interest so due and unpaid on the bonds secured by said mortgage then outstanding, and the amount found to be due plaintiff in the execution of the trusts imposed upon him, a judgment may be rendered in this cause for such deficiency against said defendant, Amarillo Street Railway Company.

5. That for the purpose of preserving the assets of said Amarillo Street Railway Company from further depreciation, and for the purpose of preserving the property and the books, accounts, records and papers of said company pending this suit, that without notice to the defendant a receiver or receivers be appointed, with the usual powers of receivers in like cases, of the plant, property, franchises and premises mortgaged and described in said mortgage of July 1, 1910, and of the tolls, earnings, incomes, rents, issues and profits thereof, and of the books, accounts, records and papers of said Amarillo Street Railway Company, and that such directions may be made with respect to such receivership as may be equitable and proper, and that pending this suit all such orders, writs and process as may be requisite and necessary may be entered or issued by this court restraining and prohibiting all persons, firms and corporations from interfering with, transferring, selling, incumbering or disposing of any of the property of said Amarillo Street Railway Company

under the control of said receiver or receivers, or in any manner interfering with the use, possession or title of said property or any part thereof.

6. That plaintiff may have such other and further relief in the premises as may be just and equitable and as to your honor may seem meet and proper.

FRUEAUFF, ROBINSON & SLOAN,

By ROBERT S. SLOAN,

Attorneys for Plaintiff.

State of Illinois, County of Cook, ss.(2)

Before me, the undersigned, Lillian Narensky, a notary public in and for said county and state, personally appeared Robert S. Sloan, who, being by me duly sworn, deposes and says that he is the duly authorized attorney and agent of the complainant in the above entitled cause; that he has read the foregoing bill of complaint and has knowledge of the facts therein alleged, and that the facts therein alleged are true.

ROBERT S. SLOAN.

Sworn to and subscribed before me this the 14th day of August, A. D. 1916.

LILLIAN NARENSKY,

[Seal.]

Notary Public.

My commission expires March 22, 1917.

(1) The address is not necessary under Rule 25.

(2) Verification by attorney as agent for plaintiff, is here based on his own knowledge. This complies with the requirement of Rule 25.

BILLS NOT ORIGINAL.**No. 482.****Petition for Leave to File Supplemental Bill.(1)**

[Caption, as in an original bill.]

The petition of A. B., the above plaintiff, respectfully shows that on or about the — day of —, your petitioner filed his bill in this honorable court against C. D., for the purpose of *[state general object of original bill]*, and praying *[state the prayer verbatim]*.

And your petitioner further shows that the said C. D., being served with process of subpoena, appeared to the said bill, but has not yet put in his answer thereto. That after the appearance of the said defendant was entered, that is to say, on or about the — day of —, and before any further proceedings were had in the said cause *[state the supplemental matter]*; wherefore your petitioner is advised that it is necessary to bring the said C. H. before this court as a party defendant to this suit.

Your petitioner therefore prays that leave may be granted to him to file a supplemental bill against the said C. H., for the purpose of making him a party defendant to this suit with proper and apt words to charge him as such, and with such prayer for relief as may be proper, and for such other, etc.

(1) See Equity Rule 34.

No. 483.**Order to File Supplemental Bill of Complaint.**

[Caption.]

On reading and filing the petition of Constantine Stephano and Stephano Stephano, co-partners trading as Stephano Brothers, and Stephano Brothers, Incorporated, filed January 20, 1913, and the bill in the nature of a supplemental bill of

Stephano Brothers, Incorporated, verified the same day, and after hearing Henry W. Wise, of counsel, in support of said petition, and no one appearing in opposition thereto,

Now, on motion of Wise & Lichtenstein, solicitors for Constantine Stephano and Stephano Stephano, co-partners trading as Stephano Brothers, and Stephano Brothers, Incorporated, it is

Ordered, that Stephano Brothers, Incorporated, be substituted as complainant in place of Constantine Stephano and Stephano Stephano, in the action now pending in this court, originally brought by Constantine Stephano and Stephano Stephano against Stamatis D. Stamatopoulos, Peter D. Stamatopoulos, Stamatis D. Stamatopoulos and George Papageorges, co-partners trading under the firm name of Stamatopoulos & Co., and it is further

Ordered, that the bill in the nature of a supplemental bill of Stephano Brothers, Incorporated, against Stamatis D. Stamatopoulos, Peter D. Stamatopoulos, Stamatis D. Stamatopoulos and George Papageorges, co-partners trading under the firm name of Stamatopoulos & Co., be filed.

E. HENRY LACOMBE,
United States Circuit Judge.

No. 484.

Supplemental Bill.(1)

[Caption and introduction, as in an original bill.]

That on or about, etc., plaintiff exhibited his original bill of complaint in this honorable court, against C. D., the defendant hereinafter named, as defendant thereto, thereby stating a certain memorandum of agreement, dated the — day of —, —, and made between E. W., therein described, of the one part, and plaintiff of the other part, and signed by the said E. W., whereby the said E. W. agreed to sell to plaintiff a certain lot or piece of land called, etc., therein particularly described, and of which the said E. W. was

seized in fee, for the sum of ——— dollars; and further stating the delivery by the said E. W. of the abstract of his title, and the acceptance of such title by plaintiff; and further stating the death of the said E. W., intestate, and that he left the said J. W., his only son and heir at law; and that letters of administration of the estate and effects of the said E. W. had been granted by the surrogate of the county of ——— to the said J. W.; and further stating applications on the part of plaintiff to the said J. W. to perform the said agreement so entered into by his father as aforesaid, and his refusal to do so; and charging that the said lot or piece of land, called, etc., formed part of a considerable estate called Hesseltine, the whole of which had, before the date of the said contract for sale, been mortgaged by the said E. W. to one J. S. for ——— dollars, which mortgage debt was still due and owing; and charging that the said E. W. would, if living, be bound to redeem the said mortgage, in order to convey the said lot or piece of land to plaintiff free from incumbrances, and that the said J. W. was bound to do so to the extent of his father's assets, which plaintiff charged were amply sufficient for the same; and praying that the said J. W. might be decreed specifically to perform the said agreement so entered into by the said E. W. as aforesaid, and to convey and procure all proper parties to join in conveying the said lot or piece of land comprised in the said agreement to plaintiff, or as he should direct, upon plaintiff's paying to the said J. W. the sum of ——— dollars, which he thereby offered to do, and in all respects to perform the said agreement on his part; and in case the said J. W. should not admit assets of his said father sufficient to enable him to perform the said agreement, then that the usual accounts of the real and personal estate of the said E. W. might be taken; and that plaintiff might have such other or further relief in the premises as the circumstances of his case might require, and to your honor should seem meet.

Plaintiff further shows unto your honor that the said J. W., being duly served with process of subpoena, appeared to plain-

tiff's said bill and put in his answer thereto, whereby he alleged, among other things, that he could not perform the said agreement of the — day of —, without first redeeming the said mortgage so made to the said J. S. as aforesaid, and that the assets of the said J. W. were not sufficient to enable him to do so.

That the said answer has been replied to by plaintiff, and witnesses have been examined on both sides, but the proofs have not yet been closed; as by the said bill and proceedings, now remaining as of record in this honorable court, reference being had thereto, will appear.

Plaintiff further shows, by way of supplement, that plaintiff has lately, and since the examination of witnesses in the said cause, discovered, as the fact is, that the said J. S. now is and always since the date of the said agreement has been ready and willing to concur in conveying the said lot or piece of land to plaintiff, discharged from his said mortgage, upon receiving plaintiff's purchase money in discharge, *pro tanto*, of the said mortgage debt.

And plaintiff charges that such information was first given to him by means of a letter addressed by the said J. S. to Mr. X, plaintiff's solicitor, and dated, etc., part of which was in the words and figures following; that is to say: "Mr. W.'s refusal to carry into effect his agreement with Mr. B. is unaccountable to me, because he knows that I have always been willing and even desirous to confirm the sale, and to release the premises from my mortgage on receiving the — dollars towards my debt. This, in fact, was understood between his father and myself at the time when the sale to Mr. B. was made"; as by such letter, reference being had thereto, will more fully appear.

Plaintiff charges, therefore, that it is unimportant whether the said J. W. has assets of his father sufficient to redeem the mortgage debt so due to the said J. S. as aforesaid, inasmuch as the said J. S. is willing to be partially redeemed, and the purchase-money of plaintiff is sufficient for that purpose.

That the said J. W. ought to be decreed to join with the said J. S. (whose concurrence plaintiff undertakes to procure) in conveying the said lot or piece of land to plaintiff, upon payment by plaintiff of the said sum of ——— dollars to the said J. S., in part discharge of his said mortgage debt.

Therefore plaintiff prays that the said defendant may answer and set forth, in manner aforesaid, whether plaintiff did not, on or about, etc., or at some other and what time, exhibit his original bill of complaint in this honorable court against such person, and of or to such purport or effect as hereinbefore in that behalf stated, or against some other and what person, and of or to some other and what purport or effect, or how otherwise? And whether thereupon such proceedings were not had in the said cause as are hereinbefore in that behalf stated, or how otherwise? And whether plaintiff has not, since the examination of witnesses in the said cause, or at some other and what period, discovered, and whether it is not the fact that the said J. S. now is, and whether or not he always, since the date of the said agreement, has been ready and willing to concur in conveying the said lot or piece of land to plaintiff, discharged from his said mortgage, upon receiving the purchase-money in discharge, *pro tanto*, of the said mortgage debt, or how otherwise? And whether such information was not first given to plaintiff by means of such letter as hereinbefore in that behalf stated, or some other and what letter, or by some other and what means, or how otherwise, and when was such information first given to plaintiff? Whether such letter as is hereinbefore mentioned to bear date, etc., was not addressed by such person to such person, and whether it was not of such date, and partly in such words and figures, or of or to such purport or effect, as hereinbefore in that behalf stated, or addressed by some other and what person or persons, to some other and what person or persons, of some other and what date, and (with respect to the part thereof hereinbefore in that behalf mentioned) in some other and what words and figures, or of or to some other and what purport or effect, or how otherwise? Whether

it is not, and whether not for the reasons hereinbefore in that behalf given, unimportant, for the purposes of these suits, whether the said defendant has assets of his father sufficient to redeem the said mortgage debt, or how otherwise? And whether the said defendant ought not to be decreed to join with the said J. S. in such conveyance as hereinbefore in that behalf stated, or in some other conveyance of the same nature, upon such payment by plaintiff as hereinbefore in that behalf mentioned, or some other and what payment, or how otherwise; and if not, why not.

And that plaintiff may have the same relief against the said J. W. as might have had if the facts hereinbefore stated and charged by way of supplement had been stated in plaintiff's said original bill. And in case the said defendant shall continue to allege that he has not assets of the said E. W. sufficient for the redemption of the mortgage debt so due to the said J. S. as aforesaid, then that he may be decreed to join with the said J. S. in conveying the said lot or piece of land comprised in the said agreement of the — day of —, unto plaintiff and his heirs, or as he shall direct, upon plaintiff's paying to the said J. S. the said purchase-money or sum of — dollars towards the discharge of the said mortgage debt; plaintiff hereby offering to pay such sum, and in all respects to perform the said agreement of the — day of —, on his part, and also undertaking to procure the concurrence of the said J. S. in such conveyance as aforesaid; and that plaintiff may have such further and other relief in the premises as the circumstances of his case may require, and to your honor shall seem meet.

(1) New averments are properly alleged in a supplemental bill, and in it any party may be brought before the court who has been omitted to be introduced at the stage of the cause at which an amendment for that purpose may be made. *Dow v. Jewell*, 45 Am Dec. 371. Thus, where a complainant had no ground for proceeding originally, but subsequently becomes entitled to relief, he should file a new bill. *Caudler v. Pettit*, 19 Am. Dec. 399. And the assignee of complainant must make himself a party by supplemental bill; he can not proceed in the name of the original party. *Mills v. Hoag*, 31 Am. Dec. 271. But

where a complainant has assigned his interest in the subject-matter of the litigation pending the suit, his assignee can not on a supplemental bill be substituted to his rights; he must file an original bill in the nature of a supplemental bill. *Tappan v. Smith*, 5 Biss. 73.

New oral testimony, tending merely to corroborate evidence on the one side, or to contradict evidence on the other, on the points in issue, is not a sufficient foundation for a supplemental bill. No new evidence is a sufficient foundation for a supplemental bill, unless it be of such a nature that it would, if unanswered, require a reversal of the decree. *Jenkins v. Eldridge*, 3 Story 299.

A bill stating previous proceedings of the court, not with a view to their alteration or amendment, but as a portion of the facts out of which the complainant's equity arises, is an original bill, though it is alleged to be a supplemental bill. *Brooks v. Brook*, 38 Am. Dec. 310.

After a case has been argued and has been under advisement, it is proper for the circuit court to deny the motion for leave to file a further bill, making an essential change in the character and objects of the cause, by way of supplement and amendment. *Snead v. McCoull*, 12 How. 407.

Equity Rules 34 and 35 deal with this matter.

No. 485.

Supplemental Bill Against the Trustee of a Bankrupt Defendant.

[Caption and introduction, as in an original bill.]

That plaintiff, A. B., did in or as of ——— term, ———, exhibit his original bill of complaint in this honorable court against C. D., of ———, praying that an account might be taken of the personal estate, effects, etc. And plaintiff further shows that the said defendant, having been served with process to appear, appeared accordingly and put in his answer to the said bill, and plaintiff replied to the said answer, but before any further proceedings were had in the said cause, and on or about the ——— day of ———, the said C. D. has been duly found and declared bankrupt, and E. D., of ———, the defendant hereinafter named, having been since duly chosen trustee of the estate and effects of the said bankrupt, and the title to all the estate and effects late of the said bankrupt, has vested in the said E. D., and therefore plaintiff is advised that he is entitled to the same relief against the said E. D. as he

would have been entitled to against the said C. D. if he had not become bankrupt. To the end therefore, etc.

And that plaintiff may have the full benefit of the said suit and proceedings therein against the said E. D., and may have the same relief against him as plaintiff might or could have had against the said C. D. in case he had not become bankrupt; or that plaintiff may have such further or other relief in the premises as to your honors shall seem meet.

No. 486.

Supplemental Bill to an Original and Amended Bill Filed by a Lessee for the Specific Performance of an Agreement to Grant a Further Lease.

[Caption and introduction, as in an original bill.]

That in or as of — term, —, plaintiff, A. B., exhibited his original bill of complaint in this honorable court against H. B., and which said bill has been amended by order of this honorable court, thereby praying that the said defendant might be decreed specifically to perform his agreement with plaintiff, touching the lease of the farm and premises in the said bill mentioned, and to grant plaintiff a lease thereof for — years, commencing from the expiration of his former lease, at the yearly rent of — dollars, plaintiff being willing and ready to do and perform everything on his part required to be done and performed in pursuance of the said agreement.

And plaintiff further shows that the said defendant appeared and put in his answer to the said original bill. As by the said bill and answer now remaining as of record in the honorable court, reference being thereunto had, will appear.

And plaintiff further shows, by way of supplement, that since the filing of the said original bill the said defendant has caused an action of ejectment to be commenced in the court of —, for the purpose of turning plaintiff out of possession of the said farm and premises, and the said action is still de-

pending in the said court. And plaintiff being advised that the said defendant can not support such action, and that he is entitled to a specific performance of the said agreement as prayed by his said amended bill, he has, by himself and his agents, several times applied to, and requested the said defendant to desist from proceeding in the said action, and he was in hopes that he would have complied with such fair and reasonable requests, as in justice and equity he ought to have done. But the said H. B. refuses to comply with plaintiff's said requests and insists upon proceeding in his said action, and to turn plaintiff out of possession of the said farm and lands, to his manifest wrong and injury in the premises.

Therefore plaintiff prays that the said defendant may be restrained by the injunction of this honorable court from proceeding in the said action, and from commencing any other action or proceeding at law for the purpose of turning plaintiff out of possession of the said farm and lands. [*And for further relief.*]

[*Pray injunction against H. B.*]

No. 487.

Supplemental Bill in a Patent Case.

For form, see under title "Patents."

No. 488.

To Perpetuate Testimony.(1)

[*Caption and introduction.*]

The plaintiff, A. B., of, etc., shows unto your honors that C. D., late of, etc., deceased, before and at the time of making his will hereinafter mentioned, was seized in fee of and in divers freehold estates, which are hereinafter more fully mentioned and described; and the said C. D., being so seized as aforesaid, and being of sound and disposing mind, memory and understanding, duly made and published his last will and

testament in writing, bearing date the — day of —, signed by him, the said C. D., and subscribed and attested according to law; and which said will, with the attestation thereof, is in the words and figures following; that is to say [*set out the will and the attestation verbatim*], as by the said will and the attestation clause thereof, reference being thereto had, will appear.

And the plaintiff further shows unto your honors that the said C. D. departed this life on or about the — day of —, without having revoked or altered his said will, leaving his brother, E. D., of, etc., the defendant hereinafter named, his heir at law; and upon the death of the said testator, the plaintiff, under and by virtue of the said will, entered upon and took possession of all the said freehold estates thereby devised to the plaintiff for life, and the plaintiff is now in possession thereof. And the plaintiff hoped that no disputes would have arisen respecting the devises contained in the said will or the validity thereof. But now so it is, etc., the said E. D. pretends that the said will is void and ineffectual; and although he will not dispute the validity thereof during the lives of the subscribing witnesses thereto, yet he threatens and intends to do so when they are dead, so that the plaintiff may be deprived of their testimony.

And the plaintiff further sheweth that all of the said subscribing witnesses are upwards of seventy years of age and in feeble health [*or, are about to depart from the United States*], and that the plaintiff fears the testimony of the said witnesses may be lost by their death [*or, departure from the United States*] before the cause can be investigated in a court of law.

In consideration whereof, etc.; and that the plaintiff may be at liberty to have the several subscribing witnesses to said will examined, and that the plaintiff, if necessary, may have a commission or commissions for the examination of the said subscribing witnesses to the said will, to the end that their testimony may be preserved and perpetuated; and that the

plaintiff may be at liberty to read and make use of the same on all future occasions, as he shall be advised.

[*Verification*(2)]

(1) Foster's Fed. Prac., 5th ed., sec. 345 and cases cited.

(2) See Story's Eq. Pleading, Sec. 305.

No. 489.

**Receiver's Supplemental(1) and Ancillary Bill to Enjoin Suit
in State Court—Conflict of Jurisdiction.**

[*Caption.*]

Floyd McGown, receiver of the San Antonio Land & Irrigation Company, Limited, plaintiff, brings this supplemental and ancillary bill in the nature of an original bill against Jesse D. Oppenheimer, Abraham Lang and Isaac Lang, defendants, citizens of the state of Texas and residents of Bexar county, Texas, and for cause of action shows:

That by a decree duly entered in the above cause on the 12th day of August, 1914, the San Antonio Land & Irrigation Company, Limited, and all of its properties, real, personal and mixed, were placed in the custody, management and control of your receiver, who has duly qualified, and is now acting as such receiver under the orders of this court; and the title to all of said properties were divested out of the San Antonio Land & Irrigation Company, Limited, and vested in your receiver as an officer of this court; and he was directed to take immediate possession and charge and the management and control under orders of the court of all of said properties and to hold and administer the same as an officer of this court under its orders and direction.

And under the said decree he was empowered to institute and prosecute all such suits by supplemental and ancillary bills herein or in other courts of competent jurisdiction as might be necessary for the protection and preservation of or to reduce to possession the properties, rights and assets of said defendant company, and in accordance with said decree in the

exercise of the power so conferred upon him, your receiver files this supplemental and ancillary bill in the nature of an original bill against the defendants herein and for cause of action respectfully shows:

1. That at the time of the appointment of your receiver, the defendant corporation owned and was in possession of the property hereinafter described, and upon his qualification as receiver said property passed into the possession and control and management of your receiver and this court.

2. That heretofore, to-wit, on the first day of March, 1912, the defendants conveyed to Franz C. Groos, William Aubrey and Leroy W. Baldwin, trustees, all those certain tracts or parcels of land lying and being situated in the state of Texas, county of Frio, and being out of that tract known as the Keystone ranch or Keystone pasture. The tracts hereby conveyed containing in the aggregate at least nine thousand six hundred and sixty-nine and 6/10 (9669.6) acres, and being arranged in three blocks and described as follows: * * *

That said Aubrey, Groos and Baldwin purchased and held said property in trust for the San Antonio Land & Irrigation Company and had no personal interest therein, and that all of the consideration paid in cash for the property was furnished and paid by the said company, and that said property was and is covered by the lien renewing the first mortgage bonds of said company.

3. That the persons for whom said grantees were acting, viz., said irrigation company and the bondholders whose money had been received by said company by the sale of its bonds, paid to the defendants for said property the sum of \$45,044 in cash, and the said trustees as such executed and delivered to the defendants for the balance of the purchase money for said land two vendor's lien notes, dated March 1, 1912, each for the sum of \$50,000, wherein they promised to pay to the defendants on or before eighteen months after date, with interest thereon from date until paid at the rate of six per cent. per annum, the interest to be paid semi-annually, said two notes for \$50,000 each, the payment of which notes

was secured by a vendor's lien upon the above described property, expressly retained in the one conveying the property to the said trustees.

That because of an error in the quantity of land conveyed one of said notes was credited with the sum of \$4,956 on March 1, 1912, leaving a balance due thereon of \$95,044; that the interest upon said note was paid as it matured at the rate of six per cent. per annum up to September 1, 1913, at which date by agreement made between the parties the interest rate was increased to eight per cent. for the period "commencing the first day of September, 1913, and ending the first day of March, 1914, making the entire interest charge on said notes for said period at eight per cent. per annum," and thereafter the interest was paid at the rate of eight per cent. per annum up to March 1, 1914, making the total amount of interest paid upon said note \$12,355.76. That before the next interest payment became due, the defendant company was placed in the hands of your receiver, since which time the earnings of the defendant company through the receivership and under the management of this court have not been sufficient to pay any part of the interest accruing upon said indebtedness, but your receiver represents that the property is of the reasonable value of \$20 an acre, and that the defendant company and your receiver have an equity therein of approximately \$50,000 in addition to the \$45,044 cash paid to the defendants when the land was purchased.

And your receiver represents to the court that he is informed and believes that the parties interested in the defendant corporation will, upon the reorganization of said corporation or the sale of its properties to satisfy its bonded indebtedness, pay off and discharge the balance due to the defendants as purchase money for said land.

4. That the said trustees answered in this cause admitting that they held the legal title in trust and subject to the mortgage being foreclosed by the plaintiff herein, and on the 29th day of January, 1917, a judgment was entered foreclosing the mortgage upon said properties among others, and these de-

defendants hold their lien subject to the exclusive right of the court to control, manage and administer the estate of the San Antonio Land & Irrigation Company, Limited.

5. That on the 16th of April, 1917, the defendants filed in the district court of the seventy-third judicial district of the state of Texas, in Cause No. B-14079, styled upon the docket of said court, Jessie D. Oppenheimer et al. v. Leroy W. Baldwin et al., a suit against Franz C. Groos, William Aubrey, Leroy W. Baldwin, the aforesaid trustees holding the legal title San Antonio Land & Irrigation Company, Limited, Medina Irrigation Company, Medina Valley Irrigation Company, Medina Townsite Company, Pacific Securities Company, Empire Trust Company, plaintiff in this suit and the trustee in the mortgage foreclosed herein, S. J. Brooks, Floyd McGown, receiver, acting under the orders of this court, and Frederick R. Swift, in trespass to try title to recover the title to and the possession of the above described property, or in the alternative to foreclose the vendor's lien held by them for the balance of the purchase money due for said land, and also to recover a large sum as attorney's fees, and defendants must answer therein on or before June 5, 1917, or plaintiffs will enter judgment by default against them unless the writ herein asked be granted.

And said defendants are wrongfully interfering with the possession of this court and its exclusive jurisdiction over said property and are unlawfully seeking to deprive this court from administering upon said property as a part of the estate now being administered by it through your receiver as the property of the San Antonio Land & Irrigation Company, Limited, and the property upon which the Empire Trust Company, trustee, has foreclosed its mortgage for the purpose of satisfying the debts due from the San Antonio Land & Irrigation Company, Limited, to the bondholders secured by said mortgage, and are thus wrongfully interfering with your receiver and this court in the possession and control of said property; and that the suit instituted by them results in a multiplicity of suits, a complication of the title to the property and a con-

flict between the jurisdiction of the state and federal court, and will necessarily involve the expenditure of large sums of money on the part of your receiver to protect and conserve the estate being administered by this court.

6. Wherefore, plaintiff having no sufficient remedy at law for the wrongs done and threatened to be done by said defendants, and because the injuries inflicted by the defendants will be irreparable, to the end that he may obtain the relief which he is entitled to in the premises, prays:

(1) That writs of subpoena be granted to plaintiff, directed to the above-named defendants, residing as above stated, requiring them and each of them to personally appear on a day certain before this court and full, true, direct and perfect answers make to all and singular the premises, but not under oath, which is expressly waived; and further to perform and abide by such other orders, directions or decrees herein as to the court may seem proper.

(2) That upon considering this bill your honor enter an order (pending a hearing upon plaintiff's application for injunction, notice of which has been given) restraining the defendants and each of them from the further prosecution of the above numbered and styled cause in the state court; from further interfering with your receiver in the possession, management and control of the property, and from further interfering with this court in the possession and control of said property; and that upon hearing of his motion, a temporary injunction issue restraining the defendants from further prosecuting said suit in the state court and further interfering with your receiver and this court in the possession and control of said property pending the hearing and determination by this court of the claim or title asserted by said defendants in their answers filed herein, and that at said hearing the court adjudge said defendants respectively guilty of contempt for so unlawfully interfering with the property in its possession and control, and punish them in such manner as in its judgment may be commensurate and proper.

And that the defendants be directed, to the end that the same may be justly adjudicated and determined by this court, to set forth in their several answers what adverse claim or demand they may have, claim or assert to said land.

Your petitioner prays for such other relief, general and special, as may be deemed proper and appropriate by the court in this proceeding, or as may be hereafter from time to time prayed for by your petitioner.

And so he will ever pray.

FLOYD MCGOWN,

Receiver San Antonio Land & Irrigation Co., Ltd.

By DENMAN, FRANKLIN & MCGOWN,

[*Verification.*]

Attorneys.

(1) Equity Rules 34 and 35 recognize supplemental pleading; Rule 34 permits such pleading where material facts were unknown, or have arisen since the original pleading. Rule 35 provides that it shall not be necessary in a supplemental bill to set forth any of the statements in the original suit.

These rules have not been made the subject of judicial discussion, and Rule 34 alone has been referred to, in *Marconi Co. v. Kilbourne Co.*, 235 Fed. 719, where a supplemental answer was permitted under conditions clearly indicated by the rule, namely, the subsequent filing of other suits in other jurisdictions against the same defendant, to harass him.

If the plaintiff's original bill is sufficient to entitle him to one kind of relief, and facts subsequently occur to entitle him to other and more extensive relief, he may have such relief by setting out the new matter in the form of a supplemental bill, although the nature of the action would thereby be changed. *General Inv. Co. v. Ry. Co.*, 250 Fed. 160, 176.

No. 490.

(1) Ancillary Bill by Defendant in Pending Suit at Law for Money, to Determine Conflicting Claims, Plaintiff Admitting Possession in Itself.

[*Caption.*]

Your plaintiff, the Sherman National Bank of New York, a citizen of the state of New York, and a resident of the county of New York in said state, brings this its bill of complaint against the defendants above named by its solicitor, Rutger Bleecker Miller, and thereupon complains and alleges as follows:

1. On information and belief, this is a suit of a civil nature, wherein the matter and amount in dispute, exclusive of interest and costs, exceeds the sum of or value of three thousand dollars (\$3,000), and relates to a fund of eleven thousand nine hundred and thirty-eight and 30/100 dollars (\$11,938.-30), which is the subject-matter of an action at law now pending in this court, wherein plaintiff is the defendant and the Shubert Theatrical Company, a New Jersey corporation, one of the defendants above named, is the plaintiff. Said fund plaintiff admits is in its possession and plaintiff desires the directions of this honorable court as to the disposition thereof, and therefore brings this ancillary bill in equity, as a court of law is unable to make a complete determination of the claims relating thereto.

2. Plaintiff as a corporation duly organized and existing under and by virtue of the laws of the United States, constituting it a corporation under the national banking act, and has its principal place of business in the borough of Manhattan in the county of New York in the city of New York and the state of New York.

3. The summons and complaint in said action, brought by said Shubert Theatrical Company (the New Jersey corporation), was served upon plaintiff on the 2d day of August, 1915, and thereafter plaintiff appeared in said action by its attorney (the solicitor for the complainant herein) and served its answer to said complaint on the 20th day of August, 1915. Thereafter and on the 7th day of September, 1915, said Shubert Theatrical Company (the New Jersey corporation) served therein an amended complaint, a copy of which is attached hereto designated as "Exhibit A," and hereby referred to and made a part hereof as though herein set forth at length. Thereafter and on the 27th day of September, 1915, plaintiff served its answer to said amended complaint upon said Shubert Theatrical Company (the New Jersey corporation), a copy of which said answer is attached hereto designated as "Exhibit B," and hereby referred to and made a part hereof as though herein set forth at length.

4. On information and belief, in the month of March, 1912, Theodore A. Liebler and George C. Tyler were co-partners doing business under the firm name of Liebler & Company; prior to the 12th day of March, 1912, the said Theodore A. Liebler and George C. Tyler as such co-partners had borrowed from plaintiff various sums of money, which said loans so made by plaintiff to said firm were evidenced by several promissory notes executed by said firm, and duly delivered by said firm to plaintiff as follows:

A note for \$10,000, executed on or about the 1st day of December, 1911;

A note for \$10,000, executed on or about the 2d day of February, 1912, and

A note for \$5,000, executed on or about the 11th day of March, 1912; which said notes duly evidenced loans aggregating \$25,000, theretofore made by plaintiff to said firm.

5. On information and belief, the defendant, the Welden National Bank of St. Albans, is, and at all the times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the United States, incorporated under the national banking act, and conducting the business of banking in the city of St. Albans in the state of Vermont.

6. On information and belief, prior to the 12th day of May, 1912, said Welden National Bank of St. Albans had loaned to said Theodore A. Liebler and George C. Tyler, as such co-partners of the firm of Liebler & Company, various sums of money aggregating the sum of \$15,000, which said loans were on said date evidenced by three several notes, each in the sum of \$5,000, one dated December 11, 1911, one dated January 26, 1912, and one dated February 9, 1912.

7. On information and belief, the defendant, Shubert Theatrical Company (the New York corporation), is and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the state of New York, and engaged in the business of conducting and exhibiting theatrical productions.

8. On information and belief, the defendant, Shubert Theatrical Company (the New Jersey corporation), is and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the state of New Jersey, and engaged in the business of conducting and exhibiting theatrical productions.

9. On information and belief, said Lee Shubert and said Jacob J. Shubert are and were at all times herein mentioned stockholders in and directors and officers of, and the principal owners of, and in control of both said corporations called "Shubert Theatrical Company"—the New York corporation and the New Jersey corporation, said Lee Shubert being president of both of said corporations.

10. On information and belief, on or about the 17th day of October, 1910, said Theodore A. Liebler and George C. Tyler, as co-partners constituting the firm of said Liebler & Company, entered into an agreement with said Lee Shubert acting on behalf of said Shubert Theatrical Company (the New York corporation), whereby said Shubert Theatrical Company (the New York corporation) undertook and agreed, in consideration of services to be rendered by said Liebler & Company in connection with the production of a certain play called "The Blue Bird," and other good and valuable consideration, to pay over from time to time to said Liebler & Company one-half of the profits of said production during its presentation in places other than the New Theatre in New York City for so long a period as said production proved to be profitable.

11. On information and belief, thereafter said Shubert Theatrical Company (the New York corporation) engaged in the presentation of said production called "The Blue Bird" for a period of several years thereafter, during which period the presentation of said production proved and continued to be a profitable venture, and by virtue thereof said partnership of Liebler & Company became entitled under said agreement to a share of the profits accruing by reason of said presentation.

12. On information and belief, during the month of November, 1911, said Lee Shubert and said Jacob J. Shubert,

acting in their own names, opened a deposit account with plaintiff, wherein from time to time thereafter up to and including the month of December, 1914, there were deposited sums of money, which said deposit account was, as agreed upon between said Lee Shubert and said Jacob J. Shubert and plaintiff, designated on the books of plaintiff as "The Blue Bird Company Special" account, and checks on said account were, pursuant to said agreement, authorized to be drawn in said name when duly signed by either said Lee Shubert or said Jacob J. Shubert, and from time to time thereafter checks so signed were drawn by said Lee Shubert and said Jacob J. Shubert, and honored by plaintiff, and duly paid out of the funds theretofore deposited to the credit of said account. At no time prior to the commencement of said action at law against plaintiff by said Shubert Theatrical Company (the New Jersey corporation) was plaintiff ever informed that said corporation had any interest in said "The Blue Bird Company Special Account."

13. On information and belief, at the time of the opening of said account by said Lee Shubert and said Jacob J. Shubert with plaintiff, said Lee Shubert and said Jacob J. Shubert informed plaintiff that the moneys deposited and to be deposited in said account represented profits accruing from the presentation of said production, "The Blue Bird," under the terms of an arrangement which the said Shuberts had theretofore made with said Liebler & Company.

14. On information and belief, on or about the 15th day of March, 1912, said Theodore A. Liebler and said George C. Tyler, as such co-partners of said firm of Liebler & Company, duly executed and delivered to plaintiff and to the defendant, the Welden National Bank of St. Albans, Vermont, a certain assignment whereby said Liebler & Company, for value received, assigned, transferred and set over unto plaintiff and said defendant, the Welden National Bank of St. Albans, as security for the repayment to said two banks of the amounts respectively due from said firm on their notes then outstanding and in the hands of said two banks, or such renewals of

said notes as might thereafter be made, fifty per cent. of the interest of said partnership (that is to say, twenty-five per cent. or one-fourth of the whole) in any and all moneys accruing and to accrue thereafter to said Liebler & Company as profits by reason of the presentation of said production, "The Blue Bird," for the theatrical seasons of 1912-1913 and 1913-1914, to the extent of the amount due or thereafter to become due on said notes or any renewals thereof. A copy of said assignment, marked "Exhibit C," is attached hereto, and is hereby made a part hereof as though herein set forth at length.

15. The notes of said Liebler & Company which, at the time said assignment was executed, were outstanding in the hands of plaintiff were, from time to time thereafter renewed, in whole or in part, until on the 4th day of December, 1914, there was due and owing from said Liebler & Company to plaintiff on two notes of said Liebler & Company, which constituted in part renewals of said notes evidencing the indebtedness outstanding on said 12th day of March, 1911, the sum of eight thousand two hundred and fifty dollars (\$8,250), which said amount of indebtedness was evidenced by two certain notes, one executed by said firm of Liebler & Company and dated on or about the 13th day of November, 1914, in the sum of \$4,250, and one dated on or about the 19th day of November, 1914, in the sum of \$4,000; on information and belief, neither of said notes has ever been paid, nor has any payment been received by plaintiff on account thereof except the sum of ninety-eight and 5/100 dollars (\$98.05).

16. On information and belief, said indebtedness of said Liebler & Company to said defendant, the Welden National Bank of St. Albans, continued to remain outstanding at all times up to and including the 4th day of December, 1914, and at that time was evidenced by a note which constituted a renewal of said three notes hereinabove described, made to said Welden National Bank of St. Albans by said Liebler & Company prior to the 12th day of March, 1912, which said note was in the sum of \$15,000, and dated the 13th day of August,

1914, said note being executed in the name of a certain corporation called "The Liebler Company," but bearing the endorsement of said Theodore A. Liebler and George C. Tyler. No part of said note has been paid except the sum of four hundred ninety-six and 55/100 dollars (\$496.55).

17. On information and belief, on or about the 4th day of December, 1914, an involuntary petition in bankruptcy was filed with this honorable court against said Theodore A. Liebler and said George C. Tyler individually, and as co-partners doing business under the firm name of Liebler & Company, and thereafter and on or about the 31st day of March, 1915, said Theodore A. Liebler and George C. Tyler, individually and as co-partners doing business under the firm name of Liebler & Company, were duly adjudicated bankrupt.

18. On information and belief, that at some time after said 31st day of March, 1915, the defendant, Irving M. Dittenhoefer, was duly chosen as trustee in bankruptcy of said Theodore A. Liebler and George C. Tyler, individually and as said co-partners under the firm name of Liebler & Company, and duly qualified as such and is still acting as such trustee.

19. On information and belief, said Theodore A. Liebler and said George C. Tyler, as co-partners under the firm name of Liebler & Company, prior to said 4th day of December, 1914, made demand upon said Lee Shubert, said Jacob J. Shubert, and said Shubert Theatrical Company (the New York corporation) for an accounting the profits accruing by reason of the presentation of said production, "The Blue Bird"; subsequently to said 4th day of December, 1914, and prior to the commencement of this action, plaintiff made demand for such an accounting upon said Lee Shubert, said Jacob J. Shubert and said Shubert Theatrical Company (the New York corporation); but neither said Lee Shubert, Jacob J. Shubert, nor said Shubert Theatrical Company (the New York corporation), nor any other person, has ever made any accounting of the profits so accruing from the presentation of said production.

20. On and prior to the 7th day of December, 1914, plaintiff had received certain funds to the credit of said account, designated as "The Blue Bird Company Special," of which sum so deposited there remained undrawn on said 7th day of December, 1914, by checks duly executed as hereinbefore set forth, the sum of eleven thousand seven hundred and ninety-nine and 18/100 dollars (\$11,799.18).

21. On or about the 7th day of December, 1914, plaintiff was served by said Irving M. Dittenhoefer, who was then the receiver in bankruptcy of said Theodore A. Liebler and George C. Tyler, as such co-partners, with a certified copy of the order of this honorable court appointing him, which said order restrained all persons from paying out any funds in which said firm of Liebler & Company had or claimed any interest, until the further order of said court, and said order has at all times since been and now is in full force and effect, as plaintiff is informed and verily believes; and a demand was made by said Dittenhoefer that plaintiff should retain and hold any all sums then in its possession belonging to said firm of Liebler & Company, or in which said firm had or claimed any interest. Thereafter and on or about the 7th day of December, 1914, plaintiff duly notified said Irving M. Dittenhoefer of its claim against the interest of said Theodore A. Liebler and George C. Tyler as such co-partners in any and all moneys accruing to said firm as profits by reason of the presentation of said production of "The Blue Bird," for said theatrical seasons of 1912-1913 and 1913-1914, by virtue of said assignment. (Exhibit C.)

22. Thereafter, by reason of said order and of said notice so received from said receiver in bankruptcy, which said notice was subsequently confirmed by said Irving M. Dittenhoefer as such trustee in bankruptcy as aforesaid, and by reason of plaintiff's own claim under said assignment hereinabove set forth (Exhibit C), and by reason of the failure of said Lee Shubert, said Jacob J. Shubert, and said Shubert Theatrical Company (the New York corporation) to render any account, plaintiff has declined and still declines to pay

over either to said Lee Shubert or to said Jacob J. Shubert, or to any other person, the sums remaining due in said account, designated as "The Blue Bird Company Special," and by reason of such refusal the aforesaid action hereinabove described has been brought by said Shubert Theatrical Company (the New Jersey corporation) as an action at law in this court against plaintiff to compel the payment by plaintiff to said New Jersey corporation of the balance remaining on hand on said 5th day of December, 1914, to the credit of said account, with interest thereon up to the date of the commencement of said action.

23. On information and belief, said firm of Liebler & Company had a claim to said funds, or some portion thereof, in said account designated as "The Blue Bird Company Special," on said 4th day of December, 1914, which said interest, or claim, thereafter duly vested, as hereinbefore set forth, in said defendant, Irving M. Dittenhoefer, as said trustee in bankruptcy, and said claim should properly be administered in this court. Said Lee Shubert and said Jacob J. Shubert both, under the original agreement hereinabove set forth, had the right to draw checks on said account, and plaintiff has not received any release or any other authorization from said Lee Shubert or said Jacob J. Shubert authorizing the payment of the balance remaining in said account to said Shubert Theatrical Company (the New Jersey corporation), or to any other person. Said Shubert Theatrical Company (the New York corporation) has, or claims, some rights to the proceeds accruing from the presentation of the said production called "The Blue Bird," which proceeds, as plaintiff was informed and verily believes, formed some part, if not all, of the funds so deposited in said account designated "The Blue Bird Company Special." Said Welden National Bank claims some title and interest in and to said fund, and plaintiff also claims some title and interest in and to said fund by virtue of said assignment, hereinabove set forth (Exhibit C). Plaintiff desires to submit to the determination of this honorable court the question of said conflicting and inconsistent

claims in order that said fund in its hands may be distributed in accordance with the principles of equity and good conscience, and hereby submits to the directions of this honorable court, as to its duty in the premises.

24. Plaintiff is informed and verily believes that in said action at law so brought by said Shubert Theatrical Company (the New Jersey corporation) in this court, it is not possible for plaintiff adequately to set up its rights against said funds, inasmuch as the only parties to said proceeding are plaintiff and said The Shubert Theatrical Company (the New Jersey corporation). Plaintiff has fully and fairly stated all of the facts and circumstances relating to the several transactions hereinabove set forth to its solicitor aforesaid, and after such full and complete statement of such facts to said solicitor, plaintiff has been advised by him that its interest can not properly be protected, nor can the interests of the other persons having, or claiming to have, an interest in and to said fund, or some part thereof, without the intervention of a court of equity, and that in order to avoid unnecessary expense arising out of the multiplicity of suits both at law and in equity, it is necessary that this honorable court shall take jurisdiction of this suit and bring all said parties before it for the purpose of properly and adequately protecting and adjudicating the several rights of the various parties hereinabove mentioned to said fund.

Inasmuch as plaintiff has no adequate relief at law, but can have relief only in equity, plaintiff files this bill of complaint in this honorable court as a suit ancillary to said action at law now pending, and prays for equitable relief as follows:

(1) That this honorable court will enjoin all parties hereto from instituting, prosecuting or continuing the prosecution of any actions, suits or proceedings at law or in equity or under any statute against plaintiff on account of said fund hereinabove described, and particularly to stay said action at law brought by said Shubert Theatrical Company (the New Jersey corporation) against plaintiff.

(2) That all persons claiming any interest in said fund be permitted to intervene in and become parties to this suit if and as permitted and authorized so to do by this honorable court.

(3) That this honorable court will direct that said Shubert Theatrical Company (the New York corporation) make and render an accounting, showing the state of account between it and the said Theodore A. Liebler and George C. Tyler, as such co-partners doing business as Liebler & Company, with regard to the profits obtained by reason of the presentation of said production, "The Blue Bird," hereinabove referred to, to the end that this honorable court may determine the rights and title of the various parties in and to said fund, designated as "The Blue Bird Company Special" account.

(4) That such order shall be made by this honorable court as to the services of this bill of complaint and of any order that may be made in this suit, as may be deemed sufficient and proper to this honorable court. That plaintiff may have such other and further relief in the premises as the nature and circumstances of the case may require and as to this honorable court may seem just and proper.

THE SHERMAN NATIONAL BANK OF NEW YORK,

By CHARLES G. COLYER, Vice-Pres.

RUTGER BLEECKER MILLER, Solicitor for Plaintiff.

[*Verification.*]

(1) For ancillary bill of complaint. See Street Federal Equity Practice vol. 2, Secs. 1228 to 1255. Simkins, A Federal Equity Suit, pp. 482 et seq; Foster's Fed. Prac., 5th ed., pp. 142-151.

No. 491.

Of Revivor(1) (Before Decree) by the Administrator of the Plaintiff in the Original Suit.

[*Caption and introduction, as in an original bill.*]

That J. A., late of —, but now deceased, on or about —, exhibited his original bill of complaint in this honorable court against G. T., of —, as the defendant thereto,

thereby stating, etc., praying, etc. [*Here state the prayer.*] And the plaintiff further shows unto your honors that the said defendant, having been duly served with process for that purpose, appeared and put in his answer to said bill, as in and by the said original bill, etc. And the plaintiff further shows that some proceedings have been had before C. G., one of the masters of this court, to whom this cause stands referred, but no general report has yet been made in the said cause; and that the said J. A. lately and on or about the —— day of ——, departed this life, having first made and published his last will and testament in writing, bearing date the —— day of ——, and a codicil thereto bearing date the —— day of ——, and thereby appointed M. C. and W. W. executors thereof.

And the plaintiff further shows that the said M. C. and W. W. have renounced probate of the said will and codicil of the said J. A., deceased, and decline to act in the trusts thereof, and that the plaintiff has obtained letters of administration with the will annexed of the goods, chattels, rights and credits of the said J. A., deceased, to be granted to him by and out of the proper court, and has thereby become and now is his legal personal representative.

And the plaintiff further shows that the said suit and proceedings have become abated by the death of the said J. A., and the plaintiff is, as he is advised, entitled to have the said suit and proceedings revived against the said defendant, G. T., and the said accounts by the aforesaid order of reference directed, prosecuted and carried on, and to have the said cause put in the same plight and condition as the same was in previously to the abatement thereof by the death of said J. A.

To the end, therefore, that the said defendant may answer the premises; and that the said suit and proceedings which so became abated as aforesaid may stand revived, and be in the same state and condition as the same were in at the time of the death of the said J. A., or that the defendant may show good cause to the contrary. May it please your honors

to grant unto the plaintiff a writ of subpoena to revive [and answer], issuing out of and under the seal of this honorable court, to be directed to the said G. T., thereby commanding him at a certain day and under a certain penalty, to be therein limited, personally to be and appear before your honors, in this honorable court, then and there [to answer the premises and] to show cause, if he can, why the said suit and the proceedings therein had, should not stand and be revived against him, and be in the same plight and condition as the same were in at the time of the abatement thereof; and further, to stand to and to abide such order and decree in the premises as to your honors shall seem meet. And the plaintiff shall ever pray, etc.

[Where it is only necessary to pray a subpoena to revive, the words within brackets should be omitted.]

(1) For requisites for a bill of revivor, consult Beach's Modern Eq. Prac., Sec. 486; Foster's Fed. Prac., 5th ed., Sec. 223. Upon a bill of revivor the sole questions before the court are, the competency of the parties and the correctness of the bill to revive. General objections to the original bill, grounded on its not showing a proper case for the interference of a court of equity, should be reserved until after the revivor of the bill. *Bettes v. Dana*, 2 Sumn. 383. Compare *Oliver v. Decatur*, 4 Cranch C. C. 592; *Kennedy v. Bank of Georgia*, 8 How. 586. See Equity Rules 35 and 45.

No. 492.

Bill of Revivor in Patent Suit.

To the Honorable the Judge of the District Court of the United States for the — District of —.

The A. B. Company, a corporation organized under and pursuant to the laws of the state of —, and having its principal place of business in the city of —, in said state, and being an inhabitant of the city of — in said state, brings this its bill of revivor against L. H., E. H. and J. B., as executors of the last will and testament of S. H., deceased, and J. R. and H. H., surviving trustees, and N. R., residuary legatee under the last will and testament of D. H., deceased.

Said L. H., J. B., E. H., J. R., H. H. and N. R., being citizens of the state of — and residents of the city of —, in said state; and thereupon plaintiff complains and says that on or about the — day of —, it filed a bill in equity in this court against S. H. and D. H., alleging infringement by them of certain letters patent of the United States, which were numbered No. 130,961 and dated August 27, 1872, of which it was at that time, and is now, the owner.

That thereafter the said S. H. and D. H., having been duly served with the writ of subpoena, appeared by counsel and filed their answer to said bill of complaint, to which answer a replication was filed on the part of plaintiff.

That thereafter plaintiff proceeded to take proofs in support of its said bill of complaint; and thereafter said defendants proceeded to take proofs in support of their said answer and in defense of said actions.

That thereafter said suit was brought to final hearing before the Honorable G. R.; that said judge filed his decision on the — day of —, adjudging invalidity of the fifth claim of the patent—being the claim in suit—and dismissing the said bill of complaint, as by reference to said decision reported in —; will more fully and at large appear.

That thereafter plaintiff appealed to the United States circuit court of appeals for the — circuit from the decision of the district court for the — district of —; that the said appeal was argued before said court, and a decision made by said court, the opinion being written by Hon. H. R., adjudging the validity of said patent and that defendants had infringed the same and remanded the cause to this court, ordering a decree against said defendants restraining them from further infringement, and also granting a reference to a master to ascertain and report damages and profit caused by said infringement—all of which will more fully and at large appear by reference to said decision reported in —.

That thereafter the accounting in this cause was commenced and voluminous proofs taken.

That thereafter the master filed his report awarding nominal damages to plaintiff against said defendants.

That thereafter, on exceptions duly filed to said report, argument was had before his honor, G. R., on motion to confirm said master's report; that said judge filed an opinion on the — day of —, recommitting said accounting to the master for further action in accordance with said opinion. That no order has yet been entered on Judge R.'s decision.

That during the pendency of said accounting the defendant, D. H., died, leaving a last will and testament, which, on the — day of —, was admitted to probate in the probate court of — county, —, and letters executory thereupon were on said — day of —, duly issued out of said probate court unto S. H., J. R. and H. H.

That said will, after directing the payment of an inconsiderable percentage of the testator's estate as specified legacies to certain persons therein named, directed the said executors to hold in trust for the benefit of the testator's grandchildren, for a period of time that has not yet expired, the sum of one million and five hundred thousand dollars, and to pay the rest and residue of testator's estate unto his daughter, N. R.

That on the — day of —, said executors filed their final accounting in the office of the clerk of the probate court of the county of —, whereby it appeared that they had paid said specific legacies, and that after paying to N. R. aforesaid a sum amounting to between three and four millions of dollars, they still retained in trust for the benefit of said grandchildren of said testator the sum of one million and five hundred thousand dollars.

That said account was approved by said surrogate and an order was entered in the said probate court on the — day of —, discharging and releasing said S. H., J. R. and H. H. from the duties as executors under said last will and testament, but directing them to continue to hold said trust fund of one million and five hundred thousand dollars as directed in said last will and testament.

That said S. H., J. R. and H. H. thenceforth continued to so act as trustees under said will as to said trust fund, and said J. R. and H. H. are now so acting.

That the aforesaid S. H. died upon the — day of —, leaving a last will and testament, which on the — day of —, was admitted to probate in the probate court of — county, —, and letters executory thereupon were on said — day of —, duly issued out of said probate court unto L. H., E. H. and J. B., and still remain in full force and virtue.

Wherefore plaintiff prays that the said cause may be revived by the decree of this honorable court, and that it may proceed to a decree in its favor in accordance with the prayer of the original bill of complaint herein.

Plaintiff further prays that a writ of subpoena may issue in due form of law, directed to the aforesaid defendants, L. H., E. H. and J. B., as executrices and executor of the estate of S. H., deceased, and J. R. and H. H., as trustees, and N. R., as residuary legatee under the will of D. H., deceased, and requiring them to appear and show cause, if any they have, why this cause should not be revived; and if no cause shall be shown by said defendants why said suit should not be revived, that a decree be entered reviving said suit in favor of plaintiff.

A. B. COMPANY,
By G. S., President.

X. & X.,

Solicitors and of Counsel for Complainant.

State of —, County of —, ss.

G. S., being duly sworn, says that he resides in the city and county of —, and is the president of the A. B. Company, the complainant herein; that he has read the foregoing bill of revivor and knows the contents thereof, and that the same is true to his own knowledge.

Deponent further says that the reason why this verification

is not made by the complaint is that it is a corporation; that deponent is an officer of the same, to-wit, president.

G. S.

Sworn to before me this — day of —, A. D. —.

[Seal]

A. G.,

Notary Public, — County, —.

No. 493.

**Of Revivor and Supplement Where Both Parties in
Original Bill are Deceased.(1)**

[Caption and introduction, as in an original bill.]

That A. B. and S. B. are the executors named and appointed in and by the last will and testament of H. W., late of, etc., deceased, that on or about the — day of July, —, the said H. W. exhibited his bill of complaint in this honorable court against T. W., late of, etc., deceased, thereby praying that the said T. W. might be decreed by this honorable court to come to a just and fair account with the said H. W. for the principal and interest then due and owing to him on the mortgage security in the said bill mentioned, and might pay the same to the said H. W. by a short day to be appointed by this honorable court, together with his costs; and in default thereof, that the said T. W. might stand absolutely barred and foreclosed of and from all manner of benefit and advantage of redemption or claim in or to the residue of the respective mortgaged premises in the said bill mentioned, and every part thereof. And the said defendant, T. W., having been duly served with process, appeared thereto, and departed this life on or about the — day of —, without having put in his answer to the said bill.

And plaintiffs show unto your honors by way of supplement to the said original bill, that the said defendant, T. W., departed this life intestate, leaving his wife, E. W., a defendant hereinafter named, *enceinte* with a child since born and named A. W., and the said A. W. is now the sole heiress at

law of the said T. W., deceased, and as such entitled to the equity of redemption of the said mortgaged premises.

That on or about the — day of —, —, letters of administration of the goods, chattels and effects of the said T. W., deceased, were duly granted by the court of — unto his widow, the said E. W., who is thereby become his sole personal representative.

That the said complainant, H. W., departed this life on or about the — day of —, having previously duly made and published his last will and testament in writing, bearing date on or about the — day of —, and thereof appointed plaintiffs joint executors; and on or about the — day of —, plaintiffs duly proved the said will in the said court of —, and took upon themselves the burden of the execution thereof.

That upon the death of the said H. W. the said mortgaged premises became and the same are now vested absolutely at law in plaintiffs as his legal personal representatives, subject nevertheless to redemption, on payment of the principal money and interest thereby secured.

That the said suit having become abated by the death of the said T. W., plaintiffs are advised that they, as the personal representatives of the said H. W., deceased, are entitled to have the same revived and restored as against the said E. W. and A. W. to the same plight and condition in which it was at the time of the death of the said T. W., and to have the same relief against the said E. W. and A. W.

Wherefore plaintiffs pray that the said E. W. and A. W. may answer the said original bill, and that they may be decreed by this honorable court to come to a just and fair account with plaintiffs for the principal and interest now due and owing to them on the said mortgage securities, and may pay the same to plaintiffs by a short day to be appointed by this honorable court, together with their costs, and in default thereof that the said defendants may stand and may be absolutely barred and foreclosed of and from all manner of benefit or advantage of redemption or claim in or to the said mort-

gaged premises, and every part thereof; and that the said suit may stand and be revived against the said defendants, and be in the same plight and condition in which the same was at the time of the decease of the said defendant, T. W., or that the said E. W. and A. W., respectively, may show good cause to the contrary.

(1) See Equity Rules 34 and 35.

No. 494.

Of Review to Examine and Reverse a Decree.(1)

[Caption and introduction.]

That in ——— term, in the year ———, W. S., of, etc. (the defendant hereinafter named), exhibited his bill of complaint in this honorable court against plaintiff, and thereby set forth that, etc. [*here insert the original bill*]. And plaintiff being served with a subpoena for that purpose, appeared and put in his answer to the said bill, to the effect following: [*Here recite the substance of the answer.*] And the said W. S. replied to the said answer, and issue having been joined, and witnesses examined, and publication duly passed, the said cause was set down to be heard, and was before your honors, the ——— day of ——— last, when a decree was pronounced, which was afterwards passed and entered, in which it was set forth and recited, that it was at the hearing, on plaintiff's behalf, insisted that plaintiff had, by his answer, set forth that, etc. [*here insert the recital and decree*]. And the said decree has since, and on or about ———, been duly signed and enrolled, and which said decree plaintiff humbly insists in erroneous, and ought to be reviewed, reversed and set aside for many apparent errors and imperfections, inasmuch as it appears by plaintiff's answer, set forth in the body of the said decree [*here insert the apparent errors*]. And no proof being made thereof, no decree ought to have been made or grounded thereon; but the said bill ought to have been dismissed for the reasons aforesaid. In consideration whereof, and inas-

much as such errors and imperfections appear in the body of the said decree, and there is no proof on which to ground any decree to set aside the said rent-charge, plaintiff hopes that the said decree will be reversed and set aside, and no further proceedings had thereon. Wherefore plaintiff prays that for the reasons and under the circumstances aforesaid, the said decree may be reviewed, reversed and set aside, and no further proceedings taken thereon, and plaintiff permitted to remain in the undisturbed possession and enjoyment of the said rent-charge.

(1) To authorize a bill of review, under either the English or American practice, error must appear on the face of the decree or pleadings, and the evidence at large can not be gone into. *Seguin v. Maverick*, 76 Am. Dec. 117. And leave of the court must be obtained before filing the bill. *Simpson v. Watts*, 62 Am. Dec. 392. Consult *Beach's Modern Eq. Prac.*, Secs. 852 et seq.

No. 495.

Petition to Appellate Court for Leave to File Bill of Review for New Matter in Court Below.

The United States Circuit Court of Appeals for the ———
Circuit.

| | |
|--|---|
| H. K., Extr., <i>et al.</i> , Petitioner | } Petition for leave to file Bill of Review. |
| <i>vs.</i> | |
| R. R., Respondent. | |

To the Honorable the Judges of said court:

H. K., executrix of the estate of F. A., deceased, and a citizen and resident of the state of ———, on behalf of herself and of T. B., H. K. and L. R., as heirs at law of F. A., deceased, all citizens and residents of the state of ———, and on behalf of all the other heirs at law of the said F. A., deceased, such other heirs being numerous and their names and places of residence being unknown, brings this her petition against R. A., a citizen and resident of the state of ———, and respectfully shows unto the court:

First. That petitioner has prepared and presents herewith a bill of review against defendant, which petitioner asks may be treated as a part of this petition, and reference made thereto for its contents, and which petitioner is advised she has a right to file in the district court of the United States for the — district of —, upon leave first had and obtained from this honorable court.

Second. That petitioner has set out in said bill of review, exhibited herewith, the substance of the decree which petitioner seeks to have reviewed in said district court, and the pleadings upon which said decree was based, and petitioner now asks for leave to file said bill of review.

Third. Petitioner avers that on or about the — day of —, A. D. —, defendant herein, R. A., filed in the district court of the United States for the — district of —, a bill against petitioner and others seeking a rescission of a certain sale of 14,804 acres of mountain lands lying in Franklin county, —, which had, on or about —, been sold and conveyed to said R. A. by F. A., of whose estate petitioner was at the time of filing of said bill, and is now, the executrix, under the last will and testament of said Anderson; that after prolonged litigation, a correct and succinct history of which and of the various steps taken in the cause is set out in the bill of review exhibited herewith, a decree was finally pronounced in favor of said R. A. against petitioner, in which it was decreed by the court that said sale should be rescinded, and the lands described therein should be reconveyed by complainant R. A. to petitioner, and that he should have and recover of petitioner the sum of \$—. To secure the payment of said recovery, a lien was declared on the lands which the said Alger was ordered in said decree to reconvey to petitioner upon the payment of said judgment. In default of payment of said decree within thirty days, a sale of said lands was ordered in satisfaction of the lien aforesaid. Said decree was entered by said district court on the — day of —. Said decree was not paid, petitioner having no means with which to pay same, the lands were sold and bought in by

complainant R. A. for the sum of \$——, and the decree credited with the amount of his bid. Subsequently complainant R. A. proceeded against the estate of F. A., deceased, for the satisfaction of the balance of his said decree, and said estate, both personal and real, was exhausted in the effort to satisfy said decree, and there still remains a balance due thereon amounting to more than \$——.

Fourth. Petitioner avers that since the rendition of said decree of the —— day of ——, she has discovered that prior thereto, and during the pendency of the suit brought by complainant R. A. as aforesaid, said R. A. has sold and conveyed the mountain lands above referred to, to A. T., of ——, for a consideration amounting, petitioner is informed and believes, to the sum of \$——, and could not therefore at the time of the rendition of the decree aforesaid directing him to reconvey said lands to petitioner, have carried out the orders of the court, even if petitioner had paid off said decree. Petitioner avers that said lands were sold as aforesaid to the said A. T. some time in the month of ——, and a deed executed therefor by the said R. A. to the said A. T., but that said deed, on the advice of D. M., one of the attorneys of the said R. A., was not recorded, the said D. M. giving as his reason to said A. T. for advising against the recording of the deed at that time, that the placing of such a deed on record might complicate efforts the said R. A. was then making to clear up the title to the land.

Petitioner is informed, and so charges, that said original deed was thereupon destroyed and that after the entry of the decree of ——, aforesaid, and after the sale thereunder of said mountain lands and the bidding in of the same by said R. A., a new deed was executed and placed on record in the register's office of Franklin county, ——, on ——, conveying said lands to said A. T. The consideration recited in said deed is "one dollar and other valuable considerations then paid." Petitioner is informed, and so charges, that no new consideration passed from said A. T. to said R. A. at the time of the execution of said last-named deed, but that

the consideration therefor was the original consideration which passed from the said A. T. to said R. A. at or about the time of the execution of the first deed, in —, and that the said R. A. has been ever since the time of the sale of said lands by him to said A. T., in —, in the full enjoyment of said consideration.

Petitioner is advised and charges that the act of said R. A. in making a sale of said mountain lands to the said A. T. in 1897, was a positive ratification of the purchase by R. A. from F. A., which purchase the said R. A. was then seeking to rescind, and that said act was such a parting with the title to said lands as then and there estopped the said R. A. from pursuing further his suit to rescind.

Petitioner is advised, and so charges, that if the facts with reference to said sale by R. A. to A. T. had been known to the court at any time before the final decree in the suit for rescission the court would have rendered no judgment against her, but would have denied defendant R. A. the relief sought, and have dismissed his said bill. Petitioner avers that said facts with reference to said sale by defendant R. A. were purposely concealed from the court and from petitioner, and a fraud thereby worked upon petitioner in that she was prevented from taking advantage of her legal right to have had suit for rescission dismissed because of said act of defendant R. A. in making a sale of said lands during the pendency of said suit.

Petitioner avers that the defendant R. A., by the sale of said lands to said A. T. as aforesaid, and the concealment of the fact from petitioner, has thereby through the instrumentality of the court, done the petitioner and the estate she represents a great wrong, in that after having sold said lands to the said A. T. and received the consideration therefor in —, he has again been paid for these same lands to the extent the entire estate of F. A. has proved sufficiently to satisfy the decree of the — day of —.

Fifth. Petitioner avers that prior to the rendition of the aforesaid decree of —, she knew nothing of the sale of said

mountain lands by defendant R. A. to A. T., in February, —, as aforesaid, and had no means of knowing of said sale, the deed to said lands having been withheld from the record.

Petitioner avers that the first information she obtained with reference to said sale, was furnished her by the attorneys, Messrs. X. & X., of —, who had represented petitioner in the R. A. suit for rescission in the district court aforesaid from the time of the filing therein of the petition to rehear until the decision of the case by that court. Said attorneys wrote to said petitioner in August, —, to come to — for a conference with them. This she did, and then and there learned for the first time of said sale. Said attorneys stated to her that they had been informed of the said sale by A. T. himself, and also by his partner or business manager, Mr. A. F., of —, both of whom had recently been in — negotiating a sale of said lands which the said A. T. was then contemplating making to parties in —.

Petitioner thereupon employed said attorneys to investigate the matter fully, and instructed them if they were satisfied as to the fact of such sale by defendant R. A. to the said A. T., to take such steps as they might deem best for the protection of petitioner and of the estate she represents.

Petitioner has no knowledge or information concerning said sale, except such as has come to her through the attorneys aforesaid, and as they have at first had what has been communicated by them to her, petitioner hereto attaches as a part of this petition, marked respectively, Exhibits "A" and "B," the affidavits of two of said attorneys, namely, R. H. and D. L.

Sixth. Premises considered, petitioner prays:

1. That respondent R. A. be served with notice of the filing of this petition and with printed copy thereof and required to show cause on a day named why the relief sought therein should not be granted. If respondent R. A. can not be found within the jurisdiction of this honorable court, then that notice be served upon Messrs. R. Y. and G. Y., or either

of them, they being attorneys at law of —, and respondent's counsel in the suit wherein the decree aforesaid was obtained and still are attorneys of said R. H. in matters pertaining to said litigation.

2. That at the hearing an order be made by the court granting petitioner leave to file against respondent R. A. in the district court of the United States for the — district of —, a bill of review in behalf of petitioner and the other complainants named therein, a copy of which bill is attached to and made a part of this petition, seeking to have reviewed, reversed and set aside a certain decree for \$— pronounced by the court against petitioner on the — day of —, in the case of R. A. v. H. K., executrix, etc., *et al.*, No. —.
X. & X.,

[*Verification.*]

Solicitors for Petitioner.

When it is desired to file a bill of review in a district court after an appeal has been taken to an appellate court and a decree rendered in such appellate court the application for leave to file must be made to the appellate court. *Southard v. Russell*, 16 How. 546; *Kingsbury v. Buckner*, 134 U. S. 650-671; *Bank v. Taylor*, 4 C. C. A. 55, 53 Fed. 854; *Shakers v. Watson*, 77 Fed. 513.

The application is made by petition for leave and copy of the proposed bill of review is regularly exhibited to the court with the petition. The case is docketed and copy of petition, bill of review and evidence printed and served on the adverse party or his counsel of record in the original suit. An order is taken fixing time for reply proofs, filing briefs and hearing. The case then comes on for argument and decree granting leave or dismissing the petition. *Foster's Fed. Prac.*, 5th ed., Secs. 447 to 450.

No. 496.

Petition for Leave to File a Bill of Review for New Matter.

[*Caption.*]

The petition of A. B., the above plaintiff, respectfully shows that on or about the — day of —, your petitioner filed his bill in this honorable court against C. D. for the purpose of [*state general object of original bill*], and praying [*state the prayer verbatim*].

And your petitioner further shows that the said C. D., being served with process of subpoena, appeared to the said bill and put in his answer thereto, to which a replication was filed. And the said cause was thereupon examined on both sides, and the proofs closed. And that the said cause was brought to a hearing before your honor on — whereupon a decree was made to the following effect [*set forth substance of decree*].

And your petitioner further shows that such decree has since been duly enrolled.

And your petitioner further shows that since the time of pronouncing the said decree your petitioner hath discovered new matter of consequence in the said cause; particularly that E. F., deceased, the uncle of the said C. D., of whom the said C. D. claims to be sole heir at law, left two sons and a daughter him surviving, named respectively, etc., who were his heirs at law; and that such sons and daughter are still alive and residing at, etc.; which new matter your petitioner did not know, and could not by reasonable diligence have known, so as to make use thereof in the said cause, previous to and at the time of pronouncing the said decree.

Your petitioner therefore prays that he may be at liberty to file a bill of review for the purpose of having the said decree reviewed, reversed and set aside, and that no further proceedings may be had under the same.

And your petitioner, etc.

No. 497.

Bill of Review for New Matter.(1)

[*Caption and introduction.*]

That on or about —, C. D., of, etc., the defendant herein, exhibited his bill of complaint in this honorable court against the plaintiff, and thereby set forth that, etc. [*Here insert the original bill.*] And the plaintiff being duly served with process for that purpose, appeared and put in his answer to the said

bill, to the effect following: [*Here state the substance of the answer.*] And the said C. D. replied to the said answer, and issue having been joined and witnesses examined, and the proofs closed [*or, the said C. D. joined issue on the answer, and*], the said cause was set down to be heard, and was heard before your honors, on the — day of —, when a decree was pronounced, whereby your honors decreed that the plaintiff's title to the premises was valid and effectual, after which the said C. D. petitioned your honors for a rehearing, and the said cause was accordingly reheard, and a decree of reversal made by your honors on the ground of the said C. D. being the heir at law of the said E. F., deceased, and which said decree of reversal was afterwards duly signed and enrolled, as by the said decree and other proceedings now remaining filed as of record in this honorable court, reference being thereto had, will appear.

And the plaintiff shows unto your honors, by leave of this honorable court first had and obtained for that purpose, by way of supplement, that since the signing of the said decree of reversal the plaintiff has discovered, as the fact is, that the said E. F. was, in his lifetime, seized in his demesne as of fee, of and in the hereditaments and premises in question in the said cause, and that the said E. F., while so seized, and when of sound mind, duly made and published his last will and testament in writing, bearing date on the — day of —, which was executed by him, and attested according to law, and thereby gave and devised unto the said J. W., his heirs and assigns forever, to and for his and their own absolute use and benefit, the said hereditaments and premises in question in the said cause (to which the plaintiff claims to be entitled as purchaser thereof from the said J. W.).

And the plaintiff further shows unto your honors that since the said decree of reversal was so made, signed, and enrolled, as aforesaid, and on or about —, the said C. D. departed this life intestate, leaving G. H., of, etc. the defendant herein his heir at law, who, as such, claims to be entitled to the said hereditaments and premises, in exclusion of the plaintiff. And

the plaintiff is advised and insists that, under the aforesaid circumstances, the said last-mentioned decree, in consequence of the discovery of such new matter as aforesaid, ought to be reviewed and reversed; and that the first decree declaring the plaintiff entitled to the said hereditaments and premises should stand, and be established and confirmed; and for effectuating the same, the said several proceedings, which became abated by the death of the said C. D., should stand and be revived against the said G. H., as his heir at law.

To the end, therefore, etc. And that the said suit may be revived against the said G. H., or that he may show good cause to the contrary, and that the said last decree, and all proceedings thereon, may be reviewed and reversed, and that the said first-mentioned decree may stand and be established and confirmed, and be added to, by the said will being declared a good and effectual devise of such hereditaments and premises as aforesaid; and that the said G. H. may be decreed to put the plaintiff into possession of the said hereditaments and premises, and in the same situation, in every respect, as far as circumstances will now permit, as the plaintiff would have been in case such last decree had never been pronounced and executed; and that the plaintiff may have such other, etc.

[Pray subpoena to revive and answer against the said G. H.]

No. 498.

To Suspend a Decree.

[Caption and introduction.]

That plaintiff in the year — borrowed the sum of — dollars from C. D., of —, the defendant herein, and in order to secure to the said C. D. the repayment thereof, with legal interest, plaintiff, by an indenture bearing date the — day of —, in the year —, granted, bargained, sold and demised unto the said C. D., his executors, administrators and assigns, all that [*describe premises*] for the term of one thou-

sand years, subject to redemption on payment by plaintiff of the said sum of —— dollars and interest, as therein mentioned, as by the said indenture, reference being thereunto had, will more fully appear.

That the said C. D., on or about ——, exhibited his bill of complaint in this honorable court against plaintiff, for payment of what was then due to him for principal and interest on the said security, by a short day to be appointed for that purpose, or that plaintiff might be absolutely debarred and foreclosed from all right and equity of redemption in the said mortgaged premises; and plaintiff having put in his answer thereto, and submitted to pay what should appear to be due from him, the said cause came on to be heard before your honors on or about ——, when it was referred to R. V., one of the masters of this honorable court, to take an account of what was so due from plaintiff to the said C. D., as aforesaid, and plaintiff was ordered to pay the same on the —— day of ——, or to be absolutely foreclosed of all right and equity of redemption in the said mortgaged premises; as by the said proceedings now remaining as of record in this honorable court, reference being thereunto had, will appear.

That plaintiff was duly prepared to pay what should be reported to be due from him; but before the said master made his report, plaintiff was sent in great haste, by the commands of his majesty, ambassador to the court of Paris, on special and weighty affairs of state, which admitted of no delay; and plaintiff was therefore unable to make any provision for the payment of what should be so found due from him as aforesaid.

That the said master, during plaintiff's absence, made his report, whereby he found that the sum of —— dollars was due to the said C. D. for principal and interest from plaintiff, but no further proceedings have since been taken in the said cause. And plaintiff being ready and willing to pay the said sum of —— dollars to the said C. D., and all subsequent interest thereon, is advised, that on payment thereof, he is entitled under the circumstances aforesaid to have so much of the said decree as relates to the foreclosure of plaintiff's right and equity of re-

demption in the said mortgaged premises suspended, and on payment thereof, to have a reconveyance of the said mortgaged premises from the said C. D. for the remainder of the term so granted to him as aforesaid. Wherefore plaintiff prays that the subsequent interest on the said sum of — dollars, so reported to be due from plaintiff as aforesaid to the present time, may be computed by the direction of this honorable court, and that on payment of the said sum of — dollars, and such interest as aforesaid, the said decree of foreclosure may be suspended, and the said C. D. directed, at the expense of plaintiff, to reconvey the said mortgaged premises to him, or as he shall appoint, freed and absolutely discharged from the said mortgage. [*And for general relief.*]

No. 499.

To Set Aside a Decree Obtained by Fraud.(1)

[Caption and introduction.]

That T. B., of, etc., deceased, the plaintiff's late father, during his life, and on or about the — day of —, was seized in his demesne, as of fee, of and in the real estate hereinafter particularly described; and by indenture of that date, made between the said T. B. of the one part, and C. D. of, etc., the defendant herein, of the other part, the said T. B., in consideration of — dollars, bargained, sold, and conveyed unto the said C. D., his heirs and assigns, all, etc. [*describe the mortgage premises*], subject to redemption on payment of the said principal money and lawful interest at the time therein mentioned, and long since past; as by the said indenture, reference being thereto had, will more fully appear.

And the plaintiff further shows that the said T. B. departed this life on or about —, leaving the plaintiff his heir at law, and only child, then an infant under twenty-one years of age, that is to say, of the age of seven years or thereabouts, him surviving.

And the plaintiff further shows that during the plaintiff's minority, on or about —, the said C. D. filed his bill of complaint in this honorable court against the plaintiff for a foreclosure of the plaintiff's right and equity of redemption in the said mortgaged premises; but the plaintiff was not represented in such bill to be then an infant; and the said C. D. caused and procured one L. M., since deceased, who acted in the management of the affairs of the plaintiff's said father, to put in an answer in the name of the plaintiff, and without ever acquainting the plaintiff, or any of his friends or relations therewith; in which said answer a much greater sum was stated to be due from the plaintiff, on the said mortgage security, to the said C. D., than in fact was really owing to him, and for which it was untruly stated that the said mortgaged premises were an insufficient security; and in consequence of such answer being put in, the said C. D. afterwards, in conjunction with the said L. M., on or about —, obtained an absolute decree of foreclosure against the plaintiff, which the plaintiff has only lately discovered, and of which the plaintiff had no notice, and in which said decree no day is given to the plaintiff, who was an infant when the same was pronounced, to show cause against it when he came of age; as by the said proceedings now remaining as of record in this honorable court, reference thereto being had, will more fully appear.

And the plaintiff further shows that the plaintiff, on the — day of — last, attained the age of twenty-one years, and shortly afterwards, having discovered that such transactions had taken place during his minority as aforesaid, by himself and his agents, represented the same to the said C. D., and requested him to deliver up possession of the said mortgaged premises to the plaintiff, on being paid the principal money and interest, if any, actually and fairly due thereon, which the plaintiff offered, and has at all times been ready to pay, and which would have been paid by the personal representatives of the said T. B. out of his personal assets, during the plaintiff's minority, had any application

been made for that purpose. And the plaintiff hoped that the said C. D. would not have insisted on the said decree of foreclosure, so fraudulently obtained as aforesaid, but would have permitted the plaintiff to redeem the said mortgaged premises, as he ought to have done. But now so it is, etc., the said C. D., etc., pretends that the said decree of foreclosure was fairly and properly obtained, and that a day was therein given to the plaintiff, when of age, to show cause against the same, and that the plaintiff has neglected to do so, and that the plaintiff is neither entitled to redeem, nor to travel into the said accounts; whereas the plaintiff charges the contrary thereof to be true, and that the plaintiff only attained the age of twenty-one years on the said — day of —, and that he has since discovered the several matters aforesaid, by searching in the proper offices of this honorable court; and the plaintiff expressly charges that, under the circumstances aforesaid, the said decree, so fraudulently obtained, as heretofore mentioned, ought to be set aside, and the plaintiff ought not to be precluded thereby, or in any other manner, from redeeming the said mortgaged premises, of which the said C. D. has possessed himself, by such means as aforesaid. All which actings, etc. In consideration whereof, etc. To the end, etc.; and that the said decree of foreclosure may, for the reasons and under the circumstances aforesaid, be set aside by this honorable court, and declared to be fraudulent and void; and that an account may be taken of what, if anything, is now due to the said C. D. for principal and interest on the said mortgage; and that an account may also be taken of the rents and profits of the said mortgaged premises, which have, or without his willful default might have been, received by or on behalf of the said C. D., and if the same shall appear to have been more than the principal and interest due on the said mortgage, then that the residue thereof may be paid over to the plaintiff, and that the plaintiff may be at liberty to redeem the said mortgaged premises, on payment of the principal and interest, if any, remaining due on the said security; and

that the said C. D. may be decreed, on being paid such principal money and interest, to deliver up possession of the said mortgaged premises, free from all encumbrances, to the plaintiff, or as he shall appoint, and to deliver up all title deeds and writings relating thereto. [*General relief.*]

(1) See Beach's Modern Eq. Prac., Sec. 884, and cases cited.

No. 500

Cross-Bill (General Form).(1)

(1) Equity Rule 30 seems to abolish the crossbill as originally known to equity practice, and Equity Rule 31 provides for service of a counterclaim on any of the defendants affected thereby. See generally the discussion in Hopkins, New Federal Equity Rules, 2d ed., pp. 189 to 193; Foster's Federal Practice, 5th ed., pp. 694, 695.

SUBPOENAS.**No. 501.****Subpoena in Chancery (Under Former Rules).**

The United States of America,
 — District of —, ss.

The President of the United States of America to the Marshal
 of the — district of —, Greeting:

You are hereby commanded to summon C. D., citizen of
 and resident in the state of —, if he be found in your dis-
 trict, to be and appear in the district court of the United
 States for the — district of — aforesaid, at —, on the
 first Monday in — next, to answer a certain bill in chan-
 cery, filed and exhibited in said court, against C. D., by A. B.,
 citizen of and resident in the state of —. Hereof you are
 not to fail, under the penalty of the law thence ensuing.
 And have you then and there this writ.

[*Add teste.*]

Memorandum. (1)

The said defendant is required to enter his appearance in
 this suit in the clerk's office of said court on or before the
 first Monday of —, 1894, otherwise the said bill may be
 taken *pro confesso*. B. R., Clerk.

(1) See 12th Rule in Equity which differs from the former Rule 12
 in requiring defendant to file his answer or other defense. See the
 next following form.

No. 502.**(1) Subpoena and Return (Under Present Rules).**

United States of America, }
 Eastern District of Wisconsin. } ss.

The President of the United States of America—To The City
 of Milwaukee, Joseph P. Carney, as Treasurer of said
 City, and John H. Donahue, Greeting:

You are hereby commanded, that you appear before the

district court of the United States of America, for the eastern district of Wisconsin, in our court of chancery, in and for the district aforesaid, at Milwaukee, to answer to a bill of complaint, exhibited against you in our said court, by Edwin H. Abbot, Jr.

And to do further, and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

This process of subpoena is returnable in the clerk's office twenty days from the date hereof and is directed to the marshal of this district, who is hereby commanded to serve the same upon the said the city of Milwaukee, Joseph P. Carney, as treasurer of said city and John H. Donahue, if to be found in his district, and due return thereof make.

Witness the Honorable Ferdinand A. Geiger, Judge of the district court of the United States for the eastern district of Wisconsin, at the city of Milwaukee, in said district, this 12th day of February, in the year of our Lord one thousand nine hundred and fourteen and of our Independence the one hundred and 38th.

[Signed] F. C. WESTFAHL, JR.,
Clerk.

FRANK M. HOYT,
Milwaukee, Wis.
Solicitors.

And it is ordered by our said court that the said the city of Milwaukee, Joseph P. Carney, as treasurer of said city and John H. Donahue, the defendants aforesaid, do file their answer or other defense in this suit in the clerk's office, on or before the twentieth day after service of this subpoena exclusive of the day of service; otherwise the bill filed may be taken as confessed.

Served on the within named city of Milwaukee by delivering to G. A. Bading, mayor and Peter Leuch, clerk of said city personally a copy of this subpoena, this 12th day of February, A. D. 1914.

Served on the within named Joseph P. Carney as treasurer of the city of Milwaukee and on John H. Donahue by leaving a copy of this subpoena with each of them personally this 12th day of February, A. D. 1914.

H. A. WEIL,
Marshal.

By J. H. VEBBER,
Deputy.

(1) Present Equity Rule 12 requires the defendant to file his answer or other defense in the clerk's office on or before the twentieth day after service. The clerk as a matter of course shall issue the process of subpoena upon the application of the plaintiff.

Prayer for process is not necessary in the bill, and no order of the court is required. *Pittsburg Water, etc., Co. v. Beler Water, etc., Co.*, 222 Fed. 950, 952; R. S. U. S. Secs. 911 and 912.

For alias subpoenas see Equity Rule 14, and for the manner of serving subpoenas see Equity Rule 13.

No. 503.

Subpoena (Another Form) with Memorandum Thereon Noting Answer Day, and Return.

United States of America,
District of Minnesota,
Third Division—ss.

The President of the United States of America, to the Golden Rule, Incorporated, Greeting:

You are hereby commanded to appear before our district court of the United States of America for the district of Minnesota, third division, at St. Paul in said district, within twenty days after the service of this subpoena upon you, exclusive of the day of such service, to answer the bill of complaint of The B. V. D. Company this day filed in the clerk's office of said court, in said St. Paul then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

For the marshal of the United States for the district of Minnesota to execute.

Witness the Honorable Wilbur F. Booth, Judge of the district court of the United States of America for the district of Minnesota, and the seal of said court hereunto affixed. Issued at St. Paul in said district this 7th day of July, A. D. 1915.

[Seal of said court.]

CHARLES L. SPENCER,
Clerk.

Memorandum.

The within named defendant is notified that it is required to file its answer or other defense in the clerk's office of said court, at St. Paul aforesaid, on or before the 20th day after the service of this subpoena, excluding the day thereof; otherwise the bill of complaint may be taken *pro confesso*.

CHARLES L. SPENCER,
Clerk.

No. 503a.

Return on Service of Writ.(1)

United States of America,
District of Minnesota—ss.

I hereby certify and return that I served the annexed subpoena on the therein-named The Golden Rule, Incorporated, by handing to and leaving a true and correct copy thereof with S. W. Dittenhofer, vice-president of above named incorporation, personally at St. Paul, in said district on the 7th day of July, A. D. 1915.

WM. H. GRIMSHAW,
U. S. Marshal.
By S. J. PICHA,
Deputy.

(1) Equity Rule 13.

No. 504.**Return of Subpoena by Marshal.(1)**

United States of America,

— District of —, ss.

Received this writ at —, at — o'clock a. m., on the — day of —, and served the same by handing a true copy thereof, with the endorsements thereon, to the said C. D. personally [*or say, I left a like copy thereof, with the endorsement thereon, with an adult person who is a member (or, resident) of the family of C. D., at the usual place of residence of said C. D.*] [*In like manner state service on either defendants or witnesses, if any have been served.*]

And the other persons named in said writ are "not found" in said district this — day of —, 19—. The distance from the court to the place of service most remote therefrom is — miles; and the extra travel necessary to serve the other persons named herein is — miles; and my actual and necessary expenses in serving this writ are, by dates and items, as follows:

I paid to —, for —, \$—

" " —, " —, —

" " —, " —, —

Total expenses \$—

H. C.,

U. S. Marshal — District of —.

Per S. H.,

Deputy.

(1) This form of return may be used on any subpoena whether it be served upon a defendant or upon a witness to testify.

The manner of serving a subpoena is prescribed by Equity Rule 13. This rule must be strictly followed or the service will be defective and will be set aside. See *Romaine v. Union Ins. Co.*, 28 Fed. 6356 and cases there collated.

As to service upon an infant see *O'Hara v. McConnell*, 93 U. S. 150; *Woolridge v. McKenna*, 8 Fed. 670.

As to service upon corporation see *Shaw v. Mining Co.*, 145 U. S. 444; *Galveston Ry. Co. v. Gonzales*, 151 U. S. 496; *So. Pac. Co. v. Denton*, 146 U. S. 202.

As to a corporation created in two states see *Williamson v. Krohn*, 66 Fed. 662.

As to service by leaving a copy at the usual place of abode see *Phoenix Ins. Co. v. Wulf*, 1 Fed. 775; *Kibbe v. Benson*, 17 Wall. 624; *Hialop v. Hoppock*, No. 6988, Fed. Cas., 5 Ben. 447.

As to form of and amending return see Equity Rule 15. *Phoenix Ins. Co. v. Wulf*, 1 Fed. 775; *Dwight v. Merritt*, 4 Fed. 614; *U. S. v. Rose*, 14 Fed. 681; No. 3508 Fed. Cas., *Cushing v. Laird*; *R. S. U. S.*, Secs. 948 and 954; *Semmes v. U. S.*, 91 U. S. 21, 23 L. Ed. 193; *Bryan v. Ker*, 222 U. S. 107, 56 L. Ed. 114; *Richards v. Ladd*, No. 11804 Fed. Cas.

No. 505.

Service by Publication.

For form of affidavit, motions, order of publication, etc., see Nos. — to —. The form is the same in equity or bankruptcy as at law.

No. 506.

Subpoena to Testify in District Court.

The United States of America,

— District of —, ss.

The President of the United States of America to the Marshal
of the — District of —, Greeting:

We command you to summon G. S., of —, county of —, district and state aforesaid, if he be found in your bailiwick, to be and appear before the judge of the district court of the United States for the — district of —, aforesaid, at —, on the — day of —, at 10 o'clock a. m., to give evidence on behalf of the plaintiff [*or*, defendant] in a suit pending in said court, wherein A. B., plaintiff, and C. D., defendant.

Hereof fail not; and of this writ make legal service and due return.

Witness, the Hon. W. T., judge of said court, this — day of —, in the — year of the independence of the United States of America.

Attest:

B. R.,

Clerk of the District Court of the United States,
— District of —.

No. 507.**Subpoena Duces Tecum to Testify in Court.**

The United States of America,

—— District of ——,

—— Division, ss.

The President of the United States of America to G. B. and
S. R., Greeting:

We command and strictly enjoin you, and each of you, that laying aside all manner of business and excuses whatsoever, you and each of you be and appear in your proper person before the judge of the district court of the United States for the —— district of ——, at ——, on the —— day of —— next, at 10 o'clock a. m., and also that you bring with you and produce at the time and place aforesaid [*here state what books or papers the witness is required to bring with him*], then and there to testify, what you and each of you may know, in a certain suit pending in said court, wherein A. B. is plaintiff and C. D. is defendant; and this you do under the penalty of the law.

[*Add teste according to the court issuing the writ.*]

No. 508.**Subpoena Duces Tecum to Testify before a Master or Examiner.**

The United States of America,

—— District of ——,

—— Division, ss.

The President of the United States of America to G. B., S. R.
and L. M., Greeting:

We command and strictly enjoin you, and each of you, that laying aside all manner of business and excuses whatsoever, you and each of you be and appear in your proper person before E. M., master in chancery [*or, an examiner appointed by*
—— Division.

the district court of the United States for the —— district of ——, *or, as may be*] at [*here give place of examination, as his office, No. 12 Main street, in the city of ——*], on the —— day of —— next, at 10 o'clock a. m., and also that you bring with you and produce at the time and place aforesaid [*here state what books or papers the witness is required to bring with him*], then and there to testify, what you and each of you may know, in a certain action pending in the district court of the United States for the —— district of ——, wherein A. B. is plaintiff and C. D. is defendant; and this you do under the penalty of the law.

[*Add teste according to the court issuing the writ.*]

(1) DEMURRERS.**No. 509.**

(1) Demurrers are abolished by Equity Rule 29.

PLEAS.(1)**No. 510.**

(1) Pleas are abolished by Equity Rule 29.

ANSWERS.**No. 511.****The Commencement.****[Caption.]**

The answer of C. D., the defendant [*or*, one of the defendants], [*or*, the joint and several answers of C. D. and P. D., the defendants (*or*, two of the defendants)], to the bill of complaint of A. B. and S. B., plaintiffs.

No. 512.**Same, where there is Only One Defendant to an Original Bill.****[Caption.]**

The answer of C. D., defendant, to the bill of complaint of A. B., plaintiff.

No. 513.**Same, by an Infant.****[Caption.]**

The answer of C. D., an infant under the age of twenty-one years, by L. M., his guardian, defendant [*or*, one of the defendants], to the bill of complaint of A. B., plaintiff.

No. 514.**Same, by Husband and Wife.***[Caption.]*

The joint answer of C. D. and E., his wife, defendants, to the bill of complaint of A. B., the plaintiff.

No. 515.**Another Form by Husband and Wife.***[Caption.]*

The joint answer of C. D. and E., his wife, the [*or*, two of the] above-named defendants, to the bill, etc., [*or, if they were married since she was made a defendant, say:*] The joint answer of C. D. and E., his wife, lately and in the bill called C. S., spinster [*or*, widow], to the bill, etc.

In answer to the said bill, we, C. D. and E., his wife, say as follows:

No. 516.**Same, where the Bill Misstates the Names of Defendants.***[Caption.]*

The answer of E. D., one of the above-named defendants, and the wife of [the defendant] C. D., to the bill, etc.

In answer to the said bill, I, E. D., answering separately from my husband, in pursuance of an order of this honorable court, dated the — day of —, 1894, authorizing me so to do, say, as follows:

No. 517.**Same, by a Lunatic or Idiot, etc.***[Caption.]*

The joint answer of C. D., a lunatic [*or*, idiot, *or*, imbecile person], by T. P., his guardian *ad litem*, and T. P., committee of the said C. D., defendants, to the bill of complaint of A. B., the plaintiff.

No. 518.

Same, by Wife Separately under an Order.

[Caption.]

The joint and several answers of C. D., in the bill called R. D., and of C. E., in the bill called D. E., defendants, to the bill of complaint of A. B., plaintiff.

No. 519.

Verification of Answer.(1)

State of ———,

County of ———, ss.

C. D. makes solemn oath and says: I am the above-named defendant. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

C. D.

Sworn to before me this ——— day of ———.

[Seal.]

J. N.,

Notary Public, ——— County.

(1) Present Equity Rules contain no requirement as to verification; Rule 36 states the officers before whom a verification may be made where the rules or a statute require. It should also be noted that the rules do not now make a requirement or any provision for waiver in the bill of oath to the answer. The omission in the new rules of these matters which were specifically provided for by the old ones should be construed to mean that they are not longer required. *Pittsburg Water, etc., Co. v. Beler Water, etc., Co.*, 222 Fed. 950, 952.

COMMON FORMS USED IN FRAMING ANSWERS.(1)**No. 520.****Accounts—Reference to Book Containing them.**

The dealings and transactions in respect of the said trade are entered in a large book, or ledger, kept on the premises at —, and the items in respect thereof are contained in one hundred and sixty-four pages, with double columns, of the said book; and to set out such items in detail would occasion very great expense; but we are willing, if the court shall think proper so to direct, that the plaintiff or his solicitor should inspect the said book, and take extracts therefrom, at all reasonable times of the day.

(1) See Equity Rule 30.

No. 521.**Accounts Refused, as Being Useless Before Decree.**

And we say and submit that it would only occasion great and useless expense were we in this our answer to set forth any further or fuller account of the rents and profits aforesaid; and that the same ought to be taken, if at all, by and under the directions and decree of this honorable court.

No. 522.**Admission for Purposes of the Suit.(1)**

We have no personal knowledge of the fact, but, for the purposes of the suit, we admit that, etc.

Or,

And this defendant further answering, says he has been informed and believes it to be true that, etc. *Or,* this defendant admits that, etc.

(1) The averments of a bill in equity may be considered as established whenever the statements in the answer can, by fair interpretation, be construed into an admission of or acquiescence in them. *Surget v. Byers, Hempst.* 715.

Plaintiff is entitled to a full answer as to every material allegation of his bill. *Price v. Tyson*, 22 Am. Dec. 279. If the answer is silent as to the fact charged to be, or which may fairly be presumed to be, within the knowledge of defendant, such fact will be deemed to be admitted. *Moore v. Lockett*, 4 Am. Dec. 683; Equity Rule 30 provides that averments other than of value or amount of damage shall be deemed confessed if not denied, with some exceptions noted.

No admissions in an answer to a bill in chancery can, under any circumstances, lay a foundation for relief under any specific head of equity unless the ground be substantially set forth in the bill. *Jackson v. Ashton*, 11 Peters 229.

If the answer of the defendant admits a fact, but insists on a matter by way of avoidance, the complainant need not prove the fact admitted, but the defendant must prove the matter in avoidance. *Clark v. White*, 12 Peters, 178; affirming, 5 Cranch C. C. 102.

A denial in an answer in equity that defendant "delivered" an alleged deed goes for nothing if the answer admits facts and circumstances which do in law constitute delivery. *Adams v. Adams*, 21 Wall. 185.

An evasive answer with admitted facts may entitle complainant to the relief prayed for. *Allen v. Elder*, 2 Am. St. Rep. 63.

In reference to the answer generally see Equity Rule 30.

No. 523.

Claims Made by Defendant.(1)

I claim to be interested in the matters of this suit, by virtue of, etc.

The short particulars of the mortgage now vested in us, and of our title thereto, are as follows, etc.

We claim to be equitable mortgagees of the hereditaments mentioned in the said bill, together with other hereditaments, under a memorandum in the words and figures following; that is to say, etc.

We claim a lien on the shares of, etc., for so much of the said debt as arises from the unpaid purchase-money of the same shares respectively, and the interest thereof.

(1) After having answered all the allegations of the bill, defendant may go on and state matters in bar or avoidance of plaintiff's claim, by way of further answer. *Price v. Tyson*, 22 Am. Dec. 279. But if the answer goes out of the bill to state anything not material to the defendant's case, it will be expunged as impertinent. *Price v. Tyson*, 22 Am. Dec. 279.

No. 524.**Craving Leave for Greater Certainty.**

We admit that, etc. [*or, we believe that, etc.*], but, for greater certainty, we crave leave to refer to the said, etc., when produced.

No. 525.**Craving Leave to Refer to Codefendant's Answer.**

I know little or nothing respecting the deeds, dealings, and transactions stated in the said amended bill; but I have seen a copy of the answer proposed to be forthwith put into the amended bill by the defendants, J. L. and G. W. F., and I have no doubt but that the statements contained in such answer are correct. However, for my greater certainty, as to the contents of deeds and other written documents, I crave leave to refer to such deeds or documents. Under the circumstances hereinbefore stated, and to avoid expense and prolixity, I abstain from answering, categorically, the interrogatories filed for the examination of the last-named defendants and myself in answer to the amended bill; but if the plaintiffs so desire I am ready and willing to put in a full answer to the said amended bill.

No. 526.**Information and Belief.**

I have been informed and believe that, etc.

I believe that, etc.

We have no reason to doubt, and therefore we believe that, etc.

We believe that the statements contained in the paragraphs numbered respectively from 1 to 8, both inclusive, of the plaintiff's bill of complaint are true, except in the particulars or respect hereinafter mentioned; that is to say, etc.

I, this defendant, C. D., say, and we, these other defendants, believe it to be true, that, etc.

We have no personal knowledge of the matters inquired after by the ——— interrogatory filed in this cause; but we have no reason to doubt, and therefore we believe, that, etc.

No. 527.

Ignorance.(1)

I [*or*, we] do not know, and can not set forth as to my [*or*, as to either of our] belief or otherwise, whether or not it is alleged or is the fact that, etc.

(1) An answer stating that the respondent has no knowledge that the facts are as stated in the bill of complaint, without any answer as to his belief concerning it, is deemed sufficient to prevent the bill from being taken as confessed, as it may be if no answer is filed. *Brown v. Pierce*, 7 Wall. 205. See *Bradford v. Geiss*, 4 Wash. 513. Under Equity Rule 30 a statement in the answer that defendant is without knowledge operates as a denial.

No. 528.

Qualified Denial.

Save as herein appears, it is not the fact, etc.

Save as herein appears [*or*, save as by the said schedule appears], I do not know, etc.

No. 529.

Reference to Schedule.

I have in the ——— schedule hereto annexed, and which I pray may be taken as part of this my answer, set forth, to the best of my knowledge, information, and belief, a description of, etc.

No. 530.**Release, Craving same Benefit as if Plead.**

We submit, and humbly insist, that the said release so executed as aforesaid, and the payment of the said sum of \$——, and the receipt given for the same, is a full discharge; and we claim the same benefit as if we had pleaded the same release. Nevertheless, we are willing and hereby submit to account as this honorable court may think fit.

No. 531.**Settled Accounts—Claim of.**

The account so stated and settled was in fact stated and settled by the said A. B. and myself, as it purports to be, on the day of the date thereof; and I claim the benefit thereof as a settled account.

No. 532.**Submission by Trustees to Act.**

We submit in all things to act as this honorable court shall direct, and we claim to have our costs, charges, and expenses, properly incurred, paid out of the estate of the said testator.

No. 533.**Traverse.**

The said J. S. died on the —— day of ——, and not on the —— day of ——, as in the second paragraph of the said bill erroneously stated; but save as aforesaid, we do not know, and are unable, as to our belief or otherwise, to set forth whether or not the statements or some or one or which of the statements contained in the paragraphs numbered respectively 1 to 8, both inclusive, of the plaintiff's bill of complaint, are or is true, or which of them are or is or in what respect untrue, or how otherwise.

No. 534.**Trustee—Desire to be Discharged.**

I have never in any manner intermeddled with the said trust estate, nor received any of the rents or profits thereof; and I am very desirous to be discharged from the trusts in the bill mentioned, and I am ready and willing to convey and release the trust premises to such persons, or to do such other acts, as this honorable court shall direct for this purpose, upon being indemnified in so doing, and having my costs and expenses.

No. 535.**Vexatious Suit; Settled Accounts.(1)**

We submit to the judgment of this honorable court, and humbly insist, that this suit is altogether unnecessary and vexatious; and that even if the plaintiff had been entitled to such relief as is prayed by the said bill, the said relief might have been obtained by proceedings at law; but we say that a large sum of money has been for a long time, and now is, justly due and owing to us from the plaintiff; and that during the whole of the transactions in the said bill mentioned we were in advance with creditors of the plaintiff; and that the plaintiff has repeatedly and partly in the letters hereinbefore set forth acknowledged the accuracy of the accounts rendered by us to him, and has treated the same as being, as in fact they were, settled accounts.

(1) Under Equity Rule 29 demurrers and pleas are abolished and provision is made for making such attacks on the bill or such defenses by motion or allegation in the answer.

No. 536.**Want of Interest in Plaintiff.**

I am advised, and humbly submit, that the plaintiff has not any interest in the estate of the said testator, or in the mat-

ters in question in this suit, nor any such estate or interest in the said testator's estate, or the matters aforesaid, so as to entitle the plaintiff to sustain this suit.

No. 537.

**Claim of Benefit of same Defense to Amended, as to
Original Bill**

We submit that the plaintiff has not by his said amended bill entitled himself to any equitable relief as against us; and we accordingly claim the benefit of the same objections to the said amended bill which are made by our said answer to the said original bill.

No. 538.

**Answer of an Executrix Submitting to Act under the
Indemnity of the Court.**

[Caption, commencement, and first paragraph.]

This defendant says that she admits that S. W., the testator in the said bill named, was at the time of his death possessed of a considerable personal estate, and particularly of the several sums in the public stocks or funds in the said bill of complaint mentioned; and that the said testator duly made and published his last will and codicil thereto, of such respective dates, and to such purport or effect as in the said bill in that behalf stated; but, nevertheless, etc.

Believes that the said testator did, soon after making said will and codicil, depart this life without altering or revoking the said will, save by the said codicil, or without altering or revoking the said codicil, leaving this defendant, his widow, and such other persons as in the said bill in that behalf named, him surviving;

Admits that she has duly proved the said will and codicil in the proper court, and has taken upon itself the execution thereof, and has by virtue thereof possessed herself of as much of the said testator's personal estate and effects as

she has been able to do; and this defendant denies that she ever threatened to sell or dispose of the said stocks, funds, and annuities in the said will and bill mentioned, without any regard to the interest of the said complainants in remainder therein, or has made any transfer of the same;

Submits to this honorable court what interest the said complainants are entitled to in the personal estate of the said S. W. by virtue of his said will;

Says she has in a schedule, etc., set forth a true and particular account of all the personal estate to which the said testator was entitled at his death, distinguishing what part thereof has come to her hands, or to the hands of any other person or persons for her use, except such sums as are mentioned in the schedule hereinafter referred to;

Says she has in the second schedule, etc., set forth an account current between her and the estate of the said S. W. and this defendant, and has therein set forth to the best of her knowledge, etc., a full and true account of all sums of money, part of the personal estate of the said testator come to her hands, or to the hands of any person or persons to her use, and of the application thereof;

Says she is ready and willing to account as this honorable court shall direct, for all such parts of the personal estate of the said testator as have been possessed or received by this defendant, having all just and reasonable allowances, made, which she is entitled to as such executrix; and in all other respects this defendant submits to act as the court shall direct, upon being indemnified and paid her costs of this suit.

No. 539.

**Answer of the Executors of a Deceased Acting Executor
to a Bill of Revivor.**

[Caption, commencement, and first paragraph.]

These defendants say that they believe it to be true that at or about the time in the said bill stated, R. W., in the said

bill of revivor named, exhibited his original bill of complaint in this honorable court against such parties as defendants thereto, as in the said bill mentioned, thereby stating and praying to the effect in the said bill of revivor set forth, so far as the same is therein set forth, and that in consequence of the death of the said R. W., the said plaintiff, T. W., at or about the time in the said bill of revivor mentioned, exhibited his supplemental bill in this honorable court against such parties defendants thereto as therein mentioned, stating and praying to the effect in the said bill of revivor set forth, so far as the same is therein set forth. And that the said several defendants in the said supplemental bill named afterwards appeared and put in their answers thereto, and that such proceedings have since been had in the said cause as in the said bill of revivor mentioned; but for their greater certainty, nevertheless, these defendants crave leave to refer to the said original and supplemental bills, answers and other proceedings now remaining filed as of record in this honorable court; and these defendants further severally answering say they admit it to be true that before any further proceedings were had in the said cause, and at or about the time in the said bill of revivor in that behalf stated, G. R., one of the defendants to the said original and supplemental bills, and one of the executors and trustees under the will of the testator, T. W., in the said bill of revivor named, and who has principally acted in the trusts thereof, departed this life, having first duly made and published his last will and testament in writing, of such date as in the said bill of revivor mentioned, and thereof appointed these defendants executors; and these defendants admit that since his death they have duly proved his said will in the proper court, and undertaken the executorship thereof, and are thereby become his legal personal representatives, and that they possessed the said G. R.'s personal estate and effects so far as they have been conveniently able, and these defendants believe (although they do not admit the same) that such personal estate and effects are sufficient to

answer whatever might be due from the said G. R. at the time of his death to the estate of the said testator, T. W., if anything were so due; but these defendants not knowing the amount thereof are advised that they can not with safety or propriety admit assets of their said testator to be in their hands sufficient to answer the same, and these defendants say they are ready to account for the said G. R.'s personal estate possessed by them, or for their use, in such manner as the court shall be pleased to direct, if the same should become necessary; and these defendants further severally answering say they submit that the said suit and proceedings which became abated on the death of the said G. R. may stand and be revived against them as such executors as aforesaid, and be restored to the same plight and condition in which they were at the time of the death of the said G. R.

No. 540.

Answer of a Widow Electing to take the Bequests Made to Her by a Will, and to Release all Interest in the Devised Estates.

[Caption, commencement, and first paragraph.]

This defendant says that she believes it to be true that C. B., deceased, the testator in the said bill of complaint named, being possessed of a large personal estate, did, at or about the time in the said bill of complaint mentioned, duly make and publish his last will and testament in writing, of such purport and effect, and containing such bequest to this defendant as in the said bill of complaint in that behalf set forth, and that the said testator appointed such persons as in the said bill of complaint named executors and executrix of his said will.

And this defendant further answering says that she believes it to be true that the said testator afterwards, and at or about the time in the said bill of complaint mentioned, duly made and published a codicil to his said will in such words and to such purport and effect as in the said bill of complaint also set

forth; but for her greater certainty, nevertheless, as to the said will and codicil, and the respective dates, purports and contents, thereof, this defendant craves leave to refer thereto when produced.

And this defendant further answering says that she admits that the said testator departed this life at or about the time in the said bill of complaint in that behalf mentioned without having in any manner altered or revoked his said will, save by the said codicil, and without having altered or revoked his said codicil; and that the said plaintiffs have since duly proved the said will and codicil in the proper court, and taken upon themselves the executorship thereof.

And this defendant further says that she claims to be entitled to the benefits intended her by the said testator's will, and is ready, upon the same being secured to her according to the directions in the said will contained, to release to J. P., in the said will named, all her right and interest in and to the premises in the said will mentioned, and for that purpose to execute all necessary instruments or deeds.

No. 541.

Answer to a Bill Charging Infringement of a Patent.

See under title "Patents" for form of answers setting up the various defenses to such bill.

No. 542.

Answer to Bill to Enjoin Transfer of Patents.

[Caption.]

The defendant, B. E., answering plaintiff's bill filed herein, admits that plaintiff and defendants are citizens, as alleged; that plaintiff was a member of the partnership of J. W. & Son, and is now owner, by assignment, of all claims belonging to said plaintiff on March 1, —; that this defendant was in the employ of said partnership as a traveling salesman

prior to —, excepting a part of the months of June, July and August of —, for which time the said defendant received no pay for services rendered the plaintiff, excepting his actual expense, which was not according to the contract entered into when the defendant was employed by said partnership, and for the services rendered the plaintiff by this defendant during said enforced vacation, the plaintiff agreed on or about —, verbally, that this defendant should receive full pay from — to —, and should have such time to look after his, this defendant's personal business as the said business required, but was to hold himself in readiness to attend to the wants of any prospective customer of the plaintiff, which this defendant did at all times; that on the — day of —, at his own expense and while attending to his own personal business, this defendant did obtain said option and some time thereafter did inform plaintiff that he had obtained said option; that this defendant did not accept the terms of said option and purchase said patent before his employment with the said partnership terminated, and as his own personal business and at his own personal expense this defendant did sell a shop-right under said patent to C. W. & Co., of —, for — dollars and has retained the proceeds thereof, that thereafter this defendant formally accepted the terms of said option and obtained said patent to be assigned to himself, paying therefor with his own money and caused said assignment to be recorded in the patent office; that this defendant did procure the assignment of a shop-right to manufacture under said patent, leaving blank the name of the grantee and the place where said license was to be exercised; that he had issued two other assignments of shop-rights, which he controls only through the friendship of parties to whom they were issued; that he had issued to the defendant, J. E., a shop-right of the kind alleged in the bill, and that this defendant has refused and still refuses to assign said patent to the plaintiff. The other allegations of plaintiff's said bill, together with all qualifications of the above admissions as set forth in said bill, this defendant denies.

And further answering plaintiff's said bill, this defendant says that on or about the —— day of ——, the said partnership of J. W. & Son, having represented to this defendant that they were unable to pay him the salary which by the terms of the contract under which he was employed by them they should pay, and this defendant, being unwilling to continue in their service at a less salary, it was agreed between the said partnership and this defendant that his employment should terminate on the first day of January, 1897, and about the said date one W. W., being then in the employ of said partnership as foreman, and because of a threatened reduction of his salary, likewise having determined to quit the employment of said partnership, said W. W. and this defendant entered into an agreement, looking to the organization of a company for the manufacture of machinery in which they desired to use the invention covered by said patent; that the said W. W. requested this defendant to visit the said inventor and patentee and to procure from him a shop-right under the said patent, or an assignment of the said patent, for the purpose of using the same in the manufacture of said machinery; that on the —— day of ——, pursuant to the said agreement and request of the said W. W., and in preparation for beginning the manufacture of said machinery, this defendant at his own expense went to see said inventor, and likewise at his own expense procured said option to be issued to himself; that up to said time neither plaintiff nor any other member of said partnership had directed, requested or suggested that this defendant should procure an option for the purchase of said patent, or procure any interest in the same for said partnership; that thereafter and about the —— day of ——, this defendant received a letter from plaintiff, bearing date of ——, in which plaintiff asked this defendant whether he had seen the said inventor and patentee, and stated that he had written to this defendant about the said matter nearly two months previously; and this defendant says that said letter contained the first information to him from plaintiff or any other member of said partnership that said partnership desired

him to procure any interest in the said patent, for said partnership, and this defendant believes and alleges the fact to be, that plaintiff had at that time learned that this defendant had already obtained said option, and thereupon wrote said letter to this defendant, falsely pretending that he had therefore, by letter, requested this defendant to obtain said option for said partnership.

This defendant further says that he obtained the said patent and the said option for the purchase of the same, at his own expense and in good faith, with the view of organizing a company for the manufacture of machinery, in which he and the said W. W. desired to use the said patented invention, after the termination of his employment, and that of said W. W., by the said partnership.

Wherefore this defendant asks that the plaintiff's bill may be dismissed at his cost, and that this defendant's title to and ownership of the said patent be quieted against all claims by the plaintiff.

B. E.

[*Verification.*]

No. 543.

Answer(1) in Case of Copyright Infringement.

[*Caption.*]

Now comes the defendant, and for answer to the bill of complaint of the plaintiff herein answering shows:

1. Defendant neither admits nor denies the corporate existence of the plaintiff, and calls for proof of incorporation, as plaintiff may be advised.

2. Defendant admits that it is a corporation as alleged in the bill of complaint, and doing business therein as alleged, but denies that at its said place of business, or elsewhere, it has committed any of the acts pleaded in the bill of complaint.

3. Defendant denies that the plaintiff is the author of the alleged copyrighted work complained of, and demands proof thereof.

4. Defendant neither admits nor denies the allegation in the fourth paragraph of the bill of complaint contained, and leaves plaintiff to its proof.

5. That defendant has no knowledge sufficient to form a belief whether on the 11th day of September, 1914, or upon any other day, plaintiff published within the limits of the United States, or elsewhere, any book known as "Hendricks' Commercial Register of the United States for Buyers and Sellers—Twenty-third Annual Edition," or whether the said alleged book was, on the 14th day of September, 1914, entered for copyright in the office of the register of copyrights at Washington, D. C., or whether two complete copies of the book were at that date or any other date filed therein, or whether the said alleged book was printed from plates made in the United States, from type set within the limits of the United States, or was bound within the United States, or whether plaintiff did all or any other acts required by law for the completion of copyright entry, or whether the said alleged book was published with copyright notice thereon, as required by law, and alleged in the said bill of complaint, and leaves plaintiff to its proof.

6. Defendant denies that by any such copyright entry or any certificate issued by the register of copyrights there was secured to the plaintiff any exclusive right and privilege in the said book throughout the United States and elsewhere, and denies that the books published pursuant to said copyright have carried the copyright notice required by law.

7. Defendant denies that the said book was composed, edited, prepared, arranged, compiled and published from original sources of information, and alleges the fact to be that the said book was composed, edited, prepared, arranged and compiled by copying from other sources of information, and especially from defendant's several copyright editions of "Thomas' Register of American Manufacturers and First Hands in All Lines," which will hereafter be referred to as "Thomas' Register of American Manufacturers." Defendant avers that all of its several editions of "Thomas' Register of

American Manufacturers" have been duly copyrighted by it by publication of the said books with notice of copyright thereon, and by compliance with all other formalities required to secure a valid copyright. Nevertheless, the plaintiff did unfairly, in violation of the defendant's several copyrights aforesaid, in the several editions of "Thomas' Register of American Manufacturers," and especially in the sixth edition, appropriate, copy, print and publish many of the lists of manufacturers and others appearing in said "Thomas' Register of American Manufacturers," said lists being original in said "Thomas' Register" and the property of the defendant. Defendant further avers that the plaintiff has from time to time continuously used the several editions of "Thomas' Register," and more especially the sixth edition, in the compilation of the several editions of "Hendricks' Register," and more specifically in the compilation of the twenty-second, twenty-third and twenty-fourth editions of "Hendricks' Register," instead of resorting to original sources for such information, all to the great loss and damage of said defendant.

8. Defendant has no knowledge sufficient to form a belief as to the number of copies of the alleged book printed and sold by the plaintiff, or whether or not the printing and publishing of said book fulfill all the requirements of the copyright law, and requires strict proof thereof; but defendant denies that the plaintiff is the sole and exclusive owner, or that the said book is of a value of \$125,000, but defendant has no knowledge sufficient to form a belief as to the actual value, if any, of the publications of the plaintiff as alleged.

9. Defendant admits that it is in the business of publishing and selling "Thomas' Register of American Manufacturers, Seventh Edition," but denies the jurisdiction of this court in dealing with questions of unfair competition between the parties hereto. Answering, however, defendant denies that its said publication, "Thomas' Register of American Manufacturers, Seventh Edition," is a violation or infringement upon any of plaintiff's rights.

10. Defendant admits that prior to the publication of "Thomas' Register of American Manufacturers, Seventh Edition," and in the previous editions of said "Thomas' Register of American Manufacturers," there had been published no consolidated list of machinists and founders, and no list of architects. Defendant, however, has for eighteen years itself and through affiliated companies published lists of machinists and founders. Further answering, defendant alleges that it has always been the policy of the defendant to continually expand the said publication and to add new lists and new names as conditions made possible or desirable, and that pursuant to said well-established policy extending over a large number of years defendant did add in the seventh edition a consolidated list of machinists and founders and a list of architects, as well as many other lists, such as lists of banks and boards of trade. It maintains that such lists are original to itself, but that the question of damages to the plaintiff by the addition of any such consolidated list of machinists and founders and list of architects is a question of unfair competition in trade, and as such without the jurisdiction of this court.

11. Defendant admits that in the year 1914 one S. E. Hendricks and several other employes of the plaintiff, after quitting the employ of the plaintiff, did enter the employ of the defendant herein; but denies that any unlawful advantage of the plaintiff was thereby secured to the defendant. Defendant specifically denies the jurisdiction of this court in passing upon any questions of unfair competition by reason of such employment of the former employes of the plaintiff, or by reason of any acts of alleged unfair competition on the part of defendant's employes.

12. Defendant denies that any list appearing in "Thomas' Register of American Manufacturers, Seventh Edition," is copied from the twenty-third or any other edition of "Hendricks' Commercial Register of the United States for Buyers and Sellers," or that any part was copied therefrom verbatim or otherwise, and alleges the fact to be that every list con-

tained in "Thomas' Register of American Manufacturers, Seventh Edition," was secured and compiled by the defendant herein from other sources than from plaintiff's alleged copyright book, and alleges the fact to be that the said list complained of, to-wit, the consolidated list of machinists and founders, and the list of architects appearing in said seventh edition, were secured and compiled, corrected and verified, wholly from sources in which the plaintiff has no right or interest.

13. That defendant has no knowledge sufficient to form a belief as to any acquiescence to the plaintiff, but denies any and all wrongful or unlawful acts on its own behalf as against the rights and privileges of the plaintiff, or privileges or rights which would or might have been enjoyed by the plaintiff had defendant's publication, "Thomas' Register of American Manufacturers, Seventh Edition," not been published. Defendant further admits that except for defendant's publication, as aforesaid, plaintiff may have enjoyed larger income and greater profits from the publication and sale of its said publication, but alleges the fact to be that any curtailment of income or profits from the sale of plaintiff's book was due wholly to the superiority of defendant's publication, and to the personalities of the persons connected with the publication of defendant's said register, and on account of the confidence of the subscribing and advertising public in the said publication and in the said personalities, and is due in no measure to any unfair or unlawful appropriation of plaintiff's rights by defendant.

14. Further answering, defendant denies any copyright or any interest in any copyright in the plaintiff as alleged, and admits that it has never received from the plaintiff any license or permission to copy any copyright book of the plaintiff, or any book of the plaintiff not copyrighted; but denies that it has infringed any copyright of the plaintiff, or wrongfully, willfully, fraudulently or unlawfully made or caused to be made, copied or caused to be copied, printed or caused to be printed, published or caused to be published, sold or caused

to be sold, advertised or caused to be advertised any copyrighted or other publication of the plaintiff; or that it is now continuing all or any of said acts, or has threatened or is threatening to continue all or any of said acts.

15. Defendant denies that it has or did have at the date of the filing of the said bill of complaint in its possession a great number of the seventh edition of the "Thomas' Register of American Manufacturers," and alleges the fact to be that it had at that time very few copies of said seventh edition, and that between the said filing of the said bill of complaint and the date of filing this answer the said copies had been seized and taken from the possession of the defendant by the United States marshal for the southern district of New York, and are still held in his possession and against the interests of the defendant.

16. Defendant denies that any act in the premises has unlawfully been to the irreparable or any other injury or damage to the plaintiff.

17. Defendant admits that its said "Thomas' Register of American Manufacturers, Seventh Edition," contains more than thirty-one hundred (3,100) pages, and weighs approximately thirteen and one-half ($13\frac{1}{2}$) pounds, as alleged in said bill of complaint; and alleges the fact to be that the said "Thomas' Register of American Manufacturers, Seventh Edition," is a publication of great value, carefully and conscientiously compiled and edited, and published at very great expense, and is recognized as an authoritative list of the several industries listed therein.

18. Defendant further answering says that this action was brought by the plaintiff because the superior merit of defendant's publication had seriously impaired the circulation and advertising value of plaintiff's publication; and that the superseding of plaintiff's publication by defendant's publication produced animosity on behalf of the plaintiff, and that the said successful though lawful business rivalry is the sole and exclusive reason for the animosity displayed on behalf of the plaintiff.

19. Further answering, defendant says that plaintiff well knew at and before the beginning of this suit that defendant's publication was not an infringement upon any copyright of the plaintiff, and that the said suit was begun by the plaintiff wholly and solely for the purpose of embarrassing defendant with its subscribers and advertisers, and for no other purpose, and with no hope or possible hope of final success in maintaining or establishing infringement of plaintiff's copyright.

20. Defendant further answering says that it, this defendant, has been seriously embarrassed with its subscribers and advertisers, and that by reason of the seizure of its said seventh edition, as aforesaid, by the United States marshal for the southern district of New York, it has been greatly and irreparably damaged, both in the sale of the present and future editions of said publication and by reason of the cancellation of orders for books and for advertising in said publication, the exact amount of said loss not being known to defendant at the present time.

21. Further answering, defendant says that in the furtherance of the animus on behalf of plaintiff the said plaintiff did promptly, following the seizure of the said "Thomas Register, Seventh Edition," advertise and notify largely defendant's advertisers and subscribers of the fact of such seizure, and the application for preliminary injunction, giving the said subscribers and advertisers to understand or reason to infer that the publication of defendant is and was in fact an infringement upon the rights and copyrights of the plaintiff, and unlawfully published and distributed, and that owners and holders of the published work of the defendant herein would be and was subject to prosecution by the plaintiff, or that the further purchase or possession of any of the publications of defendant would hereafter subject such owner or holder to prosecution for infringement of copyright of the plaintiff, and by such threats intimidated the subscribers and advertisers of defendant, and caused the defendant thereby great and irreparable damage.

22. That the copies of the said seventh edition of defendant's publication seized by the United States marshal for the southern district of New York were largely composed of office copies employed by the defendant in the compilation and corrections for publication in the next succeeding issue of the said register, and therefore of great value to the defendant, and many times the value of the said copies for sale, and that the forcible removal from and detention of the said books caused a partial cessation of compilation for the next edition and a delay in the preparation of the copy therefor, and thereby worked great and irreparable injury to the defendant.

23. That by the seizure of the said copies of defendant's publication, and by the publication of said seizure by the plaintiff, and the notification to defendant's advertisers and subscribers, defendant has been damaged in a very great amount, which amount defendant can not now determine or even estimate, but alleges that the said injury to the defendant is more than fifty thousand dollars (\$50,000).

24. That by reason of the statements made by plaintiff to defendant's subscribers and advertisers, and prospective subscribers and advertisers, defendant has deemed it necessary to and has secured and provided a bond conditioned to protect defendant's subscribers and advertisers, the cost of which said bond adds to defendant's injury and damage.

25. Defendant further answering says that the plaintiff herein by abuse of process, to-wit, by securing an order to show cause why preliminary injunction should not issue, put defendant to great expense in the preparation of opposing papers, which said expense to defendant is more than one thousand dollars (\$1,000), and that well knowing that the plaintiff had no cause for preliminary injunction and no legal or equitable right to the same, did, only a few hours prior to the hearing on said order, withdraw its said motion for a preliminary injunction, and that notwithstanding the great expense and damage suffered by defendant.

26. Upon information and belief defendant alleges that the financial control of the plaintiff is in the hands of certain

persons or corporations resident in London, England; and that the financial depreciation of plaintiff's publication by reason of the superiority of defendant's publication caused the said persons resident in London, England, to severely criticise the resident managing officers, and that all of the said several acts of the plaintiff herein alleged by defendant against this defendant have been for the purpose and only for the purpose of inducing the London control to believe that the said depreciation was not due to acts of the resident officers or to inferiority of the publication, but to unlawful acts on behalf of defendant herein, and to thereby enable the said American officers to remain in the control and management of the said publication, which said control and management, as defendant is advised and believes, was threatened by the said London control.

Wherefore defendant prays that said bill of complaint be dismissed, and that it be adjudged that the defendant has not infringed any valid copyrights possessed by the plaintiff.

That an order be entered herein requiring the United States marshal for the southern district of New York to return to defendant the books seized by and retained in the possession of said marshal as aforesaid.

That defendant have judgment for damages against the plaintiff for depreciation of the said books seized and retained by the marshal, for its damages resulting from such seizure, for its damages resulting from withholding the said books from the possession of the defendant, for its damages sustained by the abuse of process in securing order to show cause why preliminary injunction should not be issued and abandoning the same, for its damages sustained in alienating its advertisers and subscribers by means of deceptive and misleading statements circulated broadcast among defendant's advertisers and subscribers by the plaintiff prior to the hearing of this cause, and for such other and further damages and equitable relief as to the court may seem just.

That the defendant have its further judgment for its costs, attorney's fees and disbursements in this action.

That the prayer for injunction be denied and that such further relief be accorded to the defendant in view of the facts complained of by the plaintiff as to the court may seem just.

HUGO MOCK,

Solicitor for Defendant.

E. T. FENWICK,

L. L. MORRILL,

Of Counsel.

(1) See Equity Rule 29.

For treatise on Pleas under old equity rules, refer to 1 Street Federal Equity Practice, Secs. 825 to 916; 1 Foster Federal Practice, 5th ed., Secs. 173 to 177; 1 Whitehouse Equity Practice, Secs. 242 to 259.

For demurrers under the old equity rules, refer to 1 Street Federal Equity Practice, Secs. 917 to 972; Foster's Federal Practice, 5th ed., Secs. 365 and 366; 1 Whitehouse, Equity Practice, Secs. 213 to 241.

The answer, under old Equity Rule 39 might embody any defenses available by plea in bar, without subjecting defendant to discovery which was the principal reason for the plea in bar. 1 Street Federal Equity Practice, Sec. 1009.

Equity Rule 29 abolishes demurrers and pleas, and provides that their ancient offices shall be performed by the motion to dismiss or by the proper averments in the answer. These two pleadings form the subject of many decisions and are always treated at length in books dealing with equity practice. In applying the new rule the courts lean to the view that all the rights of a party formerly preserved by these pleadings are still maintained and only the manner of asserting them is changed; hence the rules stating the effect of demurring or making a plea apply to the new practice. Therefore we do not deal with a group of new rights, but with new methods of asserting old rights.

The purpose of the new rule is to simplify and render more certain the matter of procedure and the comments in recent cases are interesting.

In *Hyams v. Old Dominion Company*, 204 Fed. 681, a motion to dismiss on the ground that an indispensable party was not joined was held proper.

In *Wilson v. Amer. Ice Co.*, 206 Fed. 736, a minority stockholder filed a bill against the corporation and officers and directors to force the company to declare a dividend upon his preferred stock; defendant filed a motion to dismiss under Rule 29, because it was not alleged that defendants were not authorized to do the things complained of, and the bill did not particularly set forth the efforts of complainant to secure desired action from defendants, and causes of failure to secure action, or reason for not making an effort as prescribed by Equity Rule 27.

Court allowed the motion after considering the allegations of the bill of complaint and the law applicable to such cases, but gave leave to complainant to amend.

In *General Bakelite Co. v. Nikolas*, 207 Fed. 111, ruled that motion under Equity Rule 29 is proper method to raise sufficiency of complaint under Rule 25.

In *re Jones*, 209 Fed. 717, rule laid down that a demurrer will not lie to involuntary petition in bankruptcy since the adoption of Rule 29, which applies equally to such a proceeding on the theory that proceedings in bankruptcy are equitable in their nature.

In *Bogert v. Sou. Pac. Ry.*, 211 Fed. 776, it is said that a motion to dismiss must be determined upon bill of complaint, and can not rely upon allegations of fact in answer. Here there was a motion to dismiss and judgment on merits of pleading because of alleged defects of parties set out in answer, which also set out laches of plaintiff. A hearing would have been necessary on the motion since testimony in the shape of a record in another case was relied upon; inasmuch as the answer was already on file, a denial of the motion could not have been followed by an order to answer over; hence, the hearing was postponed to the taking of testimony in the main issue, the court ruling that there could be no hearing in advance.

In *Alexander v. Fidelity Trust Co.*, 215 Fed. 791, held that the bar of laches claimed to be presented on the face of the bill may be raised by motion to dismiss under Equity Rule 29.

In *Boyd, et al., v. N. Y. & H. R. Ry. Co.*, 220 Fed. 174, it is said that the defendant is required to show all his propositions, whether of law or of fact, at once in the answer, and the court on a motion to determine points of law authorized by Equity Rule 29, may consider whether, in view of the facts alleged, any of the legal theories propounded can properly be considered before testimony taken, or by merely taking such evidence as has previously been often adduced in support of a plea, so that when defendant claims that the complaint shows no case for equitable relief, he may not complain if the court considers the admissions or allegations of the answer which explain or enlarge but do not contradict the allegations of the bill.

In *Ralston Steel Car Co. v. National Dump Car Co.*, 222 Fed. 590, a motion to dismiss the bill was denied because the bill presented certain intricate matters of considerable detail which the court thought should go to answer and proofs, applying the rules necessary to determine the allowance of a demurrer under old rules to this motion to dismiss.

In *Goldschmidt Thermit Co. v. Primos Chemical Co.*, 225 Fed. 769, held that Rule 29 does not cover a case where objection is made to the maintenance of a bill because of the existence of a remedy at law. This must be asserted under Rule 22 or 23.

In *Crim v. Rice*, 232 Fed. 570, held that a motion may be made under Rule 29 to dismiss for failure to comply with Rule 25.

In *Wright v. Barnard*, 233 Fed. 329, held to be in the discretion of the court to determine whether to refuse to decide a case on a motion to dismiss under Equity Rule 29, and to require answer; the province of the court under this new rule being the same as under the old rule permitting a demurrer in such case.

In *Swift v. Inland Nav. Co.*, 234 Fed. 375, held that an objection to misjoinder of defendants can not be taken as a matter of right except by motion, or plea, or answer; nor can it be insisted upon at trial, since it must be taken in time or is waived.

The court, however, may raise the question *sua sponte* any time, on consideration of the due administration of justice.

In *Great Lakes, etc., Co. v. Scranton Coal Co.*, 239 Fed. 603, the court says at p. 606: "It (Rule 29) aims at simplifying the pleadings, not at abolishing the requirement of a special appearance at the outset, if the personal privilege is intended to be asserted."

In *Forbes v. Wilson*, 243 Fed. 264, a case of a stockholder's bill under Equity Rule 27, motion to dismiss was based on (a) failure to allege compliance with Rule 27; (b) insufficiency of alleged facts; the court held that on such motion the allegations of the bill would be considered true, as was the practice formerly upon demurrer.

In *Krouse v. Brevard Tannin Co.*, 249 Fed. 538, a case of stockholder's bill, the court held that Equity Rule 29 contemplates that such motion be made before the answer is filed; and if made afterward, it must be determined on the allegations of the bill unaided by the answer; recognizing, however, that such motion might be properly permitted by the court at any time before the hearing.

In *General Inv. Co. v. L. S. & M. S. Ry.*, 250 Fed. 160, at p. 172, the court says that the motion under Equity Rule 29 is a substitute for the demurrer under the older practice, and hence the motion to dismiss the bill will fail if any part of the bill is good against the motion, although if limited to the defective part it would have been sustained.

In *Old Dominion Trust Co. v. First Natl. Bank of Oxford*, 252 Fed. 613, held that the motion to dismiss applied only to facts appearing on the face of the bill and attached exhibits made a part thereof, and hence other facts, although supported by affidavit, can not be considered in deciding the motion.

There are excellent discussions by the courts of the scope of this rule and the changes effected thereby, illuminated by references to the older practice. Such discussions are found, *inter alia*, in *Boyd v. N. Y. and H. R. Co.*, 220 Fed. 174, cited above, on whether the allegations of an answer may be considered along with those of the bill, in deciding whether to sustain or overrule a motion to dismiss; in *Young v. Samuels & Bro.*, 232 Fed. 784, on the right of plaintiff to dismiss voluntarily, as determined by the stage to which proceedings have gone, and there is a very full citation of the pertinent cases.

The second portion of Equity Rule 29 requires defenses presentable by plea in bar or abatement under the old rules to be now set up in the answer. The cases refer to this portion of the rule very briefly; however, it is clear that this is a mandatory rule, while the earlier portion gives an option to the defendant. Under the old rules a plea in bar might raise the defense of the statute of limitations or of frauds, of innocent purchaser, account stated, of award, release, tender, payment, and so forth (1 Street Federal Equity Practice, Sec. 832); while by a plea in abatement such matters of defense may be raised as lack of diversity of citizenship, bankruptcy of plaintiff, another suit pending, and plaintiff's lack of capacity to sue because not a corporation (1 Street Federal Equity Practice, Sec. 830). Such matters as these must now be set out in the answer, and if the court think fit may be disposed of preliminary to the trial.

Also bearing on the answer now is Equity Rule 30, first paragraph. This rule dispenses with the need for consistency in the answer, and thereby changes the old rule of pleading. That rule prohibited a party from taking up inconsistent positions in the same litigation on the theory that one of the two positions must be false, or that neither was being asserted, and hence the allegations amounted to an evasion.

A common reason for the old rule was that an inconsistency could not be supported by oath, although the objection could have rested equally well on recognized principles of pleading; and an exception might have been made to the answer for inconsistency, or under certain conditions the inconsistent allegation may have been treated as surplusage.

In *Sydney v. Mugford Printing and Engraving Co.*, 214 Fed. 841, at page 844, the court says: "For the court does not apprehend that any one will seriously question the statement that Rule 30 of the new rules was not intended to nor did it as a matter of fact in any way affect or change the substantive law relating to what could be pleaded as a set-off or counterclaim, as the same obtained prior to the taking of effect of said rules. It seems to the court that the law on this subject remains unchanged and as before."

Here the plaintiff moved to strike out the "equitable defense, set-off and counterclaim."

In *Coulston v. H. Franke Steel Co.*, 221 Fed. 669, the motion of plaintiff was to require defendant to make its answer "more definite and certain" in respects mentioned.

The court found that the answer did not conform to the provisions of Equity Rule 30 as to short and simple terms of statement. He compares this rule with the code rule of many of the states requiring an answer at law or in equity to contain a general or specific denial of each material allegation controverted by the defendant.

The court tartly observes, at page 672, that "the old notion that a suit at law or in equity is chiefly a game affording an opportunity for the matching of wits of counsel and for the exercise of the ingenuity

of courts is fast giving place to the conception that suits both at law and in equity should be sincere and candid attempts to reach the real point of difference between the parties to them, and to secure a just settlement of such difference."

In *Churchward International Steel Co. v. Bethlehem Steel Co.*, 233 Fed. 322, it is said that a denial of plaintiff's right by a confession and avoidance is not matter which can be reached in an answer by a motion to strike, because it is not an affirmative defense.

Here the defendant pleaded that the plaintiff had assigned certain letters patent and therefore had no right to sue thereon.

As to disposing of motion in this case, the court held the motion over to be ruled on as a trial question to prevent "piecemeal" rulings, and denied the motion until trial; the action on the motion is therefore within the court's discretion.

In *Shera v. Merchants' Life Ins. Co.*, 237 Fed. 484, the court says at page 486: "Equity Rule 30 requires that the answer shall avoid 'any general denial of the averments of the bill.' It requires statements 'specifically admitting or denying or explaining the facts upon which the plaintiff relies.' So that the court is not limited to any general denial, but can consider in connection therewith the explanatory facts; but in my judgment it is thus limited."

In *Southern Textile Machinery Co. v. Foy Stocking Co.*, 243 Fed. 917, at page 918, the court says: "The answer, for want of knowledge and information, denies these allegations of title and demands proof. Under Equity Rule 30 this denial for want of knowledge is the equivalent of a specific denial, and puts on the complainant the burden of proving its title."

No. 544.

Cross-Bill(1) at the End of an Answer.

Par. 36.

And the Twin Falls Salmon River Land and Water Company by way of a cross bill herein against the plaintiffs above mentioned, and all in whose behalf they may be acting, and also by way of counterclaim and further answer, avers as follows:

That upon account of the soil and physical conditions existing upon said Salmon tract and upon the lands to the north thereof which are likely to receive the drainage therefrom, that it is absolutely essential for the best interests of the said Salmon river tract and of all the settlers thereon that very great care should be used in the application of water to said

lands for irrigation purposes, and also in regard to the amount thereof which is applied for said purpose, and if great care is not used in the irrigation of said lands a large area thereof will become valueless and the security afforded by the water contracts hereinbefore mentioned will become lost and that large numbers of suits will be brought by persons upon adjoining tracts for injury to lands done by reason of waste and seepage waters from the Salmon tract.

That it is necessary for the settlers upon said tract to use great skill in the application of water to their said lands and for the Salmon River Canal Company and the Twin Falls Salmon River Land and Water Company to cause only so much water as is necessarily required for the irrigation of crops to be run into said canals described in the contract, "Exhibit A."

That the application of the amount of water demanded by the plaintiffs in the amended bill herein and the manner of use desired and demanded therein would result in great damage and injury to a large portion of the lands on the said Salmon tract and in the destruction of the security afforded to the Twin Falls Salmon River Land and Water Company and its successors in interest under the terms of the water contract, "Exhibit C."

That under the terms of the contract, "Exhibit A," attached to the amended bill herein, it is the duty of the Twin Falls Salmon River Land and Water Company, while it shall retain control of the said Salmon River Canal Company, as specified in said contract, "Exhibit A," to cause water to be measured to users from the place of diversion at the main laterals of the irrigation system in such quantities and at such times as the condition of the crops and weather may determine, but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system.

That the use of a rotation system is necessary in the distribution of the water to settlers on said tract in order that the

minimum amount of injury may be done to the lands irrigated from said canal system and in order that the security represented by the water contracts mentioned in the amended bill herein may not be impaired, and also for the purpose of most equitably and efficiently distributing the water supply in order that effective use may be made thereof by all settlers upon said tract and in order that an unnecessary amount of water may not be used.

That the plaintiffs herein are members and officers of a settlers' association, being a voluntary association organized by a portion of the settlers on said project, and that the said settlers' association and the plaintiffs in the amended bill herein, the officers thereof, have joined together and conspired to prevent the use of a rotation system in the use of water and to prevent the use of water on said tract under proper and suitable rules and regulations in accordance with the terms of the said contract, "Exhibit A," and to prevent the proper and suitable distribution of the water supply under suitable rules and regulations now in use and those which will hereafter be made, and that they will continue to so join together and conspire and bring numerous and vexatious suits in regard to said matter unless restrained by the order of this court; that the plaintiffs herein are acting for themselves and for other persons members of the said water users' association; that the joining together and conspiring and bringing of the suits above mentioned are adverse to the interests of the settlers and water users on said tract not members of the settlers' association; that it is the duty of the Twin Falls Salmon River Land and Water Company and of the Salmon River Canal Company, Limited, to handle and distribute the water supply in such manner as will best protect and serve the interests of all the users of water from the canal system, and that this can not be done unless the rules and regulations prescribed by the Twin Falls Salmon River Land and Water Company and the Salmon River Canal Company, Limited, are complied with and unless a proper and suitable system of the distribution of water by rotation is maintained.

That unless said rules and regulations are reserved and said system of rotation maintained, it will be impossible to distribute the water supply to the irrigators upon said tract in such manner as will best protect and serve the interests of all of the users of water from said canal system, and the security represented by the contracts made in the form, "Exhibit C," will be greatly impaired and in part destroyed.

Wherefore, the Twin Falls Salmon River Land and Water Company prays that the amended bill of the plaintiff herein may be dismissed and that the plaintiffs herein and all the members of the settlers' association, of which said plaintiffs are members and officers, be enjoined and restrained from bringing any suits or in any manner interfering with the delivery and distribution of the water supply through the irrigation system herein mentioned, according to the rules and regulations established therefor and in accordance with the rotation system, and said Twin Falls Salmon River Land and Water Company prays that all proper relief may be granted herein.

S. H. H.,

[*Verification.*]

Attorney for Defendant.

(1) Cross bill and counterclaim.

Equity Rule 30, in the second paragraph thereof, requires in the answer a statement of counterclaim arising out of the transaction which is the subject-matter of the suit, and permits the setting out, without cross bill, of any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against the plaintiff, with the effect of a cross suit, enabling the court to pronounce a final judgment in the suit on both original and cross claims.

This rule has been the occasion of much speculation and interpretation on the part of the courts.

In *Terry Steam Turbine Co. v. B. F. Sturtevant Co.*, 204 Fed. 103, the court confines counterclaim and set-off which might be the subject of an independent suit to one arising out of the transaction which is the subject-matter of the suit, and indulges in a discussion of this rule on pages 104-106.

The "counterclaim" here asserted was contained in a proposed supplemental answer to an infringement suit, and set out the infringement of another patent by plaintiff, and prayed injunction and an accounting thereon. The court denied the request on the ground that this claim for tort could not be on equitable set-off; that it did not arise out of the transaction which is the subject-matter of the suit.

In *Williams Patent Crusher and Pulverizer Co. v. Kinsey Mfg. Co.*, 205 Fed. 375 (W. Dist. N. Y.), the suit was for infringement of a patent, and in the answer a counterclaim was set out for unfair competition by spreading abroad misrepresentations as to the scope of the claims, the ownership of the patent and the effect of the reissue; these were all tortious acts. The court held they could not have been litigated in a cross bill or cross suit prior to the new equity rules, and hence could not be included in a counterclaim in the answer under Rule 30. The court's construction of the second clause of the second paragraph of Rule 30 is the narrow one, and the counterclaim in the second clause is regarded as of the kind mentioned in the first clause, namely, one that arises out of the subject-matter of the suit.

In *Marconi Wireless Telegraph Co. v. Natl. Electric Signaling Co.*, 206 Fed. 295, infringement of a certain patent was alleged, and in the answer infringement of certain other patents was set out as a counterclaim, and on the counterclaim defendants prayed injunction and accounting. The court gave Rule 30 a liberal construction, taking the view that the second clause of the second paragraph was not limited by the first clause, criticising 204 Fed. 103 above and taking the view that the only limitation is imposed by the consideration of the issues that can be properly disposed of in a "final judgment." The court also supposed that it might later appear that this counterclaim was in the category of matters arising "from the same transaction."

Clearly the court here took the view that the permissive counterclaim might set out an unliquidated demand in the nature of a tort, and therefore overruled the motion to strike the counterclaim from the answer.

In *Vacuum Cleaner Co. v. American Rotary Valve Co.*, 208 Fed. 419 (S. Dist. N. Y.), in a suit for patent infringement, the answer set up a counterclaim for circulating false statements about defendant's cleaner and threatening suits against defendant's customers. Injunction and damages were prayed. The motion to strike out this counterclaim was overruled, because it fell "within the second category of counterclaims allowable under new Equity Rule 30, since it 'might be made the subject of an independent suit in equity against the plaintiff.'"

In *Motion Picture Patents Co. v. Eclair Film Co.*, 208 Fed. 416 (Dist. N. J.), the suit was for patent infringement, and the defense set up was that the plaintiff exercised a monopoly contrary to the federal anti-trust act, and was guilty of unfair competition in the use of the patents. A counterclaim was set out asking damages. Motion to strike out the counterclaim was granted because the claim was purely legal, and in that view no discussion of Rule 30 became necessary.

In *Salt's Textile Mfg. Co. v. Tingle Mfg. Co.*, 208 Fed. 156 (Dist. Conn.), the suit was for patent infringement, and defendant counterclaimed by setting out that long anterior to the plaintiff's patent defendant had given to plaintiff a sample of cloth which defendant had

long been making which was like the cloth subsequently manufactured under the patent in suit, and alleged that plaintiff admitted it was an answer to the alleged infringement, but thereafter brought the suit and caused defendant damages in advertising to the trade the pendency of the suit.

The court held that the counterclaim set out a transaction that grew out of the plaintiff's claim of infringement of his patent, and is within the purview of Rule 30. The court says that "Rule 30 should be construed liberally, not narrowly."

In *Adamson v. Shaler*, 208 Fed. 566 (E. Dist. Wis.), suit was brought for patent infringement, and defendant set up two counterclaims: one for unfair competition in trade, the other a cause of action for infringement of patents, and motion was made to strike out the latter. The court adopts the views and conclusion of Judge Dodge in 204 Fed. 103 (above).

Judge Geiger here argues that if the broad construction is given to this portion of Rule 30, several results would follow:

(1) The statutory jurisdiction would be indirectly enlarged because defendants who would otherwise be unable to invoke the federal jurisdiction may do so by counterclaim on an unrelated equitable cause of action; (2) a plaintiff would not be entitled to assert his right to affirmative relief on the subject-matter of the counterclaim, since this can not be done by cross bill or any species of reply known to equity. Hence the court grants the motion.

In *McGill v. Sorensen*, 209 Fed. 876 (E. Dist. N. Y.), the suit was for patent infringement and the counterclaim set up a charge of infringement of defendant's patent by plaintiff; but inasmuch as it was not alleged that the infringing plaintiff had a place of business in the district of trial, as required by statute to establish venue, the motion to strike out the counterclaim was granted.

Presumably, with that allegation in, the counterclaim would have stood the test of the motion.

The same judge—Chatfield—rendered the decision here as in 206 Fed. 295 (above), to the same effect.

In *Electric Boat Co. v. Lake Torpedo Boat Co.*, 215 Fed. 377 (Dist. N. J.), the suit was for infringement of patents, and the answer contained a counterclaim for infringement of certain other patents, for unlawful competition and for malicious prosecution.

In deciding the motion to strike out the counterclaim, the court reviewed the decisions on the second paragraph of Rule 30, and held that the main purpose of the permissive part of the rule "is to enable the defendant by answer to do precisely that which the plaintiff, by Rule 26, may do in one bill, viz: join * * * as many causes of action cognizable in equity as he may have against the plaintiff

"This difference as to the main purpose of this part of the rule leads to radically different results. In the former view the term cross bill (drawing to its previously accepted meaning) is given a

controlling effect upon what follows, whereas under the latter view the phrase without cross bill is but a parenthetical one, subordinate in its effect. Dominated by this former view, the learned judge, in the *Turbine* case (204 Fed. 103), was led to conclude that no other counterclaims than those covered by the mandatory provision could be set up under the permissive provision of the rule.

"To so confine the right to counterclaim, in my judgment, is to unduly limit the meaning of the term cross bill as used in such rule, disregard the manifest intent to distinguish between the kinds of counterclaim that must or may be set up in the answer, and to overlook entirely the plain purpose of the new rules to permit the parties to settle their differences in one suit, provided they can be conveniently disposed of together.

"The counterclaim arising out of the transaction which is the subject-matter of the suit, and which under the rule must be set up in the answer, covers, broadly stated, all matters which heretofore could have been pleaded by cross bill. Therefore to limit the option given to the defendant to set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him to such claims as must be set up, is to make the option fruitless."

Further, the court says that cross bill is synonymous with cross suit and cross claim.

Rule 26 and Rule 30, in his view, place both parties on an equal footing in the matter of joining causes of action. Concluding on this point, the court says at page 382:

"In my judgment, Rule 30, whether read alone or in the light of the other new rules, requires, subject to jurisdictional limitations to be presently considered, an interpretation permitting the defendant to set up against the plaintiff counterclaims unrelated to the transaction made the basis of the plaintiff's bill, provided they might be the 'subject of an independent suit in equity against him.'"

In *U. S. Expansion Bolt Co. v. H. G. Kroncke Hdwe. Co.*, 234 Fed. 868 (7 C. C. A.), a patent infringement suit, the counterclaim set out infringement of two patents of defendant and acts of unfair competition, asking injunction and accounting.

The court held that the plaintiff had waived any right to object to the jurisdiction over the counterclaim by bringing its suit in Wisconsin, and therefore the question was one of equity jurisdiction, not federal jurisdiction, and Rule 30 permitted the filing of the counterclaim. The court then considers the merits involved in the allegations of the counterclaim for the infringement, and finds no infringement.

If infringement had been found, the unfair competition might have been regarded as in aggravation of damages, but here it must be regarded separately; the charge is brought by a corporation of New York against a corporation of New York in Wisconsin, where the suit was pending on the infringement charges made by plaintiff, and

the only ground for federal jurisdiction on the unfair competition charge could be diversity of citizenship; but between two New York corporations clearly that did not exist and the suit on that ground could not be maintained in a federal court under the circumstances.

Note that the circuit court of appeals raises no objection to such counterclaim where the proper diversity should exist and the suit should be brought in the proper district.

Another suit for infringement in which counterclaim is set up for infringement by plaintiff is reported in 235 Fed. 898, *Christensen v. Westinghouse Traction Brake Co.* (W. Dist. Penn.). The court reviews the cases and follows Judge Dodge in 204 Fed. 103, and says on page 900:

"Giving proper effect to the words 'without cross bill' and the words 'shall have the same effect as a cross bill,' it seems reasonably clear that the answer was intended to perform the function of a cross bill, making the cross bill no longer necessary; the matter thus pleaded in the answer having the same effect as a cross suit. This could not be true if the defendant is permitted in effect to file an original bill by way of counterclaim having no connection with the subject of the original bill."

Further, the court says that the counterclaim of the second clause of the second paragraph of Rule 30 is one arising out of the transaction which is the subject-matter of the suit, and therefore only one kind of counterclaim is included in Rule 30.

In *Colman v. American Warp Drawing Machine Co.*, 235 Fed. 531 (Dist. Mass.), a suit for infringement of a patent was met by a counterclaim asking for a decree of the court awarding the priority of invention of the claims involved to the defendant, in accordance with R. S. U. S., Sec. 4915. Such claim, upon which defendant might have brought an original suit, was held here not to constitute a counterclaim under Rule 30. The court here follows its views expressed in 204 Fed. 103, above.

In *Board of Commissioners v. Wills & Sons*, 236 Fed. 362 (E. Dist. N. Car.), mandatory injunction was prayed to compel performance of a contract to dredge and drain a certain district. Defendants *inter alia*, by way of counterclaim, prayed that certain notes delivered to defendants for work performed be adjudged a lien, that a certain trust deed be declared valid, that certain undelivered notes be adjudged invalid and not secured by a prior lien, and that plaintiffs be ordered to raise money to pay defendants for work to be completed.

This counterclaim, the court says at page 386, "prior to the adoption of the new equity rules (Rule 30), would have been set up by a cross bill. If complainant's bill was without equity, it would have been dismissed, and if the cross bill was sustained, a decree rendered upon it for defendants.

"Under the present rule, assimilating the practice to that of the code of civil procedure, the same result is reached, not by dismissing

the bill, but by making the decree upon the counterclaim," and decreed accordingly.

In *Ohio Brass Co. v. Hartman Electrical Mfg. Co.*, 243 Fed. 629 (N. Dist. Ohio), a suit for patent infringement, in which the counterclaim set up unfair competitive methods and business practices and unfounded threats of suits against defendant's customers, the court held that the cause of action attempted to be set out in this counterclaim is an independent one and not a counterclaim under Rule 30; it reviewed the cases and preferred to follow the narrow construction of 204 Fed. 103, and other cases (above), and expressly approved the reasoning of Judge Thompson, in 235 Fed. 899 (above). The courts adopting this reasoning do so because in their opinion it could not have been the purpose of Rule 30 to enlarge the practice and jurisdiction of equity.

In *Knupp v. Bell*, 243 Fed. 157 (4 C. C. A.), the counterclaim set up was found to arise out of the transaction which was the subject-matter of the suit and judgment thereon was not disturbed.

In *Paramount Hosiery Form Drying Co. v. Walter Snyder Co. et al*, 244 Fed. 192 (E. Dist. Penn.), the court gives a broad construction to Rule 30, second paragraph, second clause, in view of the provisions of Rule 26, thereby placing the plaintiff and defendant upon an equality as to liberty of introducing into one suit a number and variety of causes of actions and defenses. Judge Dickinson's views expressed in this case are illuminating.

In *Champion Spark Plug Co. v. Champion Ignition Co.*, 247 Fed. 200 (E. Dist. Mich.), the bill alleged infringement of a trade-mark and unfair competition; the answer contained a counterclaim setting out infringement of defendant's patents by the sale of spark plugs bearing the trade-mark in question. The question arising involves both federal jurisdiction and equity jurisdiction. On the latter point the court held that the counterclaim here arose out of the transaction which is the subject-matter of the suit, and therefore covered by the first clause of the second paragraph of Rule 30.

On the first point the court held that plaintiff had waived its right to object to venue; the plaintiff was a Delaware corporation having its principal office and place of business in Ohio, and sued a corporation resident of Michigan in its home district. By bringing its suit here it was virtually saying that it was rendering itself liable to suit there in any manner provided by law, especially as here to suit by counterclaim.

The court takes occasion to review earlier decisions involving this portion of Rule 30, and expresses his disagreement with 206 Fed. 295, and other cases (see above).

On page 206 the court (Judge Tuttle) says:

"I am aware that a few district courts have held that this rule does not permit the filing of a set-off or counterclaim in a suit unless the subject-matter of such counterclaim might, under the previous prac-

tice, have been pleaded by a cross bill, and that the only effect of this rule is to allow a defendant to use its answer as a substitute for a cross bill, by setting out in such answer, as a counterclaim, any matter which might theretofore have been alleged by its cross bill, but only if it be so germane to the issues in suit that it might previously have been pleaded by a cross bill. I can not, however, agree with this view, which, it seems to me, disregards both the purpose and the clearly expressed language of the rule. If this language means anything, it means that in such answer a defendant may set out any counterclaim which might be the subject of an independent suit in equity, and that the subject-matter of such counterclaim is not limited to matters which might, under the old practice, have been the subject-matter of a cross bill" (citing cases).

Bankston v. Commercial Trust and Savings Bank, 250 Fed. 985. Note secured by lien on realty is assigned; assignee sues to foreclose the lien. Partial defense that assignment was not recorded as required by statute, hence, per statute, "plaintiff must forfeit to debtor 10 per cent."

Held, defense can not be set up in answer under Equity Rule 30, since the claim is not one which could be the subject of an independent suit in equity, nor a claim arising out of the transaction which is the subject-matter of the suit. The claim is enforceable only at law.

Caffish v. Humble, 251 Fed. 1, holds that a counterclaim for damages for breach of the contract sued on arises out of the transaction which is the subject-matter of the suit, and by Equity Rule 30, first clause of the second paragraph, defendant is required to set up the counterclaim or waive it.

In *Howard v. Leete*, 257 Fed. 918, at pages 923 and 924, the court says: "A construction of the first clause (of Equity Rule 30) as relating only to demands 'which might be the subject of an independent suit in equity,' can not be accepted. To do so would not only require the interpolation bodily of a clause in terms made applicable only to the second branch of the rule, but would ignore the existing equity practice. The object of the rule was to simplify and extend, not to curtail, an existing practice designed to prevent multiplicity of suits."

No. 545.

Allegations of no Jurisdiction in the Answer.

Thirtieth. That the bill of complaint herein does not allege facts sufficient to grant unto this court jurisdiction of the cause of action or of the person of the said defendant, The Shubert Theatrical Company, a New Jersey corporation, in that it appears upon the face of the bill of complaint that

the said defendant is a corporation organized and existing under the laws of the state of New Jersey, and a citizen and resident of the state of New Jersey, and is not a resident or inhabitant of the southern district of New York or the state of New York, and that there is not such a diversity of citizenship between the complainant and the defendants herein which would grant unto this court jurisdiction of the alleged cause of action mentioned in the bill of complaint, and that it further appears upon the face of the bill of complaint that the complainant herein is a resident of the state of New York in the southern district of New York, and the bill of complaint further fails to allege jurisdictional facts sufficient to grant unto this court jurisdiction of the cause of action or of the persons in that it fails to allege the residence of the defendant Lee Shubert, of the defendant Jacob J. Shubert; of the defendant Irving M. Dittenhoefer as receiver in bankruptcy, of the said Theodore A. Liebler and George C. Tyler.

And now the defendant The Shubert Theatrical Company (a New Jersey corporation) having answered all and singular those portions of the bill of complaint material and necessary to answer, prays that notwithstanding it has answered all the various allegations of the bill of complaint that the court dismiss the bill of complaint for lack of jurisdiction over the party defendant before requiring a trial of the various disputed questions in the suit, and this defendant prays to be hence dismissed with its reasonable costs and charges herein most wrongfully sustained, and the funds in the possession of the complainant be given to The Shubert Theatrical Company (New Jersey corporation).

THE SHUBERT THEATRICAL COMPANY,

By WM. KLEIN,
Secretary.

WILLIAM KLEIN,
Solicitor for Defendant
Shubert Theatrical Company.

No. 546.**Answer of Railway in the Hands of Receivers.**

[Caption.]

Now comes the defendant, The Chicago, Rock Island and Pacific Railway, and for its answer to complainant's bill specifically admits each and all of the averments in said bill of complaint contained, except as hereinafter qualified or specifically denied. Such admission is intended to be of the same force and effect as if the averments of the bill were herein repeated at length, save only as the same are herein modified or denied.

And in this behalf defendant avers that on the 20th day of April, A. D. 1915, Jacob M. Dickinson, and Henry U. Mudge, both of Chicago, in the state of Illinois, were appointed receivers by this honorable court of all and singular the railroads, lands, property, assets, rights, and franchises of defendant, including all other railroads and property and assets, real, personal and mixed, owned, leased or operated by defendant. And defendant avers that since that date and up to the present time the said receivers under said order of this honorable court, have been and are now managing and operating its said railroads and properties.

And this defendant, having fully answered, prays to be hence dismissed with its reasonable charge in this behalf most wrongfully sustained.

THE CHICAGO, ROCK ISLAND & PACIFIC

RAILWAY COMPANY,

By G. H. C.,

Vice-President.

A. B. and C. D.,

Defendant's Solicitors.

[Verification.]

No. 547.**Answer of Receivers of Railway.****[Caption.]**

Now come the defendants, Jacob M. Dickinson and Henry U. Mudge, as receivers of The Chicago, Rock Island and Pacific Railway Company, and for their answer to complainant's bill specifically admit each and all of the averments in said bill of complaint contained, except as hereinafter qualified or specifically denied. Such admission is intended to be of the same force and effect as if the averments of the bill were herein repeated at length, save only as the same are herein modified or denied.

And in this behalf defendants aver that they have refused to accept, receive, transport, carry or deliver beer or other fermented malt liquors sold by the complainants, or any of them at their place of business and especially at the place of business at Rock Island, Illinois, to persons residing in the state of Iowa who had thereafter purchased the same for their own personal use and private consumption and who desired and directed that the same be transported into the state of Iowa for delivery therein to the purchasers at the places where they reside, including such shipments of beer and fermented malt liquors in respect to which the purchasers found it convenient or necessary or deemed it expedient to authorize and direct, upon their written order in each instance and for such shipment, the delivery of same to some specific person or drayman for completion of delivery to the purchasers at their places of residence. And they admit that they will continue their refusal as aforesaid unless restrained by the order, judgment and decree of this Honorable Court.

Unless so restrained the defendants will persist in said refusal because the receipt and transportation of said beer and other fermented malt liquors from said points in complainants' bill mentioned consigned to persons residing in the state of Iowa and the delivery thereof to persons other than the consignees, even upon the written order in

each instance and for each shipment of the bona fide consignee, solely for the purpose of carrying said beer or other fermented malt liquors from the railway station to the place of residence of the consignee, are deemed a violation or violations of the Acts of Congress of the United States, especially the enactment entitled "An Act divesting intoxicating liquors of their interstate character in certain cases," and of the statutes of the state of Iowa, particularly Section 2421-A, Supplemental Supplement 1915, entitled "An Act requiring common carriers of intoxicating liquors to keep a daily record of such shipments; prohibiting the delivery of such shipments unless so recorded; providing for inspection of such records by certain public officers designated; and making the failure to comply with the requirements of this act a misdemeanor."

Said refusal was not made arbitrarily, nor with any view of depriving complainants herein of their legal rights, but only because of defendants' desire to make due compliance with the acts of the Congress of the United States and the laws of the state of Iowa.

The defendants deny the averments contained in the first paragraph of Section 7 of the said bill of complaint and deny that there is no valid law of the state of Iowa or of the United States which prohibits or prevents defendants from receiving and transporting shipments of beer or other fermented malt liquors under the circumstances therein set out: but, on the contrary, the defendants aver that it was their duty, unless it shall be judged that the said laws hereinbefore mentioned or either of them are invalid, to refuse to accept, receive, transport, carry or deliver such consignments; and in this behalf the defendants aver that, at all times mentioned in the bill of complaint and this answer thereto, the laws therein referred to still are in full force and effect, and control and govern defendants in the transportation and carriage of beer and other fermented malt liquors within said state of Iowa.

In addition to the foregoing reasons and considerations which induce defendants to decline said shipments, defend-

ants aver that penalties and possible arrests for violation of the laws of the state of Iowa may by its authorities be invoked and defendants placed in jeopardy if they accept shipments of the character referred to in said bill of complaint, though they will accept the same if so ordered by this Honorable Court.

Defendants state that The Chicago, Rock Island and Pacific Railway Company is a railway corporation organized and existing under and by virtue of the laws of the states of Illinois and Iowa with its principal office in the city of Chicago, State of Illinois.

Wherefore, the defendants pray this court to make such order and decree in the premises as the true intent and meaning of the Act of Congress of the United States and the laws of Iowa may require, and that if the injunction prayed for shall be issued, this court will specify the conditions upon which shipments of the character referred to in the bill should be accepted by the defendants. If the court shall find and determine that said laws forbid the acceptance of such consignments that the court shall give judgment dismissing complainants' bill, and defendants ask this Honorable Court to grant such other and further relief as shall be just and equitable.

JACOB M. DICKINSON,
H. U. MUDGE,

Receivers.

Per H. U. MUDGE,

As Receivers of The Chicago, Rock Island
and Pacific Railway Company.

M. L. BELL,
Solicitor for defendants.
[Verification.]

No. 548.**Amended Answer of Street Railway where Receiver is in Charge, Adopting Answer of Receiver.**

[Caption.]

Now comes Amarillo Street Railway Company Defendant, leave of the Court being had and obtained, and files this its First Amended (1) Original Answer herein, and says:

1. It admits all the allegations in plaintiff's petition as true, and makes no defense to the matters and things therein set forth, and agrees that the Receiver may continue in the appointment heretofore made until duly discharged by the Court, and that such other action may be taken by the Court as may be deemed necessary to preserve the property of this defendant, and to carry out the terms and provisions of the mortgage securing the bonds of this defendant, and for all other such purposes as may be requisite and necessary in the premises.

2. Replying to the petition of intervention of the City of Amarillo, filed herein on September 25, 1916, and to all other pleadings that may hereafter be filed by said intervenor, to which this answer would apply, this defendant adopts the answer of Guy W. Faller, Receiver, filed herein on the 27th day of October, 1916, and makes the allegations, statements and denials in said answer the allegations, statements and denials of this defendant.

TURNER & ROLLINS,
Attorneys for Amarillo Street Railway Company.

(1) Equity Rule 19 covers the matter of amendments, placing it in the discretion of the court and permitting amendment at any time. Amendment may under this rule be made in the appellate court. See *Western Union Telegraph Co. v. Atlanta & W. P. Ry. Co.*, 238 Fed. 36, where on appeal from a decree dismissing the bill the appellate court modified the decree by an order permitting plaintiff to amend within a time stated, the dismissal to be conditioned upon the failure to amend.

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Also, *Whitaker v. Whitaker Iron Co.*, 238 Fed. 980, where the court says, at page 991, that it would not dismiss a bill on the sole ground that an amendment thereto is in a matter known to plaintiffs at the time of the filing of the bill, inasmuch as by Rule 19 the subject of amendment is placed entirely in the court's discretion.

No. 549.

Answer of Defendants and Intervenor.

[Caption.]

Come now the following named defendants and intervenors, the same being all of the parties hereto who oppose the attempted cancellation of the enrollment and allotment of Barney Thlocco, deceased, to-wit: [*here follow names*] and for their answer to the amended bill of the United States, say:

I. That said bill of complaint does not state facts sufficient to sustain a cause of action on behalf of complainant or to entitle complainant to the relief prayed for in said bill of complaint.

II. That these defendants and intervenors, hereinafter styled defendants, admit that they claim the land involved in this action, to-wit:

The northwest quarter of section nine (9), township eighteen (18) north, range seven (7) east, as heirs of Barney Thlocco, deceased, or as assignees of said heirs, and aver that the respective interests of these defendants as such heirs or assignees and as to their rights between themselves are not pleaded in this answer, but the same are reserved as between themselves and will be determined upon further pleadings to be filed by them when the claim asserted by the United States is disposed of.

III. That these defendants admit that for a long period of time last past, that portion of the territory belonging to the United States, known and designated as Indian Territory, and now forming a part of the state of Oklahoma, and within the eastern judicial district thereof, has been occupied

first day of April, 1899, the said Barney Thlocco was a Creek Indian by blood, and was entitled under the acts of Congress in this behalf to be duly enrolled upon the Creek roll of Indians, and was so enrolled by said commission created by act of Congress in the discharge of their duties, and acting upon evidence satisfactory to them, and sufficient in law, and in fact, to authorize said commission in placing the name of said Barney Thlocco on said rolls.

These defendants further say that they have no knowledge or information as to what notice, if any, was given by said commission to the Creek nation or its officers as to the proposed enrollment of Barney Thlocco, and in this connection they allege that under the rules and regulations of said commission, which were approved by the Secretary of the Interior, no notice was required to be given to said Creek nation or any of its officers of the intended enrollment of any Creek citizen or of any proposed action of said commission with reference to such Creek citizen, and they further allege that the said Barney Thlocco was enrolled and allotted in like manner as all other Creek citizens, regularly and in accord with the approved practice of said commission.

VIII. Further answering, these defendants say that they admit that on the 30th day of June, 1902, the said commission to the five civilized tribes allotted in the name of the said Barney Thlocco the land described in the petition, and issued a certificate of allotment therefor in the name of said Barney Thlocco; and these defendants further admit that the copy of said allotment certificate attached to said petition is a true and correct copy thereof; but these defendants say that it is not true that said allotment certificate was issued upon the arbitrary assumption that Barney Thlocco was a living person on April 1, 1899, and allege, as a matter of fact, the said Barney Thlocco was a living person on said date, and a Creek Indian by blood, and entitled to be placed on said rolls and to an allotment; and

in this connection these defendants further allege that though it is true that said Barney Thlocco had died prior to the selection and allotment of said land, which was made on the 30th day of June, 1902, it was in accord with the usage, practice and custom of the commission to the five civilized tribes to so issue said allotment certificate in the name of the allottee for the use and benefit of the heirs, and that the said selection and allotment inured to the benefit of the heirs in like manner as if the allotment certificate had been issued in the name of the heirs.

IX. These defendants admit the execution and approval of the patents conveying said allotment, as alleged in the bill of complaint, and admit that said patents were not delivered to Barney Thlocco, but in this connection they aver that immediately after the issuance of said patents they were duly and lawfully recorded by the commission to the five civilized tribes in the books of record provided by law for such purpose, and that said record operated as a delivery of the patents.

X. That these defendants deny that any knowledge ever came to said commission as to a mistake of fact made by said commission in causing the name of said Barney Thlocco to be enrolled and in allotting him the land above described, and they further aver that no mistake of fact was made by said commission in that respect.

XI. These defendants say that they are without knowledge as to whether, on the 13th day of December, 1906, the Secretary of the Interior by his order caused the name of Barney Thlocco to be stricken from the roll of Creek citizens, and in this connection they aver that if the name of the said Barney Thlocco was so stricken that it was illegally done, without due process of law, and without notice to any of the heirs of said Barney Thlocco, and without notice to any person who was entitled to notice, and said act was void.

XII. That the commission to the five civilized tribes was, by various acts of Congress and treaties with the Creek nation, vested with full and complete power, authority and jurisdiction to enroll Creek citizens and to allot the lands of said nation to the enrolled members of the tribe, and the acts of said commission in enrolling said Barney Thlocco and in allotting said land in his name for the benefit of his heirs, were judicial in their nature and that the said commission to the five civilized tribes having, as hereinbefore set forth, enrolled said Barney Thlocco, and having made said allotment in the usual and ordinary course of the authorized work of said commission and upon such hearing and evidence as the commission deemed satisfactory, and the work of said commission having been approved by the Secretary of the Interior, said enrollment, allotment and patent can not be cancelled, nor can the issue of fact upon which the commission placed the name of said Barney Thlocco upon the approved Creek roll be tried again, and these defendants say that this court is without authority of law or jurisdiction to reopen or retry the question of fact sought to be put in issue by the United States. They further allege that by act of Congress said final rolls of the Creek nation approved by the Secretary of the Interior have been made final and conclusive and not subject to attack.

XIII. And defendants further say that complainant ought not to have and recover herein because defendants aver and say, that the different causes of action upon which complainant predicates its bill are barred by the Federal statute of limitation of six years, being the 26th Statutes at Large, Section 8, 1099.

XIV. And defendants further say that the patent of Barney Thlocco was issued on the 11th day of March, 1903, and recorded in the office of the commission to the five civilized tribes on the — day of —, 1903, more than thirteen years ago. That the complainant with full knowledge of all the facts, did not commence any proceeding to set aside, vacate or annul said patent until the institution

of this suit, and defendants therefore say that complainant has been guilty of laches and that its failure to prosecute a suit to set aside and annul said patent has been such laches as ought to and does bar this action in a court of equity.

Wherefore, these defendants pray that the complainant's amended bill of complaint be dismissed and that they may recover judgment, for their costs herein and all other proper relief.

A. B. and X. Y.,
Attorneys.

[*Verification.*]

No. 550.

Supplemental Answer.(1)

[*Caption.*]

Come now the defendants, W. T. Carter and Brother, a co-partnership, trading under that name, and composed of W. T. Carter, and E. A. Carter, resident citizens of Polk County, Texas, and Jack Thomas, a resident citizen of Hayes County, Texas, and said W. T. Carter, E. A. Carter and Jack Thomas, individually, and answering the bill of complaint filed herein on the 25th day of January, 1913, under leave of this court, file this their first supplemental answer, in addition to and in supplement of their second amended original answer filed herein on the 13th day of April, 1916, and pray that this supplemental answer be considered in connection with said second amended original answer, and not as superseding any allegation of law or fact made therein, or any other matters set out in said pleading, or any relief prayed for therein, all of the matters and things alleged in said second amended original answer being here and now adopted as if set out herein in *haec verba*:

I. These defendants here and now allege that since the filing of this suit, and since the filing of their said second amended original answer herein, these defendants have

acquired, by a general warranty deed, said deed being dated the 20th day of May, A. D., 1916, and duly recorded in the deed records of Polk County, Texas, in Volume 54 at page 363, all of the interest in the land sought to be partitioned herein that was at said time owned by the defendant, J. E. Bruce, said interest being more particularly described as follows: [*description omitted*].

These defendants here and now specially adopt all allegations of law and fact made in the second amended original answer hereinabove referred to; also all defenses set out therein, and all prayers for relief made therein, and further pray that if it should be decreed that their interest in the Jno. D. Nash survey is subject to partition in this suit, that the interest therein conveyed to them by the instruments hereinabove referred to in this pleading, be respected in addition to all the other interests in said land so owned by these defendants, as set out in their second amended original answer filed herein.

And for such other and further relief, as these defendants may show themselves entitled to receive, in equity and good conscience, they, as in duty bound, will ever pray.

A. B. and C. D.,
Solicitors.

(1) See Equity Rule 19.

No. 551.

Second Amended Answer.

[*Caption.*]

In the above styled and numbered cause comes now the defendant, Ray Wilson, a resident and citizen of Polk County, Texas, and having obtained leave of the court in this behalf,(1) files this his second amended answer in this cause, and answering the bill of complaint herein exhibited against him, says:

I. This defendant here and now adopts as part of his answer in this behalf the answer filed in this case by the

solicitors of the defendants, W. T. Carter and Brother, and W. T. Carter and E. A. Carter and Jack Thomas, as individuals, insofar as the allegations in the second amended original answer of the defendants above named are applicable to the defense of this defendant.

II. Defendant further adopts as if set out herein in *haec verba*, the allegations made in paragraph 1a of the second amended original answer of the defendants above named, and moves that this suit be dismissed for the reasons therein stated.

III. Replying to the allegation made in Section 6 of the bill of complaint filed herein, which allegation is as follows:

"The defendants are denying and repudiating the right of complainant to have a partition of said land and refuse amicably to partition the same, and this action on the part of the defendants renders it impossible for the complainant to avail itself of its portion of said land, or to use, enjoy and appropriate the same, thereby necessitating this suit to effect a partition at the hands of the court according to equity and good conscience,"

defendant, Ray Wilson, alleges the fact to be that as shown by plaintiff's bill, he was not a party to cause No. 4055 in the district court of Polk County, styled Annie T. Lomax v. Wm. Carlisle and Company *et al.*, and was not a party to the judgment rendered by the district court of Polk County in said cause on December 4, 1911, and that nothing in said judgment applies to or affects this defendant or this defendant's interest in said John D. Nash survey; wherefore this defendant says that the court should not take jurisdiction of this case insofar as he is concerned, because he is not a proper or necessary party to this suit, and the said Ray Wilson here and now prays that as to him this suit be in all things dismissed.

IV. If mistaken in the foregoing contentions, and if it be held that this defendant is a proper and necessary party

to this suit, and that he must submit his interest in the lands in controversy to the jurisdiction of this court for partition, defendant says: [*allegations omitted*]

VI. If mistaken in the foregoing allegations, and if it be held that this defendant must tender his interest in said lands as above set out for partition, defendant prays that upon partition there be set aside and decreed to him, free of all claims of all parties to this suit, and in severalty, the tracts of land hereinabove described by metes and bounds.

A. B. and C. D.,
Solicitors.

(1) See Equity Rule 19.

No. 552.

Allegations in Answer of Denial of Jurisdiction in Federal Court, no Federal Question, and not Requisite Jurisdictional Amount.

They deny that the matters in controversy in this suit are proper questions arising under the Constitution and laws of the United States, but show, on the contrary, that no proper Federal question arises under the bill. They also deny that the sum in controversy exceeds the value of \$3,000.00, exclusive of interest and costs, but show that the action is not one involving a consideration of that kind, but is only a suit to prevent compliance with the orders of the Mississippi Railroad Commission.

No. 553.

Denial of Jurisdiction of Federal Court to Enjoin State Railway Commission.(1)

The defendants show that they have not prepared to bring any suit in reference to the matter and that such action had not become necessary prior to the injunction sued out herein; that the suit now pending in the supreme

court of Mississippi wherein the attorney general is appellant and the Mobile & Ohio Railroad Company appellee hereinbefore referred to, will decide the principles involved in this suit and will involve a construction of the laws of Mississippi bearing on most of the questions at issue in this suit, but they admit that if the state supreme court decides said suit favorably to the attorney general that it is and was the purpose of the attorney general to proceed with said suit to compel the complainant to discharge its duty to the public and that he will adopt whatever legal procedure is deemed appropriate in case he is not enjoined from so doing.

In respect to the said suit, he shows that this court cannot enjoin his action therein, because it is a suit by the state in its sovereign capacity against the complainant in this suit, and that the Federal courts have no authority or power to enjoin him with reference thereto.

(1) See Judicial Code, Sec. 266.

No. 554.

Prayer that Answer be made a Cross-Bill.(1)

Now, having answered the material allegations of the bill, defendants pray that their answer be made a cross-bill and that the court will grant an order directing the Mobile & Ohio Railroad Company and Southern Railway Company, which operates and controls it in its own interest, to submit to the defendants or their authorized agents and accountants for examination, all books, accounts, letters, records and papers bearing on the business and operation of the Mobile & Ohio Railroad Company and of the Southern Railway Company and of the relations of one party to the other party, to the end that the truth may be known and justice done between the public and the complainant, and that on final hearing, that the court will enter an order sustaining the orders of the Railroad Commission and directing the

complainant to comply with the said orders either in whole or in part, as the facts proven after full hearing may show to be just and lawful, and if mistaken in the relief prayed, that the court will grant to the cross-complainants such other and further relief, both general and special, as the facts stated may warrant, and as in duty bound, the cross-complainants will ever pray, etc.

ROSS A. COLLINS;

Attorney General.

By GEO. H. ETHRIDGE,

Assistant Attorney General.

(1) See Equity Rule 30.

No. 555.

Answer to Amendment to Bill Filed after Answer to Original Bill, under Consent of Defendants.

[Caption.]

I, Walter E. Masland, one of the defendants in the above case, for answer to the amendment to the bill of complaint filed therein, say:

In addition to the answer set forth by me in the fourth paragraph of my original answer in this case, I deny that any action of mine will be to the great and irreparable damage or injury, or of any damage or injury to the said plaintiffs, and I aver and state, as I have heretofore done, that the said plaintiffs have a full, adequate and complete remedy at law.

G. Q. H.,

Solicitor for Defendant.

No. 556.

Answer to Interplea.

[Caption.]

Now comes plaintiff and by consent of court first obtained, files herewith his answer to the interplea(1) filed in the

above entitled cause, by the Commercial Bank, a corporation of New Madrid, Missouri.

Plaintiff admits that the Commercial Bank, the interpleader, is a corporation duly organized and existing, and doing business, at New Madrid, Missouri, under and by virtue of the laws of the state of Missouri.

Plaintiff in answer to the first count of said interplea denies each and every allegation contained therein. And the plaintiff especially denies that the interpleader is now or was at the times mentioned by plaintiff's petition or in interpleader's petition, the owner of a certain promissory note in the principal sum of ten thousand (\$10,000.00) dollars, executed by Murray Phillips, Jr., and Annie M. Phillips; and the plaintiff further denies that plaintiff's assignor, the State National Bank of Little Rock, Arkansas, entered into the agreement with the interpleader alleged in said interpleader's petition.

Plaintiff for his answer to the allegations contained in the second count of said interpleader's petition, denies that said note executed by the said Murray Phillips, Jr., and Annie M. Phillips, is now or was at any of the times therein mentioned the property of the said interpleader; and further denies that the said note was delivered to the said State National Bank of Little Rock, Arkansas, without consideration. Plaintiff further denies that the interpleader is now or was at any [of] the times therein mentioned the owner of, or entitled to the possession or proceeds of the said note executed by the said Murray Phillips, Jr., and Annie M. Phillips.

The plaintiff further answering said interpleader's petition respectfully shows to the court that on or about the 22nd day of September, 1913, plaintiff's assignor, the State National Bank of Little Rock, Arkansas, purchased the said note of the said Murray Phillips, Jr., and Annie M. Phillips, from said Commercial Bank, the interpleader herein, for a valuable consideration and that plaintiff is now and was at all the times mentioned in plaintiff's petition and in the

interpleader's petition the true and lawful holder thereof and entitled to the proceeds of said note.

Plaintiff further shows to the court that plaintiff's assignor was at all times herein mentioned, a corporation duly organized and doing business under the laws of the United States relative to national banking associations, and that the interpleader was at all times herein mentioned a corporation duly organized and doing business under the laws of the state of Missouri relative to banks and trust companies.

Plaintiff respectfully shows to the court that the contract and agreement alleged in said interpleader's petition is by its terms wholly *ultra vires*, of the powers conferred upon either the plaintiff or interpleader, and plaintiff still denying that such a contract was entered into by and between plaintiff's assignor and the interpleader respectfully shows to the court that the execution of such a contract, either by the parties voluntarily, or by the order of this honorable court, would constitute a fraud upon the public and would be in every way contrary to public policy.

Wherefore, plaintiff having fully answered the said interpleader's petition, plaintiff respectfully prays the court that it be adjudged the owner of said note of Murray Phillips, Jr., and Annie M. Phillips, and that this honorable court order the proceeds thereof, which have heretofore been ordered paid into this court, be now ordered paid over to this plaintiff, and for such other and further equitable relief as to the court shall seem meet and proper in the premises.

CHAS. CLAFLIN ALLEN &
GEO. BREAKER,
Attorneys for Plaintiff.

(1) Foster's Fed. Prac., 5th ed., Sec. 157; Whitehouse, Equity Practice, Secs. 125, 126, 127.

No. 557.**Joint Answer of City, City Treasurer, and Holder of
Certificates of Indebtedness.****[Caption.]**

Come now the defendants in the above entitled action by their attorneys, Daniel W. Hoan and Clifton Williams, and by way of answer to the cause of action set forth in the plaintiff's complaint, make the following allegations, admissions and denials:

I. The defendants admit the names, citizenship and residence of the parties as alleged in the complaint.

II. The defendants admit that a tax has been levied against the property mentioned, and for the purposes mentioned, in the complaint, in the amount of upwards of eight thousand dollars, by the defendant city, but deny that the said tax is a pretended tax or void, and in that connection allege that the same is a valid tax, and in accordance with law. The defendants admit that the city of Milwaukee would have sold the said property for the said tax if it had not been enjoined therefrom. The defendants further admit that the defendant Donahue is the owner and holder of the certificates mentioned in the complaint, as alleged in paragraph 2 thereof.

III. The defendants allege that they are without knowledge as to the ownership of the plaintiff in the property described in paragraph 3 of the complaint, and are without knowledge as to the exact frontage thereof, but admit that the said lots front upon Erie Street, and that the city of Milwaukee is a city of the first class, as alleged in said third paragraph.

IV. The defendants admit the allegations as to the established grade of said street in 1873 in the 4th paragraph of the complaint and admit that the said street was graded and graveled, as alleged in said 4th paragraph, in 1873, and in that connection allege that the said graveled of the said street was nothing more nor less than the leveling of the

said street for traffic thereover, and the placing thereupon of a thin surface of sand and gravel, and was not a pavement of the said street within the provisions of Chapter 185 of the Laws of 1911, which is quoted in paragraph 6 of the said complaint.

V. The defendants admit the allegations of section 2 of the charter, as contained in the 5th paragraph of the complaint, and allege that the *proviso* therein, being the last part thereof, applies to the case at bar.

VI. The defendants admit the allegations as to the contents of the Chapter 185 of the Laws of 1911, as contained in the 6th paragraph of the complaint.

VII. The defendants admit the allegations as to the contents of the charter provisions alleged in the 7th paragraph of the complaint.

VIII. The defendants admit the passage of a resolution on or about the 24th day of June, 1912, as alleged in the 8th paragraph of the complaint, but deny that the said copy contained in the said complaint is a correct copy thereof. The defendants also admit that the commissioner of public works made a communication, as alleged in the last part of the said paragraph 8 of the complaint, and further admit the allegations of the said paragraph as to the estimate of cost of the work.

IX. The defendants deny that the commissioner of public works failed to make an assessment of benefits and damages, as alleged in the 9th paragraph of the complaint, and the defendants deny that the assessment was made by a clerk in the office of the commissioner of public works; deny that the commissioner of public works or the person who made said assessment failed to consider the amount proposed to be made chargeable against the several lots described in the complaint, and the benefits which, in his opinion, would actually accrue to the owner of the same and the consequence of such proposed accrual, and the defendants deny that the commissioner did not assess against the several lots mentioned in the complaint the amount of

benefits which said lots would severally, in the opinion of the commissioner, derive from said improvement when completed in the manner contemplated, and deny that the commissioner failed to take into consideration in each case any injury which, in his opinion, might result to each lot from said improvement, and deny that the said assessment was arbitrary or based upon the estimate of costs, and the defendants deny that the said assessment was unfair or unjust or grossly excessive, and that the said improvement is of no benefit to the property in question, and that it has in no wise increased or enhanced the value thereof.

The defendants admit that bids were advertised for for doing the work and that contract was entered into with the defendant Donahue at the price mentioned in the complaint, and that the said Donahue was to pave the street with a permanent sandstone pavement with a concrete foundation, as alleged in the 9th paragraph of the complaint, and the defendants further admit the allegations as to the issuing of the certificates in said 9th paragraph.

X. The defendants admit the allegations of the 10th paragraph of the complaint, but allege that the same is immaterial to this cause of action, and based upon the erroneous theory of the law applicable hereto. Admitting that said lots front on said street, the defendants allege that they are without knowledge as to the exact width of said lots, or the extent of said frontage.

XI. The allegations of the 11th paragraph as to the payment of taxes are admitted by the defendants.

XII. Wherefore the defendants pray judgment that the complaint of the plaintiff be dismissed, with costs to the defendants.

DANIEL HOAN,
CLIFTON WILLIAMS,
Attorneys for the Defendants.

[*Verification.*]

No. 558.

Stipulation(1) Waiving Answer and Nunc Pro Tunc Agreement as to Filing the same.

[Caption.]

It is stipulated by and between the parties above named and their attorneys of record that the petition filed and the proofs offered in support thereof show the facts; and formal filing of answer or motion to dismiss on the part of the defendant is hereby expressly waived by the plaintiffs; and it is agreed that the case be submitted to the court upon the petition and proofs and proceedings had at the time of submission of the same for final order.

A. B.,
Attorney for Plaintiffs.
C. D. and E. F.,
Attorneys for Defendant.

It is hereby agreed that the above and foregoing stipulation be considered filed as of the date of the hearing before the trial court and before the submission to the court of the above entitled case.

A. B.,
Attorney for Plaintiffs. .
C. D. and E. F.,
Attorneys for Defendant.

(1) Must be in writing or made in open court. . Evans v. State Bank, 19 Fed. 676; Lee v. Simpson, 42 Fed. 434.

No. 559.

Averments in the Answer in Place of Motions.(1)

Defendant denies that the matter in dispute, exclusive of interest and costs, exceeds the sum or value of \$3,000.00. and therefore avers that this court is without jurisdiction and prays the same benefit and advantage of these facts and things as if it had moved to dismiss the bill of complaint in these regards.

Defendant, further answering, avers that links identical with complainant's are made and sold by others than complainant, purporting to be under agreement with complainant, and therefore the size, shape, material, ornamentation and general appearance could not identify the goods as those of complainant, and if such an agreement or arrangement exists, then said others ought to be joined as complainants, and defendant prays the same benefit and advantage of these facts and things as if he had moved to dismiss the bill of complaint in these regards.

Defendant, further answering, says that H. B. Pratt referred to in the bill of complaint is alleged to have such an interest as to require his being joined as complainant, and defendant prays the same benefit and advantage of these facts and things as if he had moved to dismiss the bill of complaint in these regards..

(1) Equity Rule 29.

No. 560.

Amendment to Answer as Amended.(1)

[Caption.]

Now comes J. M. Fisher Company, defendant herein, and by leave of court first had and obtained, amends his answer as follows:

By adding immediately after paragraph 19 of the amended answer the following:

XX. In answer to paragraph 2 of the bill of complaint as amended, defendant denies that at the time the complainant is alleged to have begun to manufacture and sell the links referred to no links of the same or similar form were being made by others, and denies that complainant's alleged type of links is, or ever was, distinctive, or had never before been made or sold except by H. B. Pratt or Bullard Brothers, or under their authority.

As to the other matters alleged in the second paragraph of the bill of complaint as amended, defendant is not informed save by the bill of complaint, and therefore denies the same and demands that the complainant make strict proof thereof.

XXI. Defendant, further answering, avers that Bullard Brothers Company, referred to in the bill of complaint as amended, is alleged to have such an interest as to require its being joined as complainant, and the defendant prays the same benefit and advantage of these facts and things as if he had moved to dismiss the bill of complaint in these regards.

S. P. H.,

Solicitor for Defendant.

I acknowledge receipt of copy of the foregoing proposed amendment to the answer and consent that the answer may be so amended.

E. E. H.,

Solicitor for Plaintiff.

(1) Equity Rule 19.

No. 561.

Defense of Prior Suit in State Court(1) and Formation of Corporation for Purposes of Federal Suit.

Defendant for a further defense alleges:

I. That on the 26th day of November, 1915, the defendant herein commenced an action in the superior court of the state of California in and for the county of Fresno, against H. N. Coffin, John McMillan, and F. H. Parsons, as trustees, and H. N. Coffin, John McMillan and F. H. Parsons, and the Los Angeles Trust and Savings Bank, a corporation, as defendants, which said action is now pending.

II. That the said Los Angeles Trust and Savings Bank, a corporation, one of the defendants in said suit in said state court, is a corporation organized and existing under

the laws of the state of California, with its principal place of business at Los Angeles, California, and said corporation is a citizen of the state of California.

III. That said cause of action in said state court involves the construction of certain instrument in writing hereto annexed marked "Exhibit A," and made a part hereof, and was brought for the purpose of establishing said F. F. Doane's interest and claim in said lands described in plaintiff's said amended bill herein.

That the said Los Angeles Trust and Savings Bank has appeared in said action on or about the 23rd day of December, 1915.

IV. That the said H. N. Coffin, John McMillan and F. H. Parsons and their associates in interest knew of said action in said state court aforesaid immediately upon said suit being filed in said court; and on the 29th day of December, 1915, there was filed by said F. F. Doane a *lis pendens* in said action with the county recorder of Fresno County, California, a copy of which *lis pendens* is hereto attached and marked "Exhibit B" and made a part hereof.

V. That on the 30th day of December, 1915, the said N. H. Coffin, John McMillan and F. H. Parsons and their associates in interest in said lands formed the corporation plaintiff herein under the laws of the state of Idaho, a copy of which articles on incorporation is hereto attached marked "Exhibit C" and made a part hereof.

VI. That the said H. N. Coffin, John McMillan and F. H. Parsons immediately filed said articles of incorporation with the secretary of state of Idaho, to-wit, on the 8th day of January, 1916, and on the 17th day of February, 1916, filed a certified copy thereof with the secretary of state of California, and on the 3d day of March, 1916, filed a certified copy thereof with the county clerk of Fresno county, California, and on the 17th day of February, 1916, filed with the secretary of state of California a designation of the person upon whom service of process may be made in

California, designating H. G. Redwine of Los Angeles, California, as such person.

VII. That said corporation plaintiff herein was formed for the purpose of removing the issue involved in said cause of action pending in said superior court of Fresno county, California, to the United States district court, and to have the same issues tried in said district court relative to the rights of the respective parties in said lands described in the plaintiff's amended bill herein.

VIII. That said corporation plaintiff herein is the agent of the real parties in interest, to-wit, H. N. Coffin, John McMillan, F. H. Parsons and their associates in interest in said lands, and that no adequate consideration was given by said corporation for transferring the interests of the said parties to said corporation, or any consideration other than the issuing of its capital stock to the said parties and their associates.

IX. That such transfer of interest in said lands by said H. N. Coffin, John McMillan, F. H. Parsons and others was made for the purpose of transferring the same issues in the said state court then and now pending to the United States district court.

That the said issues and claims of said F. F. Doane were well known by said H. N. Coffin, F. H. Parsons and John McMillan prior to the formation of said corporation and the claim of said F. F. Doane to his interest in said lands described in said amended bill herein were all based upon and grew out of contracts with said parties, which contracts and rights and claims were well known to said parties prior to the formation of said corporation plaintiff herein.

X. That said corporation plaintiff is owned and controlled by the same parties named as defendants in said action in said state court with the exception of the Los Angeles Trust and Savings Bank, a corporation, which latter corporation was at all times acting as the agent of the parties to this action and the action in said state court.

Wherefore, defendant prays that the complainant take nothing and that the action be dismissed; and

That if it be determined that this court has jurisdiction that it be adjudged that the defendant has an interest in said premises as purchaser and entitled to their possession, and for such other and further relief as may be just and equitable.

G. R. F.,
Solicitor for Defendant.

[*Verification.*]

(1) Foster's Fed. Prac., 5 ed., Sec. 177; *Randall v. Howard*, 2 Black. 585, 17 L. ed. 269.

No. 562.

Answer and Cross-Petition of Holders of Bonds of Corporation in the Hands of Receiver.

[*Caption.*]

This answering defendant says that it is a banking corporation duly organized and existing under the laws of the state of Ohio, with its principal office and place of business located at Ironton, in said state.

That this answering defendant holds, as pledgee, to secure the repayment of certain moneys loaned and advanced by it, as hereinafter set out, the following described first mortgage five per cent. (5%) gold bonds of said The Superior Portland Cement Company, to-wit: Bonds numbered eighty-two (82), eighty-three (83), eighty-four (84), four hundred fifty-eight (458), four hundred fifty-nine (459) and four hundred sixty-one (461), all in the denomination of one thousand (\$1,000) dollars each, dated June 30, 1906, and due July 1, 1936. All of said bonds have coupons attached for semi-annual interest payable in January and July of each year.

That this answering defendant received said bonds in due course of business, said bonds numbered eighty-two (82), four hundred fifty-eight (458), four hundred fifty-nine (459) and four hundred sixty-one (461), being pledged to secure

a note for two thousand (\$2,000) dollars, made by D. G. Wright and Nannie H. Wright, dated November 30, 1912, payable on demand, to the order of this answering defendant, and bearing seven per cent. (7%) interest per annum after date, and which said interest has been paid up to the first day of October, 1913, said bonds being so pledged contemporaneously with the execution of said note.

That said bonds numbered eighty-three (83) and eighty-four (84) are held in pledge, by this defendant to secure the payment of a promissory note in the sum of eight hundred (\$800) dollars, made by Nannie H. Wright, dated January 16, 1914, and due four months after date. Said note of \$800 is a renewal of a note originally for \$1,000, executed July 18, 1911, upon which \$200 was paid prior to the renewal of same on January 16, 1914, said bonds being pledged to secure said loan on July 18, 1911, and have since been held, continuously, by said bank, in pledge to secure said loan.

This answering defendant further says that each and all of said bonds were received by it in good faith, said bank relying upon the validity and regularity of the issue of said bonds by said The Superior Portland Cement Company, and if there was any irregularity concerning the issue or negotiation of said bonds, by said company, or any party to whom they were issued, this defendant had no notice or knowledge thereof, and by reason of the premises, said bank is a bona fide holder of said bonds.

That no part of said notes, or either of them, have been paid, except the amount of interest upon said note for two thousand (\$2,000) dollars hereinbefore mentioned, and that there is due, payable and unpaid, to this answering defendant, upon said note of D. G. Wright and Nannie H. Wright, the sum of \$2,000, with interest at seven per cent. (7%) per annum from October 1, 1913, and there is owing to said bank, and unpaid, upon said note of Nannie H. Wright, the sum of eight hundred (\$800) dollars, which

will bear interest at eight per cent. (8%) per annum, after May 16, 1914.

That if said bonds are not held to be valid and binding obligations of said The Superior Portland Cement Company, this answering defendant will be greatly prejudiced in its rights as holders of said bonds.

Wherefore this answering defendant prays the court to find and determine the amount due and owing to it upon each of said notes; to find and decree that it is the bona fide holder of the bonds hereinbefore described; that said bonds are a valid and subsisting obligation of said defendant the said Superior Portland Cement Company; that the injunction hereinbefore granted in this case, so far as the same relates to the bonds hereinbefore described, be dissolved; that it be permitted to sell and dispose of said bonds, or so many thereof as may be necessary to pay its said claims, together with all costs and expenses, and for all proper equitable relief, to which it may be entitled in the premises.

A. B. and C. D.,

[*Verification.*]

Attorneys for Defendant.

No. 563.

Order Granting Leave to Intervene and that Petition of Intervention(1) be Considered as Answer to Complainant and Cross-Bill to Another Intervenor.

[*Caption.*]

The petition of intervention of the Producers Oil Company in the above styled cause, being presented to this court, it is ordered that the Producers Oil Company be and is hereby permitted to intervene in said cause as a defendant, and that its said petition of intervention be considered as an answer to complainant's original bill and as a cross-bill against the state of Oklahoma, the commissioners of the land office of the state of Oklahoma, John Henry, W. T. Barrett and Frank Brown.

It is further ordered that said intervenors, the state of Oklahoma, the commissioners of the land office of the state of Oklahoma, John Henry, W. T. Barrett and Frank Brown be required to plead, demur or answer said cross-bill as and within the time that they would be required to plead, demur or answer to an original bill filed in said court as of this date.

This 16th day of January, 1915.

RALPH E. CAMPBELL,
Judge.

(1) On intervention see Equity Rule 37; Foster's Fed. Prac., 5 ed., Secs. 258 to 261; Whitehouse Equity Practice, Secs. 205, 211, 212.

No. 564.

**Petition of Intervention,(1) Considered as Answer and
Cross-Bill.**

[*Caption.*]

Now comes the Producers Oil Company and by leave of court, files its intervention in the above styled and numbered cause, and for its answer to complainant's original bill, and its cross-bill against the state of Oklahoma, the commissioners of the land office of the state of Oklahoma, John Henry, W. T. Barrett and Frank Brown, defendants in said cause, alleges and says:

First. The intervenor, Producers Oil Company, is a corporation organized and authorized to do business under and by virtue of the laws of the State of Texas, with its principal place of business in the city of Houston, Harris county, Texas, and it is a citizen and resident of the said state of Texas.

Second. This intervenor admits the allegations contained in the first and second paragraphs of the bill of complaint filed in this cause, and it also admits the allegations of the third paragraph of said bill of complaint, except those allegations wherein it is alleged that the Creek Tribe, or Nation of Indians is the owner of the hereinafter described land, which

said land is covered and included in the description of the land set out in said bill of complaint, to-wit:

The west 3 acres of lot 3 in section 6, township 18 north, range 7 east; lots 7 and 8 of section 6, township 18 north, range 7 east (35.9/100) acres; also lot 5 of section 5, and lots 5 and 6 of section 6, township 18 north, range 7 east, containing in all 124 acres, more or less, in Creek county, Oklahoma.

And intervenor says as to said described land and to each and every part thereof, included in the description of the land set out in said bill of complaint, this intervenor denies that the state of Oklahoma, or the Creek nation or tribe of Indians has any right, title, claim or interest in or to any part thereof; and intervenor further denies that the state of Oklahoma, or the commissioners of the land office of the state of Oklahoma, or their lessees, or the defendants, John Henry, W. T. Barrett or Frank Brown have any right, title, claim or interest therein, but this intervenor alleges that all of the above described land was, at the time of the bringing of said suit, and still is, the property in fee of Mabel Dale, a minor, and that intervenor owns a valid oil and gas lease thereon, as hereinafter more fully set out.

Third. Said intervenor further admits the execution of the several leases by the commissioners of the land office of the state of Oklahoma, as set out in said original bill of complaint, and in the intervention of the state of Oklahoma and the commissioners of the land office of the state of Oklahoma, and of Frank Brown.

Fourth. This intervenor is filed in subordination to and in recognition of the propriety of the bill of complaint filed in this cause, if the complainant, the United States of America, has any right, title, claim or interest in and to the above described tracts or parcels of land, but intervenor denies that said complainant has any such right, title, interest or claim to that part of the land described in paragraph second of this intervention, and alleges that it owns a valid oil and

gas lease on the land described in paragraph second of this petition, as is hereafter more fully set out.

Fifth. Except as herein expressly admitted, this intervenor denies each and every allegation in said bill of complaint contained.

Sixth. For its further answer to said bill of complaint and for its cross-bill of complaint [against] the defendants, the state of Oklahoma, and the commissioners of the land office of the state of Oklahoma, John Henry, W. T. Barrett and Frank Brown, this intervenor alleges and says:

Seventh. Intervenor alleges that Mabel Dale is a duly enrolled Indian of the Creek nation of one-sixteenth degree of blood, and that she is a minor under the age of eighteen years and resides with her parents in Payne county, state of Oklahoma.

That heretofore, to-wit, on the 1st day of April, 1904, the Creek nation executed to the said Mabel Dale, patents to the following described land, which is now situated in and a part of the lands of Creek county, state of Oklahoma, and that said patents were duly approved by the Secretary of the Interior on the 26th day of April, 1904, and were thereafter delivered to the said Mabel Dale, and copies of the same are hereto attached, marked exhibit "A," to which reference is prayed; the land conveyed by said patents is described as follows, to-wit:

Lots 7 and 8 of section 6, township 18 north, range 7 east (35.9/100) acres; also lot 5 of section 5, and lots 5 and 6 of section 6, township 18 north, range 7 east, containing in all 121 acres, more or less.

And that on the 8th day of April, 1909, the Creek nation executed, and afterwards on the 14th day of May, 1909, the Secretary of the Interior approved, a patent which was in due course delivered to said Mabel Dale, covering the following described land, which is now situated in and is a part of the lands of Creek county, state of Oklahoma, to-wit:

The west 3 acres of lot 3 in section 6, township 18 north, range 7 east,

and that acting under said patents, the said Mabel Dale, acting by and through her guardian, took possession of said described premises, and has at all times since owned and remained in possession thereof.

That heretofore, to-wit, on the 29th day of May, 1912, Oliver C. Dale, who is the father of said minor, Mabel Dale, was duly appointed and qualified as guardian of the estate of the said Mabel Dale, and he is still the duly appointed, qualified and acting guardian of said estate and has been at all times since his said appointment.

Intervenor further shows that the Cimarron river, which is a non-navigable stream, runs in a northwesterly direction through the southwest corner of section 5, and entirely through section 6, and that lot 5 in section 5, and the west 3 acres of lot 3, and lots 5, 6, 7 and 8 in section 6, township 18 north, range 7 east, above described, are traversed by the said Cimarron river. That said river is a meandered stream and the meander line thereof on the east is laid out in the west 3 acres of lot 3 and lots 7 and 8 of said section 6, and of lot 5 in said section 5, and said meander line on the west bank of said river is laid out upon lots 5 and 6 in said section 6 above described; and intervenor shows that by reason of said patents and the location of the land thereby conveyed to said Mabel Dale, that the said Mabel Dale thereby acquired title from the United States government and the Creek nation as riparian owner of the main land to all that part of said Cimarron river abutting upon the west 3 acres of lot 3 in section 6, and extending from the main land to the middle or thread of the stream; and by reason of said patents and the location of the land in lots 5 and 6 in section 6, which are located on the west side of the said Cimarron river, and lots 7 and 8 of section 6, which are located on the east side of said Cimarron river, said lots 7 and 8 being opposite to the said lots 5 and 6, the said Mabel Dale

became the owner of all of the Cimarron river extending from the main land on the east where the river abuts lots 7 and 8 the main line on the west where the river abuts lots 5 and 6, and including the entire bed of said stream; and by reason of said patents and the location of the land in lot 5 in section 5, the said Mabel Dale became the owner of all the land between the main land and the middle or thread of the stream opposite the land she owned in said lot 5 in section 5. The plat of said lots and said river is hereto attached, marked Exhibit "B," and is referred to for a description of the location of said lots and of said river.

Intervenor further shows that on the 14th day of June, 1912, the said Oliver C. Dale, as guardian of said Mabel Dale, filed his application in the county court of Payne county, Oklahoma, wherein said guardianship was pending, for permission to lease the above described land for oil and gas mining purposes; that on the 14th day of June, 1912, W. H. Wilcox, judge of the county court of Payne county, Oklahoma, then acting in said matter, authorized said guardian to make a sale of an oil and gas mining lease on said above described property; that on said 14th day of June, 1912, the said Oliver C. Dale, as guardian aforesaid, made his report to the court that he had sold an oil and gas mining lease, pursuant to the order of the court, on the above described property to the Producers Oil Company; that on the 14th day of June, 1912, said sale being reported to the court, the said W. H. Wilcox, judge of the county court of Payne county, then acting in said matter, made an order confirming the sale of said oil and gas mining lease to the Producers Oil Company.

That thereupon, on the 14th day of June, 1912, the said Oliver C. Dale, as guardian of the estate of said Mabel Dale, a minor, filed and presented to the court his final report of the execution of said oil and gas mining lease to the Producers Oil Company, and that thereafter, on the 1st day of July, 1912, the same being a regular day of the July, 1912, term of said court, the said report of the guardian of the

making of said lease to the Producers Oil Company coming on for hearing, an order was entered by the said W. H. Wilcox, judge of the county court of Payne county, then acting in said matter confirming said oil and gas lease and directing said guardian to deliver the same to the Producers Oil Company, as the order of confirmation of the sale provided.

Intervenor further shows that in pursuance of the order of the county court confirming and approving said sale, the said Oliver C. Dale, as guardian of the said Mabel Dale, did on the 14th day of June, 1912, execute an oil and gas lease on the above described property to the Producers Oil Company, which said lease was acknowledged on the 18th day of June, 1912, and was presented to and examined and approved concurrently with the order of confirmation thereof, as above set out, by the said W. H. Wilcox, judge of the county court of Payne county, Oklahoma, and was thereupon duly delivered to the Producers Oil Company, a copy of which said lease is hereto attached, marked Exhibit "C."

That said oil and gas lease covered all of the property included within the above described patents and all of the property rights, privileges and appurtenances in said land and in and to the said Cimarron river, which was conveyed to the said Mable Dale by reason of the said patents and by reason of the location of the land therein described, with reference to said Cimarron river, which said lease was duly recorded in the office of the register of deeds of Creek county, Oklahoma, in book 81, at page 669, on the 26th day of September, 1912, at 3:30 o'clock p. m., and said lease is in full force and effect; and intervenor shows that under and by virtue thereof, it went into possession of said property during or about the month of July, 1913, and began to operate said property for oil and gas purposes and sunk four wells thereon, which said wells were located on lot 5 of section 5 of the land above described, and intervenor is still in possession of said oil and gas lease and the leasehold estate and the property conveyed thereby for oil and gas purposes, and

is still in good faith operating and developing same for oil and gas purposes, as provided by said lease.

Intervenor further shows that heretofore, to-wit: on or about the —— day of ——, 19—, the said Frank Brown unjustly and illegally claiming some title or interest in and to, or some kind of an oil and gas lease on that part of the Cimarron river bed opposite said above described lands and between the main land and the middle or thread of the stream of said river, which said land was owned and in the possession of the said Mabel Dale, and on which Oliver C. Dale, as the guardian of said Mabel Dale, executed the above described oil and gas lease to this intervenor, went upon said land and on that part of said land lying between the said main land of lot 5 in section 5 and the middle or thread of the said river abutting upon said main land, and began to develop same for oil and gas purposes by drilling a well, or wells, for oil or gas thereon, and the said Frank Brown is now continuing to drill said well and is intending to complete same, and to drill other wells on the land covered by complainant's lease, above set out, to the oil-bearing sand thereunder.

Intervenor further shows that oil and gas are found in the sands and in pools under said land of the said Mabel Dale and other lands contiguous thereto and in that neighborhood, and that said oil and gas is of a fugacious nature, and that the land, when the oil and gas therefrom is extracted, becomes barren of oil and said oil is not by nature replaced in said sand or pools, and the oil so extracted from said land becomes separated therefrom and lost to the owner of said lands from which said oil is extracted.

Intervenor further shows that it is the purpose and intention of said Frank Brown to operate said well, when completed, and the oil therefrom will be brought to the surface by him, his agents or assigns, and temporarily placed in tanks and from thence conveyed to storage tanks, or through pipe lines or tank cars and sold, and intervenor will have no means of ascertaining the quantity of oil or gas so ex-

tracted or when the same was extracted, or at what price same should be accounted for.

Intervenor further shows that oil so extracted and placed in tanks will be mixed and mingled with other oils and will be sold to different parties living in different states, and that the royalty will be run in the name of the lessors of said Frank Brown, who are other and different persons from the said Mabel Dale, and that it will be impossible to recover the said oil or the value thereof without a multiplicity of suits.

Intervenor further shows that the oil wells in the neighborhood of the property of the said Mabel Dale above described, are very large producers of oil, some of said wells producing as high as 7,000 barrels of oil a day, and that the financial responsibility of said Frank Brown is entirely inadequate to respond to the intervenor for the loss which will be sustained by reason of the producing and sale of the oil in the well now being drilled and in other wells which he intends to and will drill upon other parts of the property covered by intervenor's lease.

Eighth. Intervenor further shows that unless the said Frank Brown is restrained and enjoined by said court from drilling in said well now being drilled and from drilling other wells, which he intends to drill on said land and from producing oil therefrom, that it will thereby cause intervenor irreparable injury, and that intervenor has no adequate remedy at law.

Wherefore, intervenor prays that this court may permit this intervention to be filed and that the intervenor, Frank Brown, his agents and servants, assignees and all other persons acting by, through or under him, be enjoined and restrained from drilling in and completing said well, and from drilling other wells for oil or gas on the premises above described, and from operating the same for oil or gas therefrom.

Intervenor further prays that it be allowed all of the rights of a defendant as to said original petition, and that its title to the oil and gas lease claimed by it on the land described

in the second paragraph of this petition be established and declared to be a valid bona fide, existing oil and gas lease in and to the said described property, and that the cloud on its title by reason of the claim of the United States of America, acting for and on behalf of the Creek nation of Indians, and the Creek nation of Indians, and the state of Oklahoma, and the commissioners of the land office of the state of Oklahoma, and the said Frank Brown and the said John Henry and W. T. Barrett be removed, and for such other relief, general or special, legal or equitable, as it may be entitled to.

DILLARD & BLAKE,

Attorneys for Intervenor Producers Oil Company.

(1) Intervention. In *Swift v. Black Panther Co.*, 244 Fed. 20, 156 C. C. A. 448, the court lays down the principles, on a copious citation of authorities, which govern the right to intervene. On page 458 two cases are pointed out: (a) where it is not indispensable to the preservation or enforcement of the claim of the petitioner, permission is discretionary with the court; (b) where the petitioner claims a lien or interest in specific property in the exclusive jurisdiction and subject to the exclusive disposition of a court, and such lien or interest can be established, preserved or enforced in no other way than by the determination and action of that court, the petitioner has an absolute right to intervene, and if the court refuses the petitioner may review by appeal an order refusing.

Equity Rule 37 authorizes permission to a claimant to set up his right by intervention, which shall be in subordination to and in recognition of the propriety of the main proceeding.

In *Hutchinson v. Philadelphia & G. S. S. Co.*, 216 Fed. 795, intervention by stockholder was denied in a creditors' suit against a corporation where a receiver was appointed to conserve the corporate assets, which were subsequently sold publicly, where the complaint set out by intervenor was that he believed the stockholders and directors had organized a new corporation to buy up the assets of the old one at an inadequate price, the court saying that the personal liability to intervenor of the complainant, the receiver, and the directors for losses sustained by receiver's sale of assets must be enforced in a separate suit; for intervention enforcing personal liability in a suit instituted to preserve the interest of all creditors and of continuing the business would not be "in subordination to and in recognition of the propriety of the main proceedings" as required by Equity Rule 37.

In *Glass v. Woodman*, 223 Fed. 621, intervention was refused, the grounds alleged being that (a) intervenor can not maintain an independent action at law in the federal court because complainants can not be found for service, and foreign attachment is not a permissible

instrument for initiating jurisdiction in federal courts; (b) intervenor can not maintain an action in a state court by attachment, although the state law so permits, because the property to be reached is in custodia legis.

Here the intervenor sought to enforce against some of the complainants an unliquidated claim for damages for breach of contract.

The suit here was for foreclosure and the intervenor could not show any claim to the mortgage bond or any interest in or lien upon the property or the fund to be administered, or that he was an unsecured creditor of the defendant with rights that might be affected by the foreclosure. At page 623 the court says:

"Appellant's (intervenor's) claim is, in respect of the subject-matter of the suit, neither with nor against any of the parties, and in a legal sense it can not be affected by the decree. It is so remote as not to have challenged the discretion of the trial court."

In *Jennings v. Smith*, 242 Fed. 561, 564, one who became a party defendant by intervention was stricken from the records upon his own application, against the contention that he was an indispensable party, the court saying that there was no mention of intervenor in the original bill; he had voluntarily come in, and his application to be stricken was a conclusive answer to his being indispensable, no collusion being shown.

Citizenship and jurisdictional amount are not of importance in intervention, and therefore averments as to those matters need not appear in the petition of the intervenor. In case of a receivership of a railway, the court already has control over the property and the petitioner in intervention comes in pro suo interesse in a subject-matter already in the jurisdiction of the court because of former proceedings.

No. 585.

Allegation in Answer Denying Jurisdiction and Praying Dismissal.(1)

[Caption.]

Further answering this respondent alleges that this court is without jurisdiction to enjoin the process of the district court of Creek county, and is without jurisdiction to grant the relief asked for in said application for injunction.

Wherefore, this respondent prays that said application for injunction be dismissed and the relief therein prayed for be denied.

(1) Equity Rule 29.

No. 566.**Defense of Res Adjudicata Both in State and Federal Courts.**

On information and belief, defendant avers that upon the same facts which are made to appear in this cause in this court it was decided by said superior court of Grand Rapids, in chancery, that no preliminary injunction ought to be granted, and the same was denied; that said state court had jurisdiction over the parties and the subject-matter; that the parties in said suit were the complainant in the instant cause and the principal of the defendant in the instant cause; that the decision so made is binding upon the parties to this cause; that the question now presented respecting the right of complainant to a preliminary injunction in this case is *res adjudicata*, the same having been determined adversely to complainant in said suit in the state court; that the complainant in this cause voluntarily instituted said suit in the state court instead of commencing suit in this court for the enforcement of its alleged rights; that, under the rules of comity which prevail in the courts, state and federal, this court should not now award an injunction against the defendant which upon the identical showing the state court has denied; that to award an injunction in this cause after a decision adverse to complainant in the state court would create unseemly conflict between the state and federal courts; that by reason of the acts, matters and things hereinbefore set out, said complainant is and of right ought to be estopped to maintain this suit in this court or to apply for a preliminary injunction herein.

On information and belief defendant avers that upon the same facts which are made to appear in this cause in this court it was decided by said district court of the United States for the western district of Michigan, southern division, in equity, that no preliminary injunction ought to be granted as respects said alleged oval trade-mark appearing in certificate No 57567, and the same was denied; that said district court had jurisdiction over the parties and the subject-matter; that

the parties in said suit in said United States court for the western district of Michigan were the complainant in this suit and the principal of the defendant in the instant cause; that the decision so made is binding upon the parties to this cause; that the question now presented respecting the right of complainant to a preliminary injunction in this cause as respects said alleged oval trade-mark appearing in certificate No. 57567, is *res adjudicata*, the same having been determined adversely to complainant in said suit in the district court of the United States for the western district of Michigan; that the complainant in this cause voluntarily instituted said suit in the United States district court for the western district of Michigan prior to and instead of commencing suit in this court for the enforcement of its alleged rights in said trade-mark; that under the rules of comity which prevail in the courts, state and federal, this court should not now award an injunction against defendant which upon the identical showing the district court of the United States for the western district of Michigan has denied; that to award an injunction in this cause after a decision adverse to complainant in said district court of the United States for the western district of Michigan would create unseemly conflict between federal courts in the same circuit; that by reason of the acts, matters and things hereinbefore set out said complainant is and of right ought to be estopped to maintain this suit in this court, or to apply for a preliminary injunction herein as respects said alleged oval trade-mark appearing in certificate No. 57567.

EXCEPTIONS.(1)**No. 567.**

(1) Exceptions are abolished by Equity Rule 33.

DISCLAIMER.**No. 568.****General Form.(1)***[Caption.]*

The disclaimer of the defendant, C. D., for the bill of complaint herein.

This defendant says that he does not know that he, the said C. D., to his knowledge and belief, ever had, nor did he claim or pretend to have, nor does he now claim any right, title, or interest of, in, or to the estates and premises, situated [*describe them*], in the said bill of complaint set forth, or any part thereof; and this defendant disclaims all right, title, and interest in and to the said estate and premises in [*name situation*], in the said bill of complaint mentioned, and every part thereof; and this defendant prays leave to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained. C. D.

Y. & Y.,

Solicitors for C. D.

[Verification.]

(1) See Beach's Mod. Eq. Prac., Sec. 283; Foster's Fed. Prac., 5 ed., Sec. 196; Bates Fed. Eq., Secs. 305 and 306; Whitehouse Eq. Prac., Secs. 283 to 291.

REPLICATION.(1)**No. 569.**

Replications are not required under the present equity rules. See Rule 31, according to which any new or affirmative matter in the answer will be deemed to be denied, unless such matter is a set-off or counterclaim, whereupon a reply shall be made in the time limited by the rule.

In *Goodno v. Hotchkiss*, 230 Fed. 514, at page 518, the court says: "Rule 31 * * * has done away with all replications to answers by providing that" (here follows the rule). See also *Shera v. Merchants' Life Ins. Co.*, 237 Fed. 484, at page 486.

NOTICES, MOTIONS, ORDERS, DECREES, ETC.

No. 570.

Notice to Codefendants to Join in Appeal.

[*Caption.*]

Please take notice, that the city of Kansas City, Missouri, is about to appeal to the supreme court of the United States from the order and judgment of the district court of the United States for the district of Kansas, first division, made and entered on the thirteenth day of August, 1917, and is about to apply to the district court of the United States for the district of Kansas, first division, for the allowance of such appeal; and hereby demands, requests and notifies you, and each of you, to join in such appeal and in the application to said court for the allowance thereof.

Dated at Kansas City, Missouri, September 1, 1917.

A. B.,
City Counselor of Kansas City, Mo.,
Its Attorney.

Service of the above notice is accepted this — day of —, 1917. R. X.

No. 571.

Affidavit of Service by One not an Officer.

State of Missouri,

County of Jackson, ss:

Benj. M. Powers, of lawful age, having been first duly sworn, upon his oath states that he served the above notice upon each of the above named defendants to whom said notice is directed, by either personally delivering copies of said notice to such defendants, or by sending copies of said notice through the United States mails and receiving from such defendants acknowledgments evidencing the receipt of said notice by such defendants, or by sending copies of said,

notice by registered United States mail, properly stamped and addressed to such defendants.

BENJ. M. POWERS.

Subscribed and sworn to before me this October 30, 1917.
My commission expires May 11, 1921.

CARRIE M. RUPPELIUS,

Notary Public, Jackson County, Mo.

Filed in open court this 31st day of October, 1917.

WILBUR F. BOOTH,

Judge.

No. 572.

**Notice of Motion to Dismiss Because no Diversity of
Citizenship.**

[*Caption.*]

Sir: Please take notice that upon the complaint herein and the answer of the defendant, The Shubert Theatrical Company (a New Jersey corporation), the undersigned will move this court on Thursday, the 7th day of September, 1916, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order directing the dismissal of the bill of complaint herein upon the ground that it does not allege facts sufficient to grant unto this court jurisdiction of the cause of action or of the person of the said defendant, Shubert Theatrical Company (a New Jersey corporation), inasmuch as it appears upon the face of the bill of complaint that the said defendant is a corporation organized and existing under the laws of the state of New Jersey and resident of the state of New Jersey, and is not a resident or inhabitant of the southern district of New York or the state of New York, and that there is not such a diversity of citizenship between the complainant and defendants herein which will grant unto this court jurisdiction of the alleged cause of action contained in the bill of complaint, and that it further appears on the face of the bill of complaint that the complainant herein is a resident of the state

of New York in the southern district of New York, and that the bill of complaint further fails to allege jurisdictional facts sufficient to grant unto this court jurisdiction of the alleged cause of action or of the persons in that it fails to allege the residence of the defendants, Lee Shubert, Jacob J. Shubert, Irving M. Dittenhoefer, as receiver in bankruptcy of Theodore A. Liebler and George C. Tyler, co-partners doing business as Liebler & Company, and for such other and further relief as may be equitable and just.

Yours, etc.,

A. B.,
Solicitor for Defendant.

[*Acknowledgment.*]

No. 573.

Notice of Motion to Advance Cause.

[*Caption.*]

To the Sun Company and the American Surety Company, or to Their Solicitors, E. E. Townes, Esq., and T. L. Foster, Esq.:

Please take notice that the Vinton Petroleum Company having been advised that a citation signed by Judge Gordon Russell admonishing it to appear in the United States circuit court of appeals at New Orleans thirty days from December 30, 1916, on, to-wit, the 29th day of January, 1917, to answer and show cause why the decree rendered in this cause should not be reversed, does hereby notify you that upon the filing of the transcript of record in that court pursuant to the citation on appeal it will present a motion to the court, of which a copy will be lodged with the clerk at New Orleans for your benefit on that date, petitioning the honorable circuit court of appeals to advance this cause and summarily affirm the same with ten per cent. damages for delay, as prescribed by the rules of that court; or, in the alternative, to dismiss said appeal with damages for delay and costs of suit,

predicated upon the fact that the decree entered in the court below was in strict compliance with, and in obedience to the mandate of said circuit court of appeals in an appeal heretofore prosecuted upon the same state of facts and upon the same record of evidence and bill and answer in all respects word for word and letter for letter upon which the said circuit court of appeals heretofore finally determined the issues involved between the complainant and the defendant. And upon the further ground that no proceedings subsequent to the return of the mandate have taken place in the court below and no new facts adduced other than an agreed, tabulated statement showing the amount of oil which had been run by the Vinton Petroleum Company to the Sun Company under said contract, and other than an agreement of counsel that the precise record of evidence taken upon the former appeal should constitute the record of evidence in this cause exclusively, with the exception as to the amount of oil which was proved by the agreed statement aforesaid.

And because of the fact that you are prosecuting an appeal from the decree without reasonable grounds therefor and upon the identical record heretofore reviewed by the United States circuit court of appeals and the United States supreme court on petition for *certiorari*, we shall move to obtain the relief hereinbefore stated, of which you are hereby now duly advised.

VINTON PETROLEUM COMPANY,
By A. B., Solicitor.

No. 573a.

**Writ to Serve Copy of Notice to Advance, and Marshal's
Return Thereon.**

[*Caption.*]

The President of the United States, to the Marshal of the
Eastern District of Texas, Greeting:

You are hereby commanded to serve Sun Company, a
corporation, and American Surety Company, a corporation,

or their attorneys of record, Messrs. Townes, Foster & Hardwicke, residing at Beaumont, in Jefferson county, Texas, with the accompanying certified copy of complainant's notice of motion to advance, filed January 5, 1917.

Herein fail not, and due return of this writ make.

Witness the Honorable Gordon Russell, judge of the district court of the United States for the eastern district of Texas, and the seal of said court at Beaumont this 5th day of January, A. D. 1917.

[Seal]

A. B.,
Clerk U. S. District Court, E. E. T.,
By X. Y., Deputy.

Marshal's Return.

Received this writ on the 5th day of January, 1917, and executed the same on the 5th day of January, 1917, by delivering to E. E. Townes in person, at Beaumont, in my district, the accompanying copy of paper named in the within writ, certified by the clerk of this court.

T. R.,
U. S. Marshal, Eastern District of Texas,
By M. K., Deputy.

No. 574.

Notice of Motion to Strike Out Parts of the Answer.

[Caption.]

Please take notice that upon the complaint herein and the answer of The Shubert Theatrical Company (a New Jersey corporation), the undersigned will move this court on Thursday, the 7th of September, 1916, at ten o'clock in the forenoon on said day, or as soon thereafter as counsel can be heard, for an order directing the striking out from said answer of said Shubert Theatrical Company (a New Jersey corporation):

1. All that portion of said answer designated "As and For a First Separate Defense," and constituting the paragraphs thereof respectively designated as "Sixth" to "Twenty-fifth" inclusive.

2. All that portion of said answer designated "As and For a Second Separate Defense," and constituting the paragraphs thereof respectively designated as "Twenty-sixth" to "Twenty-ninth" inclusive.

3. All that portion of said answer designated "As and For a Third Separate Defense," and constituting the paragraph thereof designated as "Thirtieth."

A. B.,

Attorney for Complainant.

No. 575.

Notice of Application for Trial.

[*Caption.*]

To Y. & Y.,

Attorneys for Defendant [*or*, Plaintiff].

Please take notice that on the — day of —, 1894, we will apply to the clerk of said court to have the above cause noted for trial at the April [*or as may be*] term thereof, 1894.

X. & X.,

Attorneys for Plaintiff [*or*, Defendant].

Service of the above notice is hereby acknowledged this — day of —, 1894.

Y. & Y.,

Attorneys for Defendant [*or*, Plaintiff].

No. 576.

Notice of Final Hearing.

[*Caption.*]

Y. & Y.,

Solicitors for Defendant.

Please take notice that under the order entered in the above-entitled cause on the — day of —, 1894, said cause will be brought on for final hearing upon the pleadings, proofs, and proceedings herein, before the judges of this honorable court, at a stated term thereof to be held at —, in the city of —, on the — day of — next, at

the opening of the court on that day, or as soon thereafter
as counsel can be heard.

Dated ———.

Service, etc.

X. & X.,

Solicitors for Plaintiff.

No. 577.

Motion for Severance on Appeal.

[Caption.]

Now comes the Kansas City Gas Company, The Wyandotte County Gas Company, Fidelity Trust Company and The Kansas City Pipe Line Company, defendants in the above entitled cause, and state and show to the court that they have filed their assignments of errors and petition for allowance of appeal from the final judgment and decree entered in the above entitled cause on August 13, 1917; that demand and notice to join in said appeal have been duly made and served upon each and all of their co-defendants; that each and all of said co-defendants have failed, neglected and refused to join in said appeal, and have been duly notified to appear in the above entitled court and cause on November 5, 1917, and appeal or join in said appeal or show cause why an order of severance should not be made against them, barring their right to prosecute an appeal or appeals in the above entitled cause.

Wherefore, The Kansas City Gas Company, The Wyandotte County Gas Company, Fidelity Trust Company and The Kansas City Pipe Line Company, defendants herein, pray the court for an order of severance from all their co-defendants for the purposes of an appeal to the supreme court of the United States from the final judgment and decree entered herein on August 13, 1917; and such other and further orders as may be proper in the premises.

A. B.,
Solicitor.

No. 578.**Motion on Special Appearance to Quash Subpoena.**

[Caption.]

Now comes Kansas City, Missouri, appearing especially for the purposes of this motion only, and moves the court to quash the writ of subpoena issued upon the bill of complaint in the above entitled cause against it, and vacate and set aside the return of service of said writ on Kansas City, Missouri, for the following reasons:

Because Kansas City, Missouri, is, and was at the time said subpoena was issued and served, a municipal corporation duly organized and existing under and by virtue of the constitution and laws of the state of Missouri, and is a governmental agency of the state of Missouri.

Because Kansas City, Missouri, is, and was at the time said subpoena was issued and served, a citizen and resident of the district of Missouri, western division, and not a citizen or resident of the district of Kansas.

Because said subpoena was served upon Kansas City, Missouri, as shown by the marshal's return, outside of the district of Kansas and in Jackson county, state of Missouri, and is and was not a valid and legal service of process upon Kansas City, Missouri, in the above entitled cause, and this court has not jurisdiction of the defendant, Kansas City, Missouri.

A. B.,

Attorney for Defendant, Kansas City.

No. 579.

Motion by Defendant That the Defenses in Point of Law be Separately Heard and Disposed of before the Trial, and to Dismiss the Bill as to Defendant.

[Caption.]

Now comes Kansas City, Missouri, one of the defendants in the above entitled suit, and respectfully shows to the court

that in its answer filed herein to the bill of complaint it pleaded defenses in point of law arising upon the face of the bill as follows:

- (a) Misjoinder of parties;
- (b) Misjoinder of causes of action whereby the bill is multifarious;
- (c) Insufficiency of fact to constitute a valid cause of action in equity against Kansas City, Missouri.
- (d) That the court is without jurisdiction of the defendant, Kansas City, in this suit, for the reason that the process served upon it herein was not authorized by law and no process has been authorized by law by which this court may acquire jurisdiction of the defendant, Kansas City, in this suit;
- (e) That the plaintiff is not without adequate remedy in the due course of law and his bill fails to show cause for equitable relief against Kansas City, Missouri.

Wherefore, this defendant, Kansas City, Missouri, prays the court to separately hear and dispose of its said defenses before the trial of the principal case and to dismiss this suit as to this defendant and that it may have judgment for its costs expended and incurred in this suit.

A. B.,
Solicitor for Kansas City, Missouri, Defendant,
Of Counsel.

No. 580.

Motion to make New Parties Defendant, for Personal Service on Absent Defendants, and Affidavit of Solicitor.

Now comes the plaintiff, Frances H. Williamson, by Murray Seasongood, her solicitor, and represents to the court that one or more of the defendants are not inhabitants of or found within this district and have not voluntarily appeared in this action; and further, that there are additional persons having or claiming an interest in certain of the bonds referred to in the bill and supplemental bill of complaint, and that the

receiver heretofore appointed by the court should also be made a party to this cause, all of which is made to appear more fully in the affidavit of Murray Seasongood accompanying this motion.

Wherefore, plaintiff prays that the court make an order making such as are not already defendants parties to this cause; directing such absent defendants to appear and plead by a day certain to be designated and that such order may be served on such absent defendants, if practicable, wherever found, and also upon the receiver in possession or charge of said property.

M. S.,
Solicitor for Plaintiff.

Affidavit of Solicitor.

State of Ohio, Hamilton County, ss:

Murray Seasongood, being first duly sworn, deposes and says that he is the solicitor for the plaintiff; that he has made diligent effort to induce the various parties defendant named in the order made by the court December 30, 1913, to enter their appearance voluntarily and to serve subpoena and copy of the injunction order on such as did not enter their appearance voluntarily; that the following defendants are not inhabitants of and can not be found within this district and have not voluntarily appeared herein, although affiant mailed to such persons by registered mail the order of the court made December 30, 1913, together with a waiver of subpoena with request that the same be signed and returned, namely:

Joseph E. Beury, of MacDonald, W. Va.
P. H. Kelly, of Thurmond, W. Va.
Edwin Mann, of Bluefield, W. Va.

Affiant further states that he is informed and believes that C. W. Summers, of Cleveland, Ohio; Amherst German Bank Company, a corporation, of Amherst, Ohio, and Walpole Rubber Company, a corporation, of Walpole, Mass., have or

claim some interest in certain of the bonds referred to in this suit and that they can not be served with process in this district; that the location of the real and personal property involved in this proceeding is as stated in the bill and supplemental bill of complaint except that the office of said company has been transferred to the Union Central Life Insurance Building, Cincinnati, Ohio, and that Guy W. Mallon, of Cincinnati, Ohio, as receiver, is in charge of said office and the real and personal property of the defendant, The Superior Portland Cement Company.

Affiant further states that he believes process can be served on each of the above defendants personally at the above addresses.

M. S., Solicitor.

[*Duly verified.*]

No. 581.

Order Making New Parties Defendant, Authorizing Service on Absent(1) Defendants, etc.

On motion of plaintiff, Frances H. Williamson, and the affidavit of her solicitor in support thereof, filed this day, and it appearing that the following persons and companies, not heretofore made defendants, have or claim some interest in the bonds referred to in this suit, namely, C. W. Summers, of Cleveland, Ohio; Amherst German Bank Company, a corporation, of Amherst, Ohio; Walpole Rubber Company, a corporation, of Walpole, Massachusetts, it is now ordered that each of the foregoing persons and companies be and they hereby are made parties defendant to this action.

It further appearing that the foregoing persons and companies and the defendants, Joseph B. Beury, of MacDonald, West Virginia; P. H. Kelly, of Thurmond, West Virginia, and Edwin Mann, of Bluefield, West Virginia, are not inhabitants of or found within this district and have not voluntarily appeared herein, it is ordered that each of such absent defendants, persons and companies, appear and answer the bill and supplemental bill, on or before the 2nd day of March,

1914; that each and all of them be required to disclose which of the bonds of The Superior Portland Cement Company they now hold or have an interest in, from whom and when they obtained said bonds and what they claim with respect to said bonds; that pending the determination of the status of said bonds in the hands of the various holders thereof, and until the further order of the court all of the above parties, their officers, agents, attorneys and employes and all persons whatsoever, be enjoined from selling, transferring, pledging or otherwise disposing of any of the bonds held by them; that a copy of this order shall be served on each of such absent defendants, if practicable, wherever found by the marshal of the district where they may reside or be found.

It further appearing that Guy W. Mallon as receiver is in possession or charge of the property of defendant, The Superior Portland Cement Company, it is ordered that he be and he is hereby made a party defendant to this cause with leave to plead herein.

X. Y., Judge.

(1) In this case the plaintiff is both a stockholder of the corporation and a holder of its bonds secured by trust deed. An assignment of the corporate property had been made to coerce bondholders into surrendering their bonds, and a receiver had been placed in charge of the property. This suit is brought in the district where the property is located to set aside the assignment and to establish the validity of the bonds, and the question of interest here is the matter of service upon persons beyond the jurisdiction and making them parties.

The motion, affidavit and order here reach parties in another state, and the question is under what circumstances may substitute process be had in adding parties to be affected by the judgment.

The pleadings here arise under the provisions of Equity Rule 37 and Judicial Code, Sec. 57. Equity Rule 37 gives wide liberty in the matter of joining and adding parties. Section 57 deals with the case in which a suit is brought to remove or enforce a lien or claim on property in the district of the forum, where parties interested as defendants reside in other districts. Very few cases since the adoption of this rule refer to it in this connection.

In *Tully v. Triangle Film Corporation*, 229 Fed. 297, it is said, at pages 298 and 299, that the "interest" mentioned in this rule is "an interest in law. It can not mean anything else, and certainly can not mean a possible injury for which a person has not retained for himself any right or redress."

So the court found misjoinder of parties plaintiff in that a licensee to produce a play "upon the stage by a company of players" was not a party in interest in a suit by the author against a party who was producing a motion picture thereof, inasmuch as such right was retained by the author and was in no respect granted to the licensee.

In *Ex parte Equitable Trust Co.*, 231 Fed. 571, at page 592, the court says: "It is argued that Equity Rule 37 gave to the court power to order that Denver be made a party. It provides that 'any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause.' Having shown that Denver was not a necessary or proper party to the cause before the court, the rule is inapplicable."

But the rule merely embodies principles well settled in the law.

See Simkin's *A Federal Equity Suit*, pp. 224 et seq.

In reference to Judicial Code, Sec. 57, there have been many adjudications; this section codifies the statute of March 3, 1875, which itself modified the previously existing statutory law, and therefore decisions on the older statutes are material in consideration of the present code, Sec. 57.

In *Hudson Navigation Co. v. Murray*, 233 Fed. 466, a motion was made to vacate an order directing defendant, a non-resident of the district in which suit is brought, to appear and plead, and also to set aside the substituted service made upon them.

Here the bill alleged: (1) plaintiff is a New Jersey corporation; (2) shares of stock fraudulently issued to defendant, a citizen of New York; (3) stock certificate now in New Jersey.

The prayer asked that (1) stock be decreed void; (2) defendant be required to surrender the certificates; (3) plaintiff be authorized to cancel them.

Held presence of certificates of stock is immaterial.

"The important question is whether the property upon the title to which, it is alleged, the invalid issue of stock creates a cloud, is within this district."

And at page 469 it is said: "Illegal stock probably does cast a cloud upon the equitable title or the interest which the genuine stockholders have, by virtue of their shares of stock, not in the stock, but in the property of the corporation, since it impairs that title or interest. * * * The statute makes the location of the property the decisive factor."

So no substituted service in accordance with Judicial Code, Sec. 57, was permissible, because the property beclouded was not located in New Jersey.

In *Murphy v. Ford Motor Co.*, 241 Fed. 134, a trustee in bankruptcy sued in the district court in Ohio to set aside an alleged preference, which consisted of the assignment of a debt by the bankrupt to a creditor. The debtor and creditor were inhabitants of other states. In the suit substituted service was sought on both the creditor and debtor, who were named as parties defendant. The suit was to set

aside the claim of the creditor assignee and to establish the claim of the bankrupt (trustee); but the money in question was not in the district, and an offer by the debtor to pay into court when it should be decided which was the lawful claimant thereto did not put the money into the possession of the court, and therefore the property sought to be affected by this suit was not within the district of suit.

In *Babcock Lumber & Land Co. v. Ferguson*, 243 Fed. 623, at page 628, the court says that where substituted service was had in accordance with Section 57, and subpoena served upon him, the defendant who fails to appear and plead is bound by the judgment.

In *Hudson Nav. Co. v. Murray*, 236 Fed. 419, the suit was brought in chancery in state court and substituted service was had in accordance with state statutes; defendant appeared for the purpose of removing to the federal court, and in the federal court made a motion to set aside the substituted service. But as the state court had acquired service in accordance with the state law, which was not repugnant to any federal rule or law, although not in the manner distinctly authorized by federal substitute service statutes, the federal court would recognize its validity in the proceedings after removal.

In this case a judgment could validly have been rendered by the state court on the case as it was when removed.

In *O'Neil v. Birdseye*, 244 Fed. 254, 257, the suit was brought in a district of which neither party was a resident, and the relief prayed required personal judgment against the defendant; and although Section 57 permitted substituted service on defendant for the purposes of the judgment in rem, yet it conferred no jurisdiction to decree a judgment in personam, and the suit could not therefore have been originally brought in the federal court, hence can not be removed thereto and was hence remanded. The court regards the bill as a whole in determining whether its requirements are satisfied by a judgment in rem.

In *Albert v. Bascom*, 245 Fed. 149, a bill was brought by a creditor to enforce a lien against land of the debtor held by the heirs of the debtor, the plaintiff and heirs being residents of other states than the one in which the land was located. The suit was dismissed because the lien must be a pre-existing one which it is the purpose of the suit to enforce, whereas here the purpose was to have a lien created by suit.

In *Perez v. Fernandez*, 220 U. S. 224, are set forth the necessary steps to be pursued by party defendant where there was publication, but not personal notice, in opening up the case within a year, and also what the record should show. This case deals with Section 8 of act of March 3, 1875, which has been codified in Section 57 of the Judicial Code.

See *Simkins' A Federal Equity Suit*, 3d ed., pp. 224 et seq. and 336 et seq.

No. 582.**Motion to Dismiss⁽¹⁾ for Insufficient Facts and for Non-joinder of Plaintiffs and Defendants.***[Caption.]*

Comes now the defendant, Twin Falls Salmon River Land and Water Company, and moves the court to dismiss the amended bill of complaint herein upon the following grounds:

1. That the amended bill of complaint does not state facts sufficient to entitle the plaintiff to any relief, there being no equity stated in the amended bill.

2. That there is a non-joinder of necessary parties plaintiff in that all of the persons interested in the subject-matter of the controversy and who may be interested with the plaintiffs are not joined as plaintiffs in the action.

3. That there is a non-joinder of necessary parties in that all of the persons adversely interested to the plaintiff are not made defendants.

Wherefore said defendant prays that the amended bill of complaint herein may be dismissed.

S. H. H.,

Attorney for Defendant.

(1) See Equity Rule 29, the motion now being used to perform the office of the demurrer under the former system.

No. 583.**Motion for Leave to File Bill in Equity in the Supreme Court of the United States.**

| | |
|-----------------|--------------|
| The State of —, | } No. —. |
| Complainant, | |
| <i>vs.</i> | |
| The State of —, | |
| Defendant. | } In Equity. |

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the complainant, the State of X., by its attorney general, M. R., and presenting herewith its bill of com-

plaint in the above entitled cause, respectfully moves the court upon the facts therein stated for leave to file the same in this court under its original jurisdiction, as provided by Article III, Section 2 of the Constitution of the United States, and to prosecute said action in this honorable court.

THE STATE OF X.,
By M. R., Attorney General.

No. 584.

Motion for Preliminary Injunction.

In the Supreme Court of the United States,
Sitting in Equity.

No. —. Term, 1919.

The Commonwealth of Pennsylvania, Complainant,
vs.

The State of West Virginia, Defendant.

(Upon request to file a bill.)

If this court, in accordance with the motion made on May 5th, instant, orders filed the bill of complaint in the above-stated suit, then complainant prays that, pending adjudication by this court on the prayers of said complaint, the enforcement of the statute in controversy be enjoined, since the operation thereof will prohibit the transportation of natural gas from West Virginia into this commonwealth, and will:

1. Etc. [*here follow effects of the operation of the statute*], and to avoid these calamities pending adjudication complainant prays that a preliminary injunction issue, as prayed for in said bill of complaint, to enjoin the enforcement of said statute until after this court shall have decided whether or not said statute shall go into effect.

Complainant has filed in support of this motion certain affidavits and refers to the averments of said bill of complaint and the resolution of the legislature.

Copies of the bill of complaint, motion for leave to file the same, and the memorandum brief in support of said motion, copies of this motion for a preliminary injunction, and of the affidavits in support thereof, have been served upon the governor and attorney general of the state of West Virginia on May 9th, instant; also notice that this motion for preliminary injunction and said supporting affidavits will be presented to this court on May 19th, instant.

COMMONWEALTH OF PENNSYLVANIA,

By P. D., Attorney General.

A. B. and C. D., of Counsel.

No. 585.

Motion Suggesting Appointment of New District Attorney and Asking His Substitution in the Case.

[Caption.]

Now comes Stuart R. Bolin, attorney at law of Columbus, Ohio, and respectfully represents to your honorable court that on the 5th day of June, 1915, he was duly and regularly commissioned by Woodrow Wilson, as President of the United States of America, as United States attorney for the southern district of Ohio for the unexpired term of Sherman T. McPherson, resigned.

Wherefore said Stuart R. Bolin, respectfully moves the court to instruct the clerk that he be substituted as attorney of record for the plaintiff in the above entitled cause of action.

STUART R. BOLIN,

United States Attorney.

No. 586.

Motion for Additional Security for Costs.

[Caption.]

Now comes the defendant and moves the court for an order requiring the plaintiff to file a bond as security for costs herein.

Y. & Y.,

Solicitors for Defendant.

No. 587.**Cost Bond.**

For form of bond, see No. 139

No. 588.**Appearance.**

For form for appearance, consult Nos. ——. See also rule in equity.

No. 589.**Order Associating Counsel for the Defendant.****[Caption.]**

Now comes defendant, the C. & D. Railway Company, by R. Y., its counsel, and states to the court, on the hearing herein, that F. L. has been associated by said defendant as one of its counsel in this cause, and moves that the proper entry be made thereon. It is ordered that the clerk of the court make minute of the same, and that said F. L. is so associated of record as of counsel to said defendant in this cause.

No. 590.**Order to Take Bill Pro Confesso.(1)****[Caption.]**

The subpoena in the above entitled cause having been returned, which return has been filed, and it appearing therefrom that the said subpoena was duly served on C. D., the defendant herein, and no appearance having been entered on the part of said defendant, or demurrer, or plea, or answer filed, although such appearance should have been entered or pleading filed on or before the — day of —; therefore, on motion of R. X., solicitor for the plaintiff, it is ordered

and decreed that the bill herein be taken *pro confesso* as to said defendant.

Dated ———.

(1) See Equity Rule 16; *Austin v. Riley*, 55 Fed. 833.

No. 591.

Consent to Take Bill Pro Confesso.

[*Caption.*]

Whereas the bill in equity in the above entitled cause was filed in this court on the — day of —, and a subpoena issued and duly served on me in this cause as required by law [*or*, I hereby waive service of subpoena and enter my appearance herein], and I do not desire to defend said action; therefore I hereby consent that the said bill be taken *pro confesso*, and I hereby admit [*state admission*] as charged in said bill [and I hereby consent that said injunction may issue in said action out of this court as prayed for in said bill without any further proof being made or given in said action], and the plaintiff may attach this stipulation and confession to the said bill, and the same to be binding and conclusive upon me, this defendant.

C. D.

No. 592.

Decree Pro Confesso.(1)

[*Caption.*]

It appearing to the court that the bill in equity in the above entitled cause was filed in this court on the — day of —, 1894, and that a subpoena was issued and duly served on the defendant herein; that no appearance has been entered on the part of the defendant, or motion or answer filed, and that an order taking the said bill *pro confesso* was duly entered on the — day of — in the order-book, and that no proceedings have been had or taken by said defendant since such order was entered; now, therefore, more than

thirty days after entering said order as aforesaid, to-wit, on the — day of —, it is hereby ordered, adjudged and decreed [*insert the finding of the court*].

(1) A decree taken *pro confesso* does not become absolute until the next term of court. See Equity Rule 17; *Thompson v. Wooster*, 114 U. S. 104, 29 L. ed. 107.

No. 593.

Decree Pro Confesso Sustaining Patent.

See under title "Patents."

No. 594.

(1) Motion to Vacate a Decree Pro Confesso.

[Caption.]

In this cause the defendant, C. D., comes, by his solicitors, and moves the court to set aside the decree *pro confesso* entered herein against him on —.

First. Because said decree *pro confesso* was taken without service of process on said C. D.

Second. Because a motion had been filed by said C. D. through his solicitors to the dependent foreclosure bill filed against said C. D. and others in this cause, and said motion has never been heard by the judges of this court, or any action taken thereon.

Y. & Y.,

Solicitors for C. D.

(1) Equity Rule 17.

No. 595.

Order Vacating a Decree Pro Confesso.(1)

[Caption.]

The motion of the defendant, C. D., to the bill of A. B., to set aside the decree *pro confesso* entered against him on the — day of —, is on argument and consideration allowed, and it is ordered that the decree *pro confesso* be set aside, and the case stand as before said erroneous entry.

(1) Equity Rule 17.

No. 586.**Order for Attachment to Compel Answer.(1)****[Caption.]**

The subpoena issued in the above cause having been returned, which return has been filed, and it appearing therefrom that the said subpoena was duly served on C. D., the defendant herein, and no appearance having been entered on the part of the said defendant, therefore, on motion of R. X., solicitor for the plaintiff, it is ordered and decreed that an attachment issue against the said C. D.

(1) See Equity Rule 58 concerning answers to interrogatories.

No. 597.**Attachment to Compel Answer.(1)**

The President of the United States of America to the Marshal of the — District of —, Greeting:

You are hereby commanded that you attach C. D., if he may be found in your district, and bring him forthwith [*or, on the — day of —, etc.*] personally before the judge of the district court of the United States for the — district of —, in the — circuit, held at [*name place of holding court*], in the city of —, in the said district, to answer for certain contempts in not obeying our writ of subpoena to him directed, and on him duly served, commanding him to appear before the said district court, in equity, on the [*as in subpoena*], to answer a bill of complaint exhibited against him in the said court by A. B., and further to perform and abide such order as our said court shall make in this behalf; and you are further commanded to detain him in your custody until he shall be discharged by the said court.

And have you then and there this writ.

[Add teste.]

(1) See Equity Rule 58.

No. 598.**Praecipe for Copy.**

[Caption.]

B. R., Clerk of said Court.

Please prepare a certified copy of the bill of complaint [*or, answer, or other paper, as may be, naming it*] herein.

X. & Y.,
Attorneys for —.

No. 599.**Order to Stand Over to Add New Parties.**

[Caption.]

This cause coming on to be heard this — day of —, and counsel for the respective parties having been heard, and it appearing to the court that E. F. and G. H. are necessary parties to this cause, it is ordered that this cause do stand over, to the end that the plaintiff may make the said E. F. and G. H. parties thereto, either by amendment or supplemental bill, as he may be advised.

No. 600.**Order to Stand Over to Supply Proofs.**

[Caption.]

This cause coming on to be heard this — day of —, and counsel for the respective parties having been heard, and it appearing to the court that the plaintiff has omitted to introduce proof of [*here state the substance of what is omitted*], it is ordered that this cause stand over, to the end that the plaintiff may examine witnesses to prove [*state what plaintiff has leave to prove*].

No. 601.**Petition by Infant for Appointment of a Guardian ad Litem.***[Caption and address.]*

The petition of C. D., of —, the [or, a] defendant in this suit, respectfully shows that your petitioner is an infant over the age of fourteen years, to-wit, of the age of fifteen years and upwards; that the bill in this cause was filed against your petitioner [and others] for the foreclosure of a mortgage alleged to have been executed by the father of your petitioner (who is now deceased) in his lifetime, to the plaintiff, and praying for a sale of the mortgaged premises. And your petitioner further shows that she claims an interest in the said mortgaged premises as heir at law of her father; and that she has been served with a subpoena in said cause, requiring her to appear and answer the said bill, returnable on the — day of —, instant.

Your petitioner therefore prays that L. M., a solicitor of this court, residing in —, may be appointed the guardian *ad litem* of your petitioner, to appear and defend this suit on her behalf.

No. 602.**Petition by Plaintiff for Appointment of Guardian ad Litem for an Infant Defendant.***[Commence as in preceding form.]*

The petition of A. B., the plaintiff in this suit, respectfully shows that the bill in this suit was filed against the defendant to foreclose a mortgage executed by the father of said defendant (who is now deceased) in his lifetime, to your petitioner, and praying for a sale of the mortgaged premises; and that the said defendant claims an interest in the said premises as heir at law of her father. And your petitioner further shows that the said C. D. resides in —, and is, as he is informed and believes, an infant over the age of four-

teen years, to-wit, of the age of fifteen years and upwards. And that on the —— day of ——, a subpoena in this cause was duly served on the said C. D., requiring her to appear to and answer the said bill, returnable on the —— day of ——, last. And your petitioner further shows that although more than —— days have elapsed since the appearance day mentioned in said subpoena, no guardian *ad litem* has as yet been appointed for such infant, or applied for by her or any person on her behalf, to the knowledge or belief of your petitioner.

Your petitioner therefore prays that L. M., the register of this court, may be appointed guardian *ad litem* of such infant defendant, to appear and defend this suit in her behalf.

No. 603.

**Petition for the Appointment of a Guardian at Litem. Notice
and Consent to Such Appointment.**

[Caption.]

To the Judge of the District Court of the United States for
the —— District of ——, —— Division.

Your petitioner, R. S., would respectfully represent to the court that S. B., one of the above-named defendants, is a minor, under the age of twenty-one years, as your petitioner is informed and verily believes.

Your petitioner further represents that said S. B. is a resident of said —— district of ——, and that it is necessary that a guardian of the person and estate of said minor be appointed in said cause.

Your petitioner therefore prays that a day be fixed for the hearing of said petition, and due notice thereof be given to said complainant or his solicitor, and that D. W., or some other suitable person, be appointed guardian *ad litem* of the person and estate of said minor, as aforesaid in said cause, according to the provisions of the statute in such case made and provided.

R. S.,

Attorney for S. B.

State of —, County of —, ss:

On this — day of —, before me personally came R. S., the petitioner named in the foregoing petition, who being by me duly sworn did depose and say that he has heard read the foregoing petition by him subscribed, and knows the contents thereof, and that the same is true according to the best of his knowledge and belief.

J. R.,

Notary Public, — County, —.

To R. X., Esq., Solicitor for Complainant—Sir:

Please take notice that the foregoing petition was brought on for hearing before Hon. H. S., judge of the district court of the United States for the — district of —, — division, in equity, on the — day of June, —, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard.

Yours, etc.,

R. Y.,

Dated —.

Solicitor for Defendants.

I hereby consent to the appointment of D. W. as guardian *ad litem* of S. E

R. X.,

Dated —.

Solicitor for Complainant.

No. 604.

Order Appointing Guardian *ad Litem* of Defendant.

[Caption.]

This cause coming on to be heard on this the 4th day of November, 1914, upon the petition of Bessie Wildcat, a minor, for the appointment of a guardian *ad litem* for one of the defendants in the above entitled action and plaintiff in a cross-complaint filed by her in the said action, and,

It appearing to the court that Santa Watson is a competent and responsible person, and that he has consented to act as such guardian *ad litem*,

It is hereby ordered that the said Santa Watson be and he is hereby appointed guardian *ad litem* for the said Bessie Wildcat, a minor, and is authorized and directed to appear

and defend the above entitled action on her behalf, and to prosecute the same under the cross-petition filed in said cause.

RALPH E. CAMPBELL, Judge.

No. 605.

Order Appointing Guardian ad Litem by Consent.

[*Caption.*]

This application having come on to be heard upon the petition of R. S., representing that S. B., one of the above-named defendants, under the age of twenty-one years, and asking for the appointment of a guardian *ad litem* of the person and estate of said minor in said cause, and R. X., solicitor for said complainant, having consented thereto, in writing, it is ordered that D. W. be, and he is hereby appointed by this court, as guardian of the person and estate of said S. B., in said cause.

No. 606.

Answer of Infant by Guardian ad Litem.

[*Caption.*]

Answer of defendant, C. D., an infant, under the age of twenty-one years, by C. S., her guardian *ad litem*, to the bill of complaint of A. B. herein.

This defendant, C. D., answering by her said guardian *ad litem*, C. S., states that she is an infant of the age of seventeen years, and she therefore submits her rights and interests in the matters in question in this cause to the protection of this honorable court, and denies any matter or thing material for her to make answer to and not herein answered, avoided and denied. And she prays to be hence dismissed with her reasonable costs and charges in this behalf sustained.

C. D.

By C. S., Guardian *ad litem*.

No. 607.

**Motion to Amend Bill of Complaint by Crossing Out Original
and Inserting Amended Bill.**

[Caption.]

Now comes the petitioner and moves to amend the bill of complaint filed by crossing out the whole of the original bill of complaint on file and inserting therefor the within amended bill of complaint.

By its attorney,
M. E. R.

No. 608.

**Motion to Amend Amended Bill of Complaint by Striking Out
Words and Inserting Others.**

[Caption.]

Now comes the petitioner and moves to amend the amended bill of complaint on file by striking out the words "Massachusetts Co-operative Cigar Company" wherever they may appear and inserting therefor the words "Massachusetts Co-operative Association."

(Signed by Attorney.)

No. 609.

Motion to Amend Bill by Adding Defendant.(1)

[Caption.]

Comes now the plaintiff above named, and moves the court that he may have leave to amend his bill by adding the said E. F., a defendant thereto with apt words to charge him.

R. X.,
Attorney for Plaintiff.

(1) Equity Rule 19.

All persons should be joined who are so related to the subject-matter of the suit that their rights must be passed upon by the court in reaching a final decree. *Coison v. Millaudon*, 19 How. 113; *Con. Water Co. v. Babcock*, 75 Fed., 76 Fed. 243; *Kelley v. Boettcher*, 85 Fed. 55.

No. 610.**Motion to Amend Bill by Inserting Matter.**

[*Caption.*]

Comes R. X., solicitor for the complainant, moves the honorable court to amend the original bill in this cause by inserting in the first paragraph of said bill after the word "Kentucky," and before the word "for," the following: "And otherwise complying with the statutory laws of Tennessee and also the United States, regulating foreign corporation by filing an abstract of the complainant charter with the secretary of state for registration, and with the registers of each county where your complainant is engaged in business" and which is marked Exhibit "A & B" hereto.

No. 611.**Nunc Pro Tunc Order Permitting an Amendment to Bill.**

[*Caption.*]

This cause came on to be heard upon motion of complainant's counsel, before the Hon. C. D., district judge, to amend the complainant's bill in the first paragraph after the word "Kentucky" and before the word "for," and insert the following: "And otherwise complying with the statutory laws of Tennessee regulating foreign corporations by filing an abstract of the complainant's charter with the secretary of state for registration, and with the registers of each county where your complainant is engaged in business," and also the United States. The court having considered the order, and being of the opinion that the complainant has a right to amend its bill as set out above, does therefore order and decree that the complainant be permitted to amend its bill as set out. This order was granted at Chambers in —, on the —, and is entered now for then.

No. 612.

Motion to File a Second Amended Bill.

[Caption.]

The complainant moves the court for leave to file a second amended bill, wherein a conveyance to the defendant, C. D., by her children, of the real estate in the original bill described, is alleged, said allegation having been omitted by clerical error in the original bill.

X. & X.,

Solicitors for Complainant.

No. 613.

Order Granting Leave to File Amended Bill.

[Caption.]

This cause coming on to be heard on motion to file amended bill, tendered herein ——. The court now being fully advised, orders and adjudges that said amended bill be and the same is now filed.

No. 614.

Order for Leave to Amend Bill.

[Caption.]

Pursuant to agreement in open court, it is ordered that the complainant, the A. B. Trust Company, of the city of —, be and it hereby is given leave to amend its bill of complaint herein as to the defendants, the Second National Bank, of —, and H. Z.

And now comes the said A. B. Trust Company, of the city of —, and files an amendment to its bill pursuant hereto, and it is ordered that each of the defendants, the Second National Bank, of —, and H. Z., file their answer thereto on or before the March rule day, and on failure so to do said bill may be taken *pro confesso* against them.

No. 615.**Amendment to a Bill.(1)****[Caption.]**

And now comes the plaintiff, and, with leave of the court first had and obtained, amends his bill of complaint herein, as follows:

First. In the sixth line of the second paragraph of said bill, after the word "thereto," insert [*here set forth what is to be inserted*].

Second. At the end of the fifth paragraph add the following: [*here insert the additional matter*].

Third. Erase the words [*set them forth*], in the third line of the tenth paragraph [*continuc in like manner to set forth the new matter*].

R. X.,

Solicitor for Plaintiff.

(1) The amendment should not be made by interlineations and erasures in the original bill, but by filing the same on separate paper; and the amended bill should state no more of the original bill than is necessary to make intelligible where the new matter is to be inserted. See also Equity Rule 19.

No. 616.**Motion by Plaintiff to Dismiss His Bill with Costs.(1)****[Caption.]**

Comes now, the above-named A. B., complainant, and shows the court that having exhibited his bill in this honorable court against the above-named defendant, who has appeared (and put in his answer) thereto, this complainant is now advised to dismiss his said bill.

This complainant therefore humbly prays that the said bill may stand dismissed out of this court, with costs to be taxed by the proper taxing master (or by the clerk of this court).

R. X.,

Attorney for Plaintiff.

(1) Daniell's Ch. Prac., 5th Am. ed. 790.

See the discussion and citation of authorities in *Young v. J. Samuels & Bro.*, 232 Fed. 784, and note the comprehensive collection of authorities at page 787. Where the case has been referred to a master to hear and determine all issues of fact and of law and the master has made a number of findings, including a general one for defendant, and after plaintiff has filed exceptions thereto, voluntary dismissal without prejudice to plaintiff would be prejudicial to the defendant. *Smith v. Carlisle*, 228 Fed. 666 (reversing 224 Fed. 231); *City of Detroit v. Detroit City Ry. Co.*, 55 Fed. 569, for good discussion of the general principle; *Pullman Car Co. v. Transportation Co.*, 171 U. S. 138.

No. 617.

Motion by Party Late an Infant, on Coming of Age, to Dismiss Bill with Costs, before Decree.

[Caption.]

Comes now the plaintiff, above named, late an infant, but now of full age, and shows to the honorable court:

First. That this plaintiff when an infant, by C. B., his next friend, filed his bill in this cause against the defendants, to which they appeared; but no decree has yet been made therein.

Second. That this plaintiff has now attained the age of twenty-one years and is not desirous to proceed any further in the said cause.

Wherefore this plaintiff now moves the court that his said bill may stand dismissed out of court; with costs to be paid by him to the said C. D. and to the defendants.

R. X.,
Attorney for Plaintiff.

No. 618.

Motion for Judgment on Pleadings.

[Caption.]

And now comes C. D. O'Brien, Esq., solicitor for the defendant in the above entitled cause, and moves the court that judgment in favor of said defendant be entered upon the pleadings herein.

And said motion is set down to be heard at 10 o'clock a. m., January 3, 1916.

No. 619.**Order Granting Motion for Judgment on Pleadings.****[Caption.]**

The above entitled cause came on this day, pursuant to agreement, to be heard upon the motion herein by solicitor for defendant that judgment in favor of said defendant be entered upon the pleadings herein, said plaintiff appearing by Amasa C. Paul, Esq., its solicitor, and said defendant appearing by C. D. O'Brien, Esq., its solicitor. And thereupon the said solicitor for the said plaintiff moves the court that judgment upon the pleadings herein be entered in favor of said plaintiff; and argument upon both of said motions having been made to and duly and maturely considered by the court, it is by the court

Ordered: That the motion herein for judgment upon the pleadings in favor of said plaintiff be and the same hereby is granted.

And to such order defendant is duly granted an exception.

And the solicitor for said plaintiff is directed to draw and present to this court to be signed an interlocutory decree providing for judgment in favor of said plaintiff and for a perpetual injunction, for a reference to Samuel Whaley, Esq., special master, to ascertain and report plaintiff's damages sustained, and for costs.

No. 620.**Motion to Strike for Insufficient Facts.(1)****[Caption.]**

Comes now the complainant by its solicitors of record and moves the court to strike the answer of all the defendants and interveners herein filed in this action on the 4th day of May, 1915, for the reason and upon the ground that said answer fails to set forth facts sufficient in law to constitute any

defense to the cause of action set forth in the amended bill of complaint.

A. B. and C. D.,
Solicitors for Complainant.

(1) Equity Rule 29.

No. 621.

Motion to Dismiss for Insufficient Facts, a Remedy at Law and no Jurisdiction.(1)

[Caption.]

Comes now W. V. Tanner, as attorney general of the state of Washington, one of the defendants above named, and appearing separately and for none other of the defendants herein, moves to dismiss the bill of complaint filed herein, for the reasons and upon the grounds that, as appears upon the face thereof,

I. Said bill of complaint does not state facts sufficient to warrant this court in granting any relief to the plaintiffs;

II. That plaintiffs have a plain, speedy and adequate remedy at law;

III. That this court has no jurisdiction over the persons of these defendants or either of them, or of the subject-matter of this action.

(Signed) W. V. TANNER,
Solicitor for said Defendant.

(1) Equity Rule 29.

No. 622.

Motion to Dismiss Bill of Complaint for Infringement of Copyright.

[Caption.]

On motion of the Dugan Piano Company, J. V. Dugan, The Item Company, Limited, and James M. Thompson, the said Item Company, Limited, being the proprietor of the paper known as the "New Orleans Item," herein represented by Frank E. Rainold, Louis G. Tessier and Robert H. Marr as solicitors, and on suggesting to the court that the alleged acts of the defendants, complained of in the bill of complain-

ant, do not constitute an infringement of the alleged copyright:

(1) Because advertisements are not copyrightable and hence advertisement copy is not copyrightable.

(2) Because the copyright of a text-book or manual of instruction in a useful art, science or system does not confer upon the author or the proprietor of the text-book, even though copyrightable, a right of property in the art, science or system explained in the text-book or manual of instruction, and hence complainant has not and can not have an exclusive right to make, sell, print or use advertisements written in accordance with the forms set forth in such book, and complainant has not and can not have the right to limit the use thereof to purchasers of said manual of instruction or its licensees.

(3) Because the description of an art, science or system in a book, although said book may be entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art, science or system, as explained and exemplified, in said book.

Movers further show that in the event that the bill is not dismissed for the foregoing reasons, that the said bill is vague, general and defective, and that:

(1) It does not point out what matter in said book is copyrightable and is actually protected, in the opinion of complainant by the copyright dated September 12, 1912, relied on in the bill, and

(2) It does not set out particularly what copyrightable and copyrighted matter contained in said book has been made use of by the defendants in the alleged advertisements of the Dugan Piano Company.

(3) Said bill does not set out what portions of the advertisements of the Dugan Piano Company constitute the alleged infringement of the copyright of September 12, 1912.

And on further suggesting to the court, that in the opinion of the undersigned solicitors it is unnecessary to answer the bill of complaint for the reasons above stated, and that in the

opinion of undersigned solicitors the reasons first stated in this motion are sufficient in point of law to dismiss the bill of complaint:

It is ordered, that complainant do show cause, on a day to be fixed by the court, why the bill of complaint should not be dismissed.

A. B. and C. D.,

[*Service acknowledged.*]

Solicitors.

No. 623.

Motion to Dismiss for no Equity, Misjoinder, Nonjoinder, Limitations of Statute, Uncertainty, etc.

[*Caption.*]

Now come the defendants, A. and B., and on the records, pleadings and files in said cause move the court to dismiss the complaint upon the following grounds, to-wit:

1. That it appears on the face of complaint by plaintiff's own showing that they are not entitled, nor is either of them entitled, to the relief prayed for by this complaint against the defendants, nor to any relief arising from the facts alleged in said complaint.

2. That it appears on the face of said complaint that this court has no jurisdiction to hear and determine this suit.

3. That it appears on the face of said complaint that this court has no jurisdiction of the subject-matter of this suit.

4. That it appears on the face of said complaint that said complaint is wholly without equity.

5. That it appears on the face of said suit that there is a non-joinder of parties defendant therein, in this, that T. M. Campbell, the only surviving participant in the alleged fraudulent acts and concealments, primarily relied upon in said complaint, is not joined as a party defendant therein.

6. That it appears on the face of said complaint that there is a misjoinder of causes of action set forth therein, in this:

(a) That an alleged cause of action against these movants as heirs and distributees of the estate of Jeanette Fensky, de-

ceased, is united and mingled with an alleged cause or alleged causes of action against other persons who were not heirs or distributees of said Jeanette Fensky, and with whom no privity with these movants or either of them is shown or alleged.

(b) That an alleged cause of action against these movants as heirs and distributees of the estate of Jeanette Fensky, deceased, is united and mingled with an alleged cause of action against one who acted as administrator of said estate, based upon his acts as such administrator, and with whom no privity with these movants or either of them is shown or alleged.

7. That it appears on the face of said complaint that plaintiff's supposed cause of action against these defendants and each of them is barred by the provisions of subdivision 4 of section 338 of the code of civil procedure of the state of California.

8. That it appears upon the face of said complaint that plaintiff's supposed cause of action against these defendants and each of them is barred by the provisions of section 343 of the code of civil procedure of the state of California.

9. That it appears on the face of said complaint that the causes of complaint are stale and that so long a time has passed since the matters and things complained of took place that it would be contrary to equity and good conscience for this court to take cognizance thereof or to enforce any further or other answer thereto.

10. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said complaint did not accrue, if it accrued at all, to plaintiffs within five years before the bringing of this suit.

11. That it appears on the face of said complaint and the allegations therein that the right of action set up in said complaint did not accrue, if it accrued at all, to plaintiffs within four years before the bringing of this action.

12. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said

complaint did not accrue, if it accrued at all, to plaintiffs within three years before the bringing of this action.

13. That it appears on the face of said complaint that the same is uncertain in each of the following respects, to-wit:

(a) That it can not be ascertained therefrom whether the plaintiffs or either of them had, prior to the sale and transfer to Jeanette Fensky of their interests in the estate of Ferdinand Fensky, any actual knowledge of the alleged sales of real estate.

(b) That it can not be ascertained therefrom whether the deeds described in paragraph 11, or any of them, were recorded prior to the sale and transfer to Jeanette Fensky of the interests of the plaintiffs in the estate of Ferdinand Fensky, nor whether the alleged purchasers or any of them were then in possession of the land sold.

(c) That it can not be ascertained therefrom what, if any, part of the Kansas real estate had not been sold.

(d) That it can not be ascertained therefrom what was the value of the real estate or personal property in the state of California, set apart to the widow as a homestead or as exempt property, if any.

(e) That it can not be ascertained therefrom whether the California property of Ferdinand Fensky, or any of it, was community property, nor whether it was shown to be so in the inventory.

(f) That it can not be ascertained therefrom what papers or records filed in the various administration proceedings described in plaintiffs' complaint are alleged to have failed to disclose the truth, nor in what respects or particulars they so failed.

(g) That it can not be ascertained therefrom what representations or statements were made in the inventories in said administration proceedings upon the various estates or in any of such inventories, nor which of such representations or statements were believed by the plaintiffs, nor which thereof, if any, were false, nor what were the facts, if any, showing them to be so.

14. That it appears on the face of said complaint that the same is unintelligible in each of the same respects in which it is hereinbefore alleged to be uncertain.

15. That it appears on the face of said complaint that the same is ambiguous in each of the same respects in which it is hereinbefore alleged to be uncertain.

Wherefore, and for divers other good reasons of objection appearing upon the face of said complaint, these defendants pray the judgment of this honorable court whether they shall be compelled to make further or any answer to the said complaint, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

J. H. M.,

Solicitor for Defendants.

No. 624.

Informal Motion and Decree Dismissing Bill in Open Court, and Notice of Exceptions.

By Attorney: May it please the court on behalf of all the defendants and intervenors who appeared in objection to the government, we ask for the dismissal of the government's bill and a decree in favor of said defendants and intervenors. For the reason that the government has not made out a case, has not sustained the allegations of the bill by the evidence.

By the Court: The decree may enter in favor of the defendants dismissing the bill. Exceptions may be noted.

No. 625.

Motion in Answer to Dismiss for no Unconstitutionality Shown, no Federal Jurisdiction, etc.

And the said defendants and each and every of them say that the said bill of complaint ought to be dismissed because it is without equity, and because the facts therein stated are not sufficient to constitute a valid cause of action in equity, and the defendants and each and every of them now move the said court to dismiss the said cause, because:

1. That the said bill of complaint does not make out or state such a cause as to entitle the complainants, or any of them, to the relief prayed, or to any relief.

2. That the said bill of complaint is argumentative and does not state a case which will warrant the interposition of a court of equity.

3. That it appears from the averments of the said bill of complaint that the said complainants, and each of them, have a complete and adequate remedy at law.

4. That it is not shown from the averments of the said bill that the statute challenged is as a matter of law in contravention of any designated provision of the state or federal constitution, but on the contrary it appears from the averments of the said bill of complaint that the statute challenged is as a matter of law a valid and proper exercise by the state of Florida of its police power to pass and enforce inspection laws, and that said act is a valid inspection law.

5. That the allegations of fact in the said bill of complaint are not sufficient to show that the statute challenged is in contravention of the power of Congress to regulate commerce with foreign nations, and among the several states, nor do the allegations of the bill show any real burden imposed by said act on interstate commerce, nor show any real denial of right, or deprivation of property as to the complainants, or any of them.

6. That it appears from the averments of the said bill of complaint that the said suit is to all intents and purposes a suit against the state of Florida, and it is not shown that the state of Florida has consented to be sued.

7. That it appears from the said bill of complaint that the supposed grounds of jurisdiction of a federal court are frivolous, with no facts alleged sufficient to show or make it appear that any real substantial federal question is involved.

And that the defendants, the attorney general of the state of Florida, and the several prosecuting officers of the state of Florida, here made defendants, move to dismiss the said bill in so far as it seeks to restrain and enjoin the bringing of

criminal prosecutions or the enforcing of criminal laws, because it is apparent that in such particular the real defendant is the state of Florida, who has not consented to be sued, and also move to dismiss the said bill for each and every of the grounds hereinbefore assigned.

A. B.,

Attorney General of the State of Florida.

C. D. and E. F., Solicitors.

No. 626.

Motion to Dismiss Intervening Petition.(1)

[Caption.]

Nannie H. Wright and D. Gregory Wright move the court to dismiss the intervening petition of the Sturtevant Mill Company on each of the following grounds:

1. Said intervening petition is not in subordination to, and in recognition of the propriety of the main proceeding, as required by federal equity rule 37.

2. The intervenor is a creditor subsequent to the matter complained of and the intervening petition is without equity and does not entitle the intervenor to the relief prayed for, or to any relief.

3. The intervenor has been guilty of laches.

4. The jurisdictional amount of \$3,000, exclusive of interest and costs, is lacking.

A. B. and C. D.,

Attorneys for Movants.

(1) See *Jennings v. Smith*, 242 Fed. 561; *Atlas Underwear Co. v. Cooper Underwear Co.*, 210 Fed. 347.

No. 627.

Order Overruling Motions to Dismiss Intervening Petition.

[Caption.]

This cause came on to be heard upon the motion of Nannie H. Wright and D. Gregory Wright (filed April 15, 1916) to dismiss the intervening petition of the Sturtevant Mill Com-

pany; was argued by counsel and submitted to the court, and the court being fully advised, finds said motion not well taken and overrules the same, to which the said Nannie H. Wright and D. Gregory Wright except.

Said Nannie H. Wright and D. Gregory Wright are granted ten days from the date of this order in which to answer said intervening petition.

HOLLISTER, Judge.

No. 628.

Motion to Dismiss Bill Asking for Receiver.

[Caption.]

And now, to-wit, the 15th day of April, 1915, comes the Crown Gasoline & Oil Company, by Blair & Anderson, and M. L. Thompson, its attorneys, and moves that the bill of complaint in the above entitled case be dismissed, as not setting forth any sufficient legal or equitable reason why a receiver for the company should be appointed.

Defendant assigns as specific reasons why the bill of complaint is insufficient, in that it does not set forth that the plaintiff has secured a judgment against the defendant company, or that he is in position now to secure a judgment against the defendant.

2nd. The bill of complaint fails to set forth that any creditor has secured a judgment against the company, or that any creditor can secure a judgment against the company defendant.

R. and A.,

Attorneys for Crown Gasoline & Oil Company.

No. 629.

Motions for Various Purposes made on Hearing informally.

Mr. Davis then moved to dismiss the bill on the ground that this court has no jurisdiction because there is no diversity of citizenship between the parties; also upon the ground

that assuming that the court has jurisdiction this is not a case where it should exercise it, because it appears that the surrogate's court of Kings county has issued letters of administration to the defendant and this court should not interfere with the administration by the probate court of the state in an action which in any way could result in an interference. He also moved to dismiss the bill upon the ground that it fails to state facts sufficient to constitute any cause of action whatever, and upon the ground that there was no delivery of either Exhibit A or Exhibit B annexed to the complaint as appears from the concessions of plaintiff's counsel upon his opening. He also moved that the court compel the plaintiff to elect upon which cause of action she would proceed. He also demanded a jury trial if the plaintiff intended to proceed with the case upon any theory outside of a strict trust and also upon the ground that if there was a trust it was passive and the action should be at law. * * *

In the course of argument upon the motions the following occurred:

Mr. Patterson: I wish to renew, for the purposes of the record, the motions which were previously made before your honor, to strike out various defenses in the answer. I move to strike out the third paragraph, as constituting no defense to the first cause of action; and separately as to the fourth paragraph, as constituting no defense for the first cause of action; and I move separately to strike out the fifth, sixth, seventh, eighth, ninth and tenth paragraphs of the answer as constituting no defense to the first cause of action; and I move separately to strike out the fourteenth paragraph of the answer as constituting no defense to the first cause of action. I move separately to strike out the seventeenth paragraph of the answer as constituting no defense to the second cause of action, and I move separately to strike out the eighteenth paragraph of the answer as constituting no defense to the second cause of action. I move separately to strike out the nineteenth and twentieth paragraphs of the answer as constituting no defense to the second cause of

action, and I move separately to strike out the twenty-second paragraph of the answer as constituting no defense to the second cause of action.

The Court: I will reserve ruling on the motions.

* * * * *

Mr. Davis: I renew my motions to dismiss on the whole case, and move to strike out Exhibits 1 and 2 and 4 and 7, and all the testimony in relation thereto, and reassert my constitutional right to trial by jury, in the event that any recovery is sought by plaintiff or is allowed to plaintiff on the claim of legal ownership as distinct from a trust.

Mr. Patterson: We also renew all of our motions and move to strike out all of the testimony and evidence offered by the defendant upon the same grounds stated at the time such evidence was received, and we ask the court to direct an interlocutory judgment in favor of the plaintiff for an accounting.

Decision reserved.

Briefs to be submitted.

No. 630.

Motion to Dismiss made on Special Appearance.

[*Caption.*]

The defendants herein by their attorneys, Watson and Pasco, and T. F. West, attorney-general of the state of Florida, appearing specially and without submitting to or acknowledging the jurisdiction of this court to try and determine the issues involved in this cause, or to make any valid orders in said cause, move the court to dismiss the said cause, and for grounds for such motion say:

1. That the said bill of complaint does not make out or state such a case as to entitle the complainants, or any of them, to the relief prayed, or to any relief.

2. That said bill of complaint does not allege or show the existence of sufficient facts to entitle the complainants or any of them, to the relief prayed, or to any relief.

3. That said bill of complaint is argumentative and does not state a case which will warrant the interposition of a court of equity.

4. That it appears from the averments of said bill of complaint that the said complainants and each of them have a complete and adequate remedy at law.

5. That it does not appear from the averments of said bill of complaint that the statute challenged as unconstitutional is in contravention of any designated provision of the state or federal constitution.

6. That it appears from the averments of said bill of complaint that the statute challenged is a valid and proper exercise by the state of the power to pass and enforce inspection law.

7. That it appears from the averments of said bill of complaint that the statute challenged is not in contravention of that provision of the federal constitution conferring on the Congress of the United States the power to regulate commerce with foreign nations and among the states of the Union.

8. That it appears from the averments of the bill of complaint that the suit is to all intents and purposes a suit against the state of Florida.

9. That it appears from the averments of the bill of complaint that as to the prosecuting officers named as defendants therein the suit is to all intents and purposes a suit against the state of Florida.

W. and P.,
Attorneys for Defendants.

No. 631.**Separate Motion of Defendant Railway to Dismiss.**

[Caption.]

I. Defendant, The Denver and Rio Grande Railroad Company, severally moves that the amended bill of complaint in the above entitled suit, and the whole thereof, be dismissed for insufficiency of fact to constitute a valid cause of action in equity against this defendant, either severally or jointly with the other defendants, in the following respects and each of them:

First. It appears from the plaintiff's own showing by his amended bill that this court has no jurisdiction to hear and determine this suit.

Second. The amended bill does not state facts sufficient to constitute a valid cause of action in equity against this defendant either severally or jointly with the other defendants.

Third. It appears by the plaintiff's own showing by his amended bill that he is not entitled to any relief in view of Equity Rule No. 27.

Fourth. It appears by the plaintiff's own showing by his amended bill that he has no title to maintain this suit, or to any relief against this defendant by reason of the facts therein alleged.

Fifth. It appears by the plaintiff's own showing by his amended bill that he, and his assignors and predecessors in ownership (if any), of the common stock of this defendant alleged to be owned by the plaintiff, have for many years (namely, at least seven years) prior to the institution of this suit acquiesced in and ratified all of the acts of this defendant charged by the bill to have been and to be unlawful or *ultra vires* and have recognized the validity of the acts of the defendant now complained of, and have been guilty of gross laches in the institution of any suit on account of the matters by plaintiff alleged, and he is therefore estopped in equity from instituting, prosecuting or maintaining this action.

Sixth. It appears by the plaintiff's own showing by his amended bill that this suit was not brought and is not being maintained in good faith, or for the purpose of protecting the value of the ten shares of common stock of this defendant alleged by the plaintiff to be owned by him, or for any purpose entitling the plaintiff to invoke the aid of a court of equity.

Seventh. The said amended bill fails to state facts sufficient to show that this defendant has ever violated or is violating any act of Congress of the United States mentioned in the amended bill, and especially the commodities clause of the Interstate Commerce Act, or the act of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly called the Sherman Anti-Trust Act, or that the defendant has ever committed any act in violation of the rights or interests of the plaintiff as an alleged owner of ten shares of the common stock of this defendant.

II. And without waiver of the foregoing motion, but relying thereon, defendant, The Denver and Rio Grande Railroad Company, severally moves that the amended bill of complaint in the above entitled cause, insofar as it is based upon or seeks any relief because of any alleged violation or threatened violation by this defendant of the act of Congress of July 2, 1890, commonly called the Sherman Anti-Trust Act, be dismissed for insufficiency of fact to constitute a valid cause of action in equity against this defendant, either severally or jointly with the remaining defendants, and particularly for the reasons and in the respects specified in the preceding subdivision "I" of this motion, and each thereof.

And in connection therewith this defendant moves to strike from the amended bill all portions thereof relating or referring to said last mentioned act of Congress, or alleged violations thereof, and particularly paragraphs 15, 16, 17, 18, 19 and 20 of the amended bill, and each and every one of said paragraphs, and also all that portion of paragraph 24 reading as follows:

"That the aforesaid matters and things have continually constituted and do now constitute an unlawful and unreasonable combination and conspiracy in restraint of trade and commerce among the several states within the meaning and purview of the act of Congress of July 2, 1890, entitled, 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies.' "

III. And without waiver of the foregoing motions, or either thereof, but relying thereon, defendant, The Denver and Rio Grande Railroad Company, severally moves that the amended bill of complaint in the above entitled suit, insofar as it is based upon or seeks any relief because of any alleged violation or threatened violation by this defendant of the Interstate Commerce Act, and particularly the commodities clause thereof, be dismissed for insufficiency of fact to constitute a valid cause of action in equity against this defendant, either severally or jointly with the remaining defendants, and particularly for the reasons and in the recites specified in the preceding subdivision "I" of this motion.

And in that connection this defendant moves to strike from the amended bill all portions thereof relating or referring to said last mentioned act of Congress, or to alleged violations by this defendant thereof, and [*particularly*] paragraphs 6, 7, 8, 10, 14, 19, 20, 21, 22 and 23 of the said amended bill, and each of said paragraphs, and also any and every other portion of said amended bill which pretends to allege facts or conclusions intended to support plaintiff's allegations of violations of said commodities clause.

A. B and C. D.,

Solicitors for Defendant, The Denver and Rio Grande Railroad Company.

No. 632.**Motion to Dismiss Suit by Individual Against the United States.**

[Caption.]

Now comes the United States of America by its counsel and moves that the court dismiss the bill of complaint in the above entitled proceeding:

(1) For lack of jurisdiction, on the ground that the court is without jurisdiction to entertain a suit by a private party against the United States to modify an existing decree of the court entered in a suit brought by the United States and is without power to enter any order in such proceeding except an order dismissing the bill of complaint for want of jurisdiction.

(2) For insufficiency of fact to constitute a valid cause of action in equity.

UNITED STATES OF AMERICA,

By A. B.,

Special Assistant to the Attorney-General.

Special service accepted by X. Y., Solicitor for Plaintiff.

No. 633.**Motion to Vacate Preliminary Injunction in Part.**

[Caption.]

And now, this 7th day of April, 1915, come Walter E. Masland, Charles H. Masland, Maurice H. Masland, Charles W. Masland, Frank E. Masland and J. Wesley Masland, the defendants in the above case, and respectfully move the court to vacate the preliminary injunction granted by it on the 26th day of March, 1915, insofar as the same applies to the right of the defendants or their counsel to directly or indirectly disclose any and all processes, apparatuses, articles of manufacture or compositions of matter, or any new or useful improvements thereon, claimed to be the property of the

plaintiffs, to expert or fact witnesses produced at or during the taking of proofs of trial, including the right to consult with expert or fact witnesses regarding the same, either during cross-examination or in preparation or presentation of the defendants' case.

GEORGE QUINTARD HORWITZ,
Attorney for Defendants.

No. 634.

Motion to Vacate Order Allowing Fees.

[Caption.]

The United States of America, by its attorney-general and by its attorneys, Robert W. Childs and Roger B. Hull, special assistants to the attorney-general of the United States, move this honorable court to set aside, vacate and annul an order of this court filed in the above entitled action in the office of the clerk of this court on Saturday, May 8, 1915, awarding and allowing to A. B. and C. D. the sum of \$20,000 as fees and compensation in the said cause. This motion is made upon the following grounds:

1. Because the said order awarding and allowing said fees was unauthorized by and contrary to law.
2. Because said order awarding and allowing said fees was entered without previous notice to plaintiff in this cause, or to the Pirrung estate, a party at interest in this cause.
3. Because the amount of said fees was unreasonably excessive.

And the United States of America also moves this court to vacate the order entered in the office of the clerk of this court on May 7, 1915, awarding and allowing to X. Y., receiver, the amount of \$20,000, for the following reasons:

1. Because the said order was entered without previous notice to plaintiff in this cause, or to the Pirrung estate, a party at interest in this cause.
2. Because the amount of said fees was unreasonably excessive.

This motion is based upon the files and records in the department of justice and in the treasury department of the United States government in Washington, and upon supporting affidavits to be filed hereafter.

Respectfully,

T. W. GREGORY,
Attorney-General.

ROBERT W. CHILDS,
ROGER B. HULL,

Special Assistants to the Attorney-General.

June 1, 1915, 9:55 A. M.

On consideration and for good cause shown the hearing of the within motion is continued until the June term, 1915.

J. E. SATER,
Judge.

No. 635.

Order to Withdraw Answer to Have it Sworn to by Defendant.

[Caption.]

In this cause, it is by consent ordered that defendants be permitted to withdraw their answer heretofore filed herein on the — day of —, for the purpose of having said answer sworn to by defendant, R. M., and that when the same is so sworn to, it may be filed.

No. 636.

Motion to Amend Answer.(1)

[Caption.]

Now comes C. D., the intervening and answering defendant herein, and moves the court for leave to amend, by interlineation, his answer filed herein on the — day of —, 19—, as follows:

First. By striking out the words and figures, etc., in line — and —, pages —, and inserting instead thereof the words and figures following, etc.

R. Y.,

Attorney for Defendant.

(1) Equity Rule 19.

No. 637.

Motion for Leave to Amend an Answer by Consent.(1)

[Caption.]

Now comes the defendant, C. D., and shows to the court:

First. The plaintiff lately filed his bill in this cause against this defendant, who appeared thereto, and on the — day of —, 19—, filed his answer to the said bill.

Second. This defendant has since discovered the mistakes hereinafter mentioned in his said answer and desires to correct the same.

And, therefore, moves the court for leave by consent of the plaintiff to amend his said answer in the respects following; namely [*state the proposed amendments*].

R. Y.,

Attorney for Defendant.

(1) Equity Rule 19.

No. 638.

Motion to Amend Answer with Notice Accepted.

[Caption.]

Now come the defendants in the above entitled cause, and move the court for leave to file the above and foregoing amendment *nunc pro tunc* as of the date of the filing of the original answer herein.

R. Y.,

Of Counsel for Defendants.

Messrs. X. & X.,

Solicitors for Complainant:

Gentlemen: Please take notice that upon the date of hearing of the above entitled cause, and prior to such hearing,

I shall submit the foregoing motion for leave to amend the answer.

R. Y.,

Of Counsel for Defendants.

Dated ———.

Service of the above and foregoing motion and notice accepted, and the receipt of a copy thereof and of the amendment referred to therein acknowledged, at ———, this ——— day of ———.

X. & X.,

Counsel for Complainant.

No. 639.

Order Granting Leave to File Amended Answer and Fixing Time for Testimony.

[Caption.]

The above-named cause, coming on this ——— day of ———, to be heard on the motion of the defendant for leave to file an amended answer herein, instant, and for extension of the time to file testimony to ———, and the court having heard the evidence adduced on said motion, and being fully advised in the premises, does hereby grant said motion.

It is therefore ordered by the court that the defendant be, and he is hereby, granted leave to file his amended answer in the above entitled cause forthwith, and said defendant is hereby granted leave to file his testimony on or before October 1, ———.

It is further ordered that the complainant shall have until October 15, ———, to file its testimony in rebuttal.

No. 640.

Amended Answer.

[Caption.]

Now comes the above-named defendant, C. D., and by leave of court first had and obtained, files this his amended answer to the bill of complaint filed herein, by adding the following paragraph after paragraph six of the answer [or

by inserting after the words *here state the place where the amendment is to be inserted*] the following [*here insert the new matter and conclude as in original answer*].

No. 641.

**Motion for Leave to File Supplemental Answer by
Consent.(1)**

[*Caption.*]

Now comes the defendant, C. D., and shows to the court:

First. The plaintiff lately filed his bill in this cause against this defendant, who appeared thereto, and on the — day of —, 19—, filed his answer to the said bill.

Second. This defendant has since discovered certain mistakes in his said answer, and desires to explain and correct the same by a supplemental answer.

This defendant therefore moves the court by consent of the plaintiff he may be at liberty on or before the — day of —, 19—, to file a supplemental answer to the plaintiff's bill, for the purpose of [*state what, e. g., correcting statements inadvertently made in his answer filed on the — day of —, 19—, that he had not sold an artificial exhaust elsewhere than at his mill at W.; and as to the number of millstones to which such machinery had been applied*].

R. Y.,

Attorney for Defendant.

(1) Equity Rules 32 and 34.

No. 642.

Supplemental Answer.(1)

[*Caption.*]

Now comes the above-named defendant, the C. D. Mining Company, and by leave of court first had and obtained, files this, its supplemental answer, to the complaint of the plaintiff filed herein, and alleges:

First. That since the commencement of the above entitled action and the filing of the complaint therein, and since the filing of the answer of this defendant therein, this defendant has purchased from the government of the United States that certain quartz lode mining claim called the C. D., situated in G. mining district, — county, —, more particularly described as follows, to-wit: [*Here describe property.*]

And has paid the government of the United States for said mining claim at the rate of five dollars (\$5.00) per acre; and has obtained the receiver's receipt of the United States land office at — for the land district in which said mining claim is situated, for the sum of money so paid for said mining claim.

Second. That by virtue of the said purchase and payment, and the holding of the said receipt of the receiver for the purchase price of the said mining claim, the defendant, the C. D. Mining Company, is now the owner of the said C. D. mining claim, so described as aforesaid in fee.

R. Y.,

Attorney for Defendant.

[*Verification.*]

(1) Equity Rule 34.

No. 643.

Order Extending Time to Answer.

[*Caption.*]

On application of the defendants, they are allowed thirty days from the entry of this order within which to answer the complainant's bill.

No. 644.

Entry of Consolidation of Suits.(1)

[*Caption.*]

By order of court made this — day of —, the case of the A. B. Trust Company vs. the C. & D. Railroad Company, C. & D. *et al.*, No. — upon the docket of this court, and also

the case of the A. B. Trust Company vs. the E. & F. Railway Company, the C. & D. Railway Company *et al.*, No. — upon the docket of this court, both filed on said date, were consolidated with this cause, and the orders and proceedings heretofore had in said causes respectively are hereby made orders and proceedings in this cause, the consolidated cause to proceed under the title of this cause.

(1) R. S. U. S., Sec. 921, and notes thereon in 6 Fed. Stat. Ann., 2d ed., p. 80; Foster's Fed. Prac., 5th ed., Sec. 472.

No. 645.

Order Granting Leave to Intervene.(1)

[*Caption in main suit.*]

This day came E. F., by R. S., his solicitor, and moves the court for leave to file an intervening petition in this cause, which motion is hereby granted and such leave given upon the said petitioner giving the usual cost bond in such behalf according to the practice of the court; and such cost bond being now given the said petition is now accordingly filed.

(1) Where the property of a defendant is in the possession of the court or one of its officers, a person having an interest in or claim against such property may ordinarily intervene in the main suit to set up his claim or interest. See *Savings & Trust Co. v. Bear Valley Ins. Co.*, 93 Fed. 339. In such cases the court may entertain a petition by the aggrieved person either in the form of a simple motion or by intervention *pro interesse suo* in the cause in which the process issued or by ancillary or dependent bill in equity and may afford such relief as right and justice require. The existence of such a power, independent of statutory jurisdiction, is recognized by the supreme court in *Freeman v. Howe*, 24 How. 450; *Minnesota Company v. St. Paul Company*, 2 Wall. 609-633; *Railroad Companies v. Chamberlain*, 6 Wall. 748; *Krippendorf v. Hyde*, 110 U. S. 276; *Pacific Railroad of Missouri v. Missouri Pacific Ry. Co.*, 111 U. S. 505; *Stewart v. Dunham*, 115 U. S. 61; *Phelps v. Oaks*, 117 U. S. 236; *Dewey v. West Fairmount Gas Company*, 123 U. S. 329; *Gumbel v. Pitkin*, 124 U. S. 131; *Johnson v. Christian*, 125 U. S. 642-646; *Morgan's Co. v. Texas Central Railway*, 137 U. S. 171.

For forms of petitions see under "Receivers," Nos. 620 et seq. Equity Rule 37; *Kardo Co. v. Adams*, 231 Fed. 950.

No. 646.**Order Denying Application to Intervene.**

[Caption.]

This day this cause came on further to be heard upon the application of S. B. for leave to file the intervening petition and the answer attached to said application, and on the evidence adduced by the parties, including the offer made in open court at the hearing by the reorganization managers and filed herein, and was argued by counsel; and the court being fully advised in the premises finds that all and singular the allegations of fraud and collusion made in said proposed intervening petition and answer are untrue; that said E. & F. Railway Company, at the time of the filing of the several bills of complaint herein, was and now is insolvent; that the several defaults in the payment of interest as set forth in said bills of complaint were and are *bona fide*, and that said plan of reorganization is fair and just to all interests, including those of the said S. B. in case he should choose to avail himself thereof.

Therefore it is ordered and adjudged that the said application be and hereby is denied. But it is ordered that the said S. B. may, in case he refuse to accept said offer of said reorganization managers, file in this court, within ten days if he be so advised, an intervening petition for the purpose only of setting up any claim he may have to participate in the distribution of the proceeds of the sale hereinbefore ordered.

No. 647.**Motion for Leave to Intervene.**

[Caption.]

Comes now George M. Swift and moves the court for leave to intervene as a party defendant in the above entitled case and represents to the court that he is interested in the lands set out in the original and amended bill of complaint and the

oil and gas being produced therefrom, as the assignee and trustee of Saber Jackson, one of the parties to the above entitled action, and who is the owner of a life estate by courtesy in said land, and desires to file an answer and cross-petition herein, and asks that Howard Webber be made a party defendant to said suit for the reason that he is a necessary party to this suit for the final and complete determination of the rights of this intervening defendant, in this, to-wit: That the said Howard Webber is a sub-lessee of the Black Panther Oil & Gas Company and is operating the said lease as such sub-lessee, being engaged in drilling oil wells upon said lands and taking oil from said lands and marketing the same, and is converting the proceeds of such sales of oil to his own use and committing waste thereby upon the estate of the said Saber Jackson, and on this intervening defendant, in and to the said lands.

That the Black Panther Oil & Gas Company is operating by and through the said sub-lessee, Howard Webber, under a lease for oil and gas mining purposes, made and executed by the said Saber Jackson, covering the said lands, which lease has been assigned to the Black Panther Oil & Gas Company. That the said lease and the assignments thereof conveying the same to the Black Panther Oil & Gas Company were of record upon the land records of Creek county, Oklahoma, where the said land is situate and the said Howard Webber took the said sub-lease with full notice and knowledge of the same. That the said Howard Webber is operating the said sub-lease under a contract by the terms of which he gets one-half of all of the oil produced from said lands and is converting the same to his use by selling the same and appropriating the proceeds thereof, to the injury of this intervening petitioner, and of the said Saber Jackson, and thereby committing waste upon the estate of the said intervening petitioner and of the said Saber Jackson in said lands.

That on December 24, 1914, the defendant, Saber Jackson, made, executed and delivered to one T. E. Standley a warranty deed and assignment of oil and gas royalties accrued

and to accrue, which warranty deed and assignment was procured by false and fraudulent representations, and was wholly without consideration. That the said T. E. Standley is asserting some rights in the land and royalties, and is a necessary party to the complete and final determination of this action.

That the intervening petitioner has been empowered as trustee for the said Saber Jackson under a proper power of attorney to institute suit to cause the said deed to be cancelled, a copy of which power of attorney is hereto attached and marked Exhibit "A."

That this intervening defendant holds an assignment to himself as trustee for himself and Saber Jackson of the interest of Saber Jackson, in and to the royalties accruing and to accrue under and by virtue of a certain oil and gas mining lease, made and executed by the said Saber Jackson to J. Coody Johnson, under date of November 13, 1913, and by assignment from J. Coody Johnson assigned and conveyed to L. C. Parmenter, as trustee under date of January 27, 1914, and by assignment of said L. C. Parmenter, assigned and conveyed to the Black Panther Oil & Gas Company, a corporation, under date of February 4, 1914.

That under said lease and by the terms thereof this intervening defendant and the said Saber Jackson are entitled to a one-eighth royalty from the proceeds of the wells now drilled upon said lands and which may hereafter be drilled upon said lands, which royalty interest is not contingent upon the establishing of any interest in or to the said lands.

Wherefore the said intervening defendant asks the court to make and cause to be entered herein an order permitting the said George M. Swift, trustee, to intervene herein, and making the said Howard Webber and T. E. Standley parties defendant herein.

A. B.,

Attorney for George M. Swift.

No. 648.

Order Denying Petition to Intervene.

(Another Form.)

[*Caption.*]

Now on this 22nd day of February, 1915, comes on to be heard the application of George M. Swift for leave to intervene in this cause, and after argument of counsel, and due consideration, the court finds that the application should be denied.

It is therefore considered, ordered and decreed that the application of George M. Swift for leave to intervene in this cause be and the same is hereby denied, to which order of the court George M. Swift asks and is allowed his exceptions.

No. 649.

Order Allowing Petition to Intervene (Another Form).

[*Caption.*]

This cause coming on to be heard on the application of the city of Amarillo, intervener in this suit, to be made a party, and the petition having been duly considered, and it appearing to the court that the said city of Amarillo, petitioner, has an interest in the subject-matter of this suit sufficient to enable it to become a party to this suit:

It is therefore ordered, adjudged and decreed that the city of Amarillo, petitioner, has leave to intervene in said suit.

This order to be without prejudice in any proceedings heretofore had in this cause.

E. R. MEEK,

Judge of the District Court of the United States for the
Northern District of Texas, Amarillo Division.

No. 650.**Petition of a City Intervenor.**

[Caption.]

Comes now your intervenor, the City of Amarillo, a municipal corporation, duly incorporated under the laws of the state of Texas, and having its domicile in the county of Potter, state of Texas, and within the northern district of Texas, Amarillo division, complaining of Emile B. Boisot, trustee, hereinafter called plaintiff, and Amarillo Street Railway Company, hereinafter called defendant, and Guy W. Faller, hereinafter called receiver, and represents and shows unto your honor:

1. That your intervenor has an interest in the subject-matter of this suit, the same being a first and paramount lien upon all the properties, franchises, etc., belonging to or in any wise appertaining to the Amarillo Street Railway Company, which may be situated within the corporate limits of said city of Amarillo, which interest and lien accrued and is as follows, to-wit:

* * * * *

9. Wherefore this intervenor says that by reason of the facts set up in the preceding paragraph the lien for the cost of paving between the rails, and for a distance of two feet on the outside of each outer rail of the tracks of the Amarillo Street Railway Company on the portion of South Polk street, which has been assessed by the city of Amarillo against said railway, is and should by this court be so declared a first and paramount lien against the property and franchises of the Amarillo Street Railway Company, taking precedence over and to be satisfied before the lien of the mortgagees or bondholders as asserted by plaintiff in this cause.

10. Your intervenor would further represent and show to the court that at the hearing heretofore had for the benefit of the property owners as heretofore alleged, Guy W. Faller at that time general manager of the Amarillo street railway

system in Amarillo, appeared and offered no objection or protest to the levy and assessment against the property and franchise of said street railway system, but agreed that said street railway company would, in accordance with the terms and provisions of the notice published, pave the portion of South Polk street occupied by said street railway company and for a distance of two feet outside of each outer rail thereof, and place the additional concrete base as required by said city commission under the foundation required for said paving and secured from the said commission the right to temporarily suspend the operation of their street-car system on North Polk for the purpose of enabling said street-car system to facilitate the work of excavating on South Polk, where the paving was to be done; and in pursuance of said promise, said street car company immediately began the prosecution of the work, by excavating along its tracks and rails and for a distance of two feet on the outside of each outer rail thereof, all of which was done prior to the institution of the suit and the appointment of the receiver by this court.

Wherefore, premises considered, this intervenor would show to your honor that a necessity exists by reason of the fact that the city of Amarillo has incurred and is liable to incur large sums of extra expense on account of the excavated and incomplete condition of that portion of the street occupied by the tracks of the street railway company, and the fact that immediately upon the institution of this suit and the appointment of a receiver by this court, the street railway company, or the receiver so appointed, suspended the work which had already been begun as heretofore alleged in this petition; for the issuance by this court of an immediate order to the receiver to proceed with and continue and complete the work so begun and left in the incomplete stage; or if said receiver can not proceed with, continue and complete the paving of the street railway area with his own force, that he be instructed by the court to at once enter into an arrangement with some person or persons to complete said work; and this is necessary on ac-

count of the fact that intervener has no remedy in the ordinary course of law, the property being in the custody of this court and the receiver operating and handling the same under the direction of this court. Intervener prays, therefore, that the order prayed for be issued at once; that this court recognize and so state its decree, that the lien created by the special assessment levied by the city of Amarillo for the paving of the street railway area is a first and paramount lien and is to be satisfied out of the proceeds of the operation of the railway company by the receiver, or, if the property should be sold, out of the proceeds of the sale thereof, ahead of and before any part of the amount claimed by the bondholders; and for any other and further relief which intervener may show itself entitled to upon the hearing of this cause.

THE CITY OF AMARILLO,

By A. B., Attorney.

Intervener.

No. 651.

Petition of Intervention.

[Caption.]

Comes now the state of Iowa, the intervener herein, and represents to the court that it has an interest in the matter in controversy adverse to the complainant herein and states:

I. That section 2419 of the code of the state of Iowa, this intervener, became effective July 4, 1888, and is still in force, and is as follows: * * *

II. That section 4043 of the sixty-second Congress, second session, known as the "Webb-Kenyon" law, was enacted March 1, 1913, and reads as follows: * * *

III. That if the prayer of the complainants be granted and the temporary injunction heretofore issued herein be made permanent, then the defendants herein will, by the order of this court, be not only permitted, but required to violate the provisions of section 2419 of the code of the state of Iowa, the intervener herein, as well as the provisions of the Webb-

Kenyon law, in addition to their violation of the provisions of sections 2 and 3 of section 2421-a, supplemental supplement, 1915, set forth at length at pages 10 and 11 of complainant's printed bill.

IV. That the violation of said laws of the intervener herein by the defendants herein and others similarly situated will result in great and irreparable injury to this intervener.

Wherefore intervener prays that the temporary order made herein on September 21, 1915, be set aside, and that complainant's bill be dismissed and that complainants and each of them be enjoined from offering for shipment and that the defendants and each of them be enjoined and restrained from receiving for transportation into Iowa, from transporting or delivering within the state of Iowa, any spirituous, vinous, malted, fermented or other intoxicating liquors, except to the consignees in person, and then only when such consignee is the holder of a permit to sell the same for lawful purposes, and for such other and further relief as to equity pertains.

A. B., Atty. Gen. of Iowa,

C. D., Asst. Atty. Gen. of Iowa,

Solicitors for Intervener.

No. 652.

Motion to Assign Time Within which Parties shall take Evidence.

[*Caption.*]

Now comes the plaintiff [*or, defendant*] herein and moves the court to assign a time within which the parties respectively shall take their evidence.

X. & Y.,

Solicitors for —.

No. 653.**An Order Assigning Time within which to take
Testimony.(1)**

[Caption.]

The above-named cause coming on this — day of —, to be heard on motion of plaintiff [or, defendant] for an order to assign time within which the parties respectively shall take their evidence, and counsel being heard for the respective parties, it is hereby ordered that the plaintiff shall have until the — day of —, 1894, within which to take his evidence in chief, and that the defendant thereafter shall have until the — day of —, within which to take his evidence, and that the plaintiff thereafter shall have until the — day of —, in which to take his evidence in rebuttal.

(1) Equity Rules 47 and 48.

No. 654.**Order Allowing Testimony by Depositions.(1)**

[Caption.]

This day came the complainant and filed herein the affidavit of its attorney, E. B. Anderson, and moved the court that it be allowed to take the testimony of its witnesses by way of depositions to be used in its behalf on the trial of this cause and at the same time a stipulation of the parties hereto was filed and pursuant to said motion and said stipulation it is ordered that the testimony of all of the witnesses, both those for the complainant and for the defendants, be taken by depositions and that said depositions be used by the respective parties for whom they are taken.

It is further ordered that the depositions for the complainants be taken and filed herein forty days from this date, and that those for the defendant be taken and filed within thirty days from the expiration of the time for the filing of complainant's depositions, and that rebutting depositions for either

of the parties hereto shall be taken and filed within twenty days after the time for the taking of the original depositions for the respective parties hereto has expired.

(1) **Equity Rule 47.**

There is disagreement among the courts as to the effect of Equity Rule 47 in view of R. S. U. S., Sec. 863.

See *Victor Talking Machine Co. v. Sonora Phonograph Corp.*, 221 Fed. 676; *Iowa Washing Machine Co. v. Montgomery, Ward & Co.*, 227 Fed. 1004; *Block v. Arrowsmith Mfg. Co.*, 243 Fed. 775, and the case of *Audiffren Refrigerating Machine Co. v. General Electric Co.*, 245 Fed. 783, in which it is held that a court may, where procedure is irregular, vacate the notice in advance of the taking of the depositions, the nature of the power being the same as that exercised in suppressing a deposition.

The deposition of witness who has before deposed may be taken for cause shown, 245 Fed. 783, above.

The effect of Equity Rule 47 is to regulate the method of procedure under R. S. U. S., Sec. 863, and it does not vary said statute; this construction of Equity Rule 47 harmonizes its provisions with the statutory provisions, 245 Fed. 783, above.

Equity Rule 47 does not limit the power of the court by order to permit the taking of depositions at any time, *United States, etc., Co. v. Mackey Wall Plaster Co.*, 252 Fed. 397.

No. 655.

Order Allowing Particular Deposition to be Taken.(1)

[*Caption.*]

This day came the plaintiff and filed herein a notice, accepted by the defendants through their attorney, W. P. Sandidge, and moved the court for an order allowing it to take the deposition of Arthur Talkington, in Kansas City, Missouri, and in support of said motion filed the affidavits of C. H. Brooks, E. B. Anderson and F. T. Ransom, and the motion being submitted to the court, it is ordered, the parties plaintiff and defendant, through their respective attorneys agreeing thereto, that the deposition of said witness, Arthur Talkington, may be taken in St. Louis, Missouri.

(1) See Equity Rule 47 and U. S. R. S., Sec. 863.

No. 656.**Order Preserving Oral Testimony Taken in a Suit in Equity.(1)**

[Caption.]

The evidence in this case having been given in open court orally and taken down stenographically, and thereafter reduced to typewriting by the stenographer, and such typewritten copy having been approved as correct by the parties:

It is ordered that such typewritten copy of testimony be filed by the clerk and that it be accepted and treated in all respects as if the same had been taken before an examiner or by deposition and duly admitted in evidence, and it is ordered that such testimony may be filed within thirty days with the same force and effect as if filed before the trial.

(1) Oral testimony is now required by Equity Rule 46, unless otherwise permitted by statute or equity rules.

No. 657.**Stipulation to Read Depositions Taken in Another Case.**

The District Court of the United States for the ——— District of ———.

A. B.

vs.

C. D.

It is hereby agreed between the plaintiffs and defendants, through their respective counsel, that the depositions and exhibits taken and on file in action No. ———, in this court, entitled S. R., plaintiff, vs. L. M. National Bank, etc., defendants, may be read on the trial of the above styled action in this court, by either party, and that either party may produce and read on the trial of this action such of said depositions and exhibits taken and on file in the aforesaid action of S. R. vs. L. M. National Bank, etc., as he or it desires, subject to all exceptions for relevancy. And it is further agreed and stipulated

that either party may further examine or retake in this action or further cross-examine in this action any witness whose deposition on file in the aforesaid action of S. R. vs. L. M. National Bank, etc., is to be read.

And it is further agreed that the reading of said depositions, or any of them, is to be wholly without prejudice to the rights of any of the parties herein to testify in his or its own behalf and to take further evidence.

R. X.,

Attorney for Plaintiff.

R. Y.,

Attorney for Defendant.

No. 658.

Motion to take Additional Testimony.(1)

[*Caption.*]

Now comes the defendant, the C. D. Company, herein and moves this honorable court that this cause be reopened for the purpose of permitting the said defendant to take newly discovered testimony. In support of this motion, the affidavits of E. S. and R. T. are attached hereto and made a part hereof.

R. Y.,

Attorney for Defendant.

(1) This motion should be supported by affidavits stating the nature of the newly discovered evidence and showing reasons for not introducing it at an earlier stage in the case. As to practice in such cases see *Allis v. Stowell*, 85 Fed. 481; *Giant Powder Co. v. Powder Co.*, 5 Fed. 197. Note that Equity Rule 46 requires testimony to be taken in open court, with some exceptions.

No. 659.

Order to Re-Open Case and take Further Testimony.(1)

[*Caption.*]

On reading and filing the defendants' motion, and the affidavits of E. S. and R. T., thereto annexed, and after hearing R. Y., Esq., for the defendants, and R. X., Esq., for the plain-

tiff, it is ordered that this cause be reopened and that the time allowed for taking testimony on behalf of the defendants in the above entitled cause be extended to and including the — day of —.

(1) As to when such leave will be granted, see *Allis v. Stowell*, 85 Fed. 481; *In re Gamewell, etc., Tel. Co.*, 73 Fed. 908.

A district court can not reopen case after the term at which final decree was rendered; *Roemer v. Simon*, 91 U. S. 149; *Brooks v. R. R. Co.*, 102 U. S. 107.

No. 660.

Order Suppressing Notice of taking Testimony.(1)

[Caption.]

On motion of R. Y., in behalf of defendants in the above cause, it is hereby ordered that complainant's witness, Laureau, be produced for cross-examination at —, on —; or in lieu of this, that the complainant's notice for taking testimony in —, on the — day of —, be postponed to read on the — day of —; and that said witness, Laureau, be produced at that time.

In case the complainant, at their option, produce said witness, Laureau, for cross-examination in —, on the — day of — (in accordance with the first section of this order), the notice for taking testimony in — on the same date is hereby suppressed.

(1) *Henning v. Boyle*, 112 Fed. 397.

No. 661.

Order Fixing Time within which to File Briefs.

[Caption.]

On motion of complainant, by R. Y., of counsel, it is now ordered that this case be and the same is submitted generally. It is further ordered that the parties complainant and defendant have and they are given sixty days from the date of this entry to file briefs herein.

No. 662.**Stipulation to Submit Cause on Printed Briefs.****[Caption.]**

It is hereby stipulated and agreed that this cause be submitted to the court on printed arguments; the plaintiff's counsel to serve his argument within — days, and the defendant's counsel to answer the same within — days thereafter, and the plaintiff's counsel to reply within — days after the defendant's counsel's arguments shall have been served.

Dated this — day of —, at —. R. X.,
Solicitor for Plaintiff.
R. Y.,
Solicitor for Defendant.

No. 663.**Motion to Enter a Decree Nunc Pro Tunc.****[Caption.]**

Comes now the plaintiff [*or*, defendant] above named and moves the court:

That the decree [*or*, order] made in this cause, bearing date, etc., has been drawn up, but the time for entering the same, according to the rules of this court, being elapsed:

This plaintiff [*or*, defendant], therefore, moves the court that the said decree [*or*, order] may be entered *nunc pro tunc* as of the — day of —.

R. & R.,
Attorneys for —.

No. 664.**Motion to Rectify a Decree or Order.****[Caption.]**

Comes now the plaintiff [*or*, defendant] and shows to the court:

First. That by the decree [*or*, by an order] made in this cause by [*as the case may be*], dated the — day of —,

19—, it was decreed, etc. [*Set out so much of the decree or order as is material to the subject-matter of the motion.*]

Second. That the said decree [*or, order*] has been duly entered in, etc.

Third. That since such entry was made this plaintiff [*or, defendant*] has discovered that the said decree [*or, order*] omits to [*state omissions required to be rectified*].

This plaintiff [*or, defendant*], therefore, moves the court that the said decree [*or, order*] may be rectified or corrected by [*state in what respect*]; or that the court [*or, as may be*] will please to make such other order in the premises as to the court [*or, as it may be*] shall seem meet.

R. & R.,

Attorney for —.

No. 665.

Motion for Decree on Mandate.(1)

[*Caption.*]

Now comes the defendant, C. D., and shows to the honorable court that the above-named cause was commenced in this court, tried and decree entered against defendant.

That the defendant appealed said cause to the circuit court of appeals for the — circuit, where the decree of the trial court was reversed, and said court of appeals in its opinion filed says: "Decree reversed, and cause remanded for further proceedings not inconsistent with this opinion."

That on the — day of —, 19—, mandate issued, and by order of this court, on motion, said mandate was filed and entered of record in said cause, —, 19—.

Defendant now moves the court for final decree upon the facts found by the honorable trial judge, and the law as laid down in said opinion of the honorable circuit court of appeals, and for such other or further proceedings as may be necessary, that justice may be done the parties.

Y. & Y.,

Solicitors for Defendant, C. D.

(1) Desty's Fed. Proc., Sec. 213; *Sibbald v. U. S.*, 12 Pet. 488, 9 L. ed. 1167, R. S. U. S., Sec. 701.

No. 666.**Order Directing that Mandate of Circuit Court of Appeals be Spread of Record, and other Orders Consequent Thereupon.**

[Caption.]

The case above entitled coming on for hearing on this day, all parties being represented by counsel, it is made to appear to the court that the circuit court of appeals of the eighth circuit in said case on appeal issued its mandate of date December 16, 1913, and filed herein December 17, 1913, which said mandate is in the hands of the clerk of the court;

On due consideration, it is ordered by the court that the said mandate be spread of record on the records of this court, and from its said mandate it appears the decree of this court heretofore entered was by said circuit court of appeals confirmed;

It further appears to the court that the costs in the suit decided by said mandate have been paid;

It is further ordered by this court that the receivers heretofore appointed by this court, namely, Conway F. Holmes, Eugene Mackey and George F. Sharitt, pursuant to the decree of the court heretofore rendered and confirmed by said court of appeals, on or before January 1, 1914, turn over to the receivers appointed by the district court of Montgomery county, Kansas, viz., John M. Landon and R. S. Litchfield, the property heretofore described and referred to in the decree of this court heretofore entered of record, viz: all of the property of the defendant, Kansas Natural Gas Company, that is within the state of Kansas, except such property as has been disposed of by sale and except such moneys as have been and will hereafter be expended under the order of the court; and that the receivers of this court surrender and deliver to the said receivers of the district court of Montgomery county all of the property belonging to the Kansas Natural Gas Company located in the state of Kansas.

It is further ordered that of the money now in the hands of the receivers of this court, there shall be turned over by said

receivers, on or before January 1, 1914, to the said receivers of the district court of Montgomery county, Kansas, the sum of seventy-five thousand dollars (\$75,000) to apply on account; further sums to be hereafter ordered and determined and to be confirmed by a later order of this court.

It is further ordered that the receivers heretofore appointed by this court, and still acting in that capacity, shall forthwith proceed and continue with all diligence to collect all moneys due for the product at any and all times heretofore sold by them, and held and retained, the said moneys so collected to be covered by an order hereafter to be made by this court.

It is further ordered that said receivers of this court file a verified report with the clerk of this court, on or before January 8, 1914, to be taken up and considered by this court January 9, 1914.

And it is ordered that all person owing the receivers of this court, take notice of these orders and make said payments accordingly.

Done and ordered of record this December 30, 1913.

SMITH MCPHERSON, Judge.

No. 667.

Petition for New Trial.(1)

[Caption.]

Your petitioner shows this honorable court:

First. That since the argument and decision rendered herein your petitioner has discovered certain new evidence of which he did not know and could not have known by reasonable diligence at the time of the hearing of this cause. The evidence referred to consists [*here state the nature of the evidence relied upon, naming the witnesses and character of the testimony which petitioner expects to introduce*].

Wherefore your petitioner prays that a rehearing may be granted herein with leave to take such additional testimony on the matters heretofore referred to, and that the court may fix

a time within which such testimony may be taken on the part of your petitioner and such further time as opposing party may take evidence to rebut the same.

And your petitioner will ever so pray.

R. S.,
Petitioner.

[Verification.]

(1) A petition for rehearing must be filed at the term at which the decree was entered. *Brooks v. R. R. Co.*, 102 U. S. 107.

As to rehearing on the ground of newly discovered evidence, see *Municipal Signal Co. v. Natl. Elec. Co.*, 99 Fed. 569; *Robinson v. Sutter*, 11 Fed. 798; *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 93 Fed. 712, 35 C. C. A. 547.

It rests in the discretion of the judge to grant or refuse a rehearing. *Am. Diamond Rock Boring Co. v. Sheldens*, 1 Fed. 870.

Judicial Code, Sec. 269; 5 Fed. Stat. Ann., 2d ed., notes at pp. 1050 to 1055.

No. 668.

Order Denying Motion for Rehearing.

[Caption.]

This cause coming on to be heard on the petition of defendant for a rehearing herein, came the parties plaintiff and defendant by their respective attorneys and made argument to the court thereon.

Whereupon the court being fully advised, it is ordered that said petition for a rehearing be and the same is denied.

No. 669.

Motion to Retax Costs.

[Caption.]

Now comes the defendant herein and moves the court to retax the costs in the above-named cause by adding to the same already taxed the following items, to-wit:

\$20.00 as docket fee.

\$20.90 as notary fees for taking depositions of S. M., G. H. and L. F.

\$15.00 as notary fees for taking depositions of F. L., B. R. and E. H.

\$15.00 as attorney's fees on the depositions of the six witnesses above named.

Y. & Y.,

Solicitors for Defendant.

[An affidavit showing that the notary fees had been actually paid should be filed with this motion.]

No. 670.

Cost Bill.

See form No. —.

No. 671.

Final Record in Equity.

The plaintiff in the above entitled cause filed his bill of complaint, which is hereunto annexed, on — day of —, and the writ of subpoena was thereupon issued and returned personally served.

An appearance was duly entered for the defendant by R. Y., his solicitor, and on the first Monday of — thereafter, an answer to said bill of complaint was filed, the same being hereunto annexed.

On the first Monday of — thereafter, the plaintiff filed a replication, the same being hereto annexed.

On the — day of —, an order of the court granting to the plaintiff a preliminary injunction as prayed for in the bill of complaint was filed and entered, which said order is hereunto annexed.

Testimony was thereafter taken by the respective parties and filed in the clerk's office of the said district court.

Afterwards, and at the — term of — of said court, present the Honorable G. W., district judge, the said cause came on to be heard on the pleadings and proofs, and was argued by counsel. On the — day of —, a decree of said court was filed and entered in favor of the plaintiff, by which

it was adjudged that a perpetual injunction should issue against the defendant, and that an accounting be had before C. G., master of said court; the said order being hereunto annexed.

On the — day of —, the said master filed his report, upon which, and on the — day of —, the said court caused its final decree to be entered herein, the same being hereunto annexed.

And the costs having been taxed by the clerk at — dollars, the process, pleadings and decrees, together with other papers filed in said cause, are duly annexed hereunto.

Wherefore let the said A. B. recover of said C. D. the sum of — dollars, as adjudged in said final decree, together with the further sum of — dollars, the cost and charges as taxed, making in the aggregate the sum of — dollars.

Signed and enrolled this — day of —. B. R.,

Clerk of the District Court of the United States for
the — District of —.

[Seal.]

No. 672.

**Order making Fidelity Title and Trust Co. a Party Plaintiff,
etc.**

[Caption.]

And now, October 19, 1912, this cause came on for further hearing upon the bill of complaint filed and upon the answer of the respondent thereto, and upon the petition and bill of complaint of the intervener, Fidelity Title and Trust Company, of Pittsburgh, Pennsylvania, and upon the answer of the defendant, Kansas Natural Gas Company, thereto under its corporate seal and sworn to by its president and secretary, admitting and confessing the truth of all statements, averments and charges in the said petition and bill of complaint of the intervener, and also the right of the intervener to the relief prayed for and joining in the prayer of the intervener for the

appointment of a receiver, and waiving all notice of the application therefor, the intervener, appearing by its solicitor, Charles Blood Smith, Esq., of Topeka, Kansas, and the respondent by its solicitor, John J. Jones, Esq., of Chanute, Kansas, and the court being fully advised as to the premises,

It is now ordered, adjudged and decreed:

That the prayer of the Fidelity Title and Trust Company, the intervener, be granted and that it be and now is hereby made a party plaintiff on the record in the above entitled cause *nunc pro tunc* as of October 7, 1912, and as fully to all intents and purposes as though such from the beginning: And

That the order of this court entered October 9, 1912, with all its appointments, requirements, injunctions and directions, be and the same is now reordered, readjusted and redcreed; and

The presentation of the petition of intervention and the filing of the bill of complaint of the intervener, and all proceedings thereof, being for the common good of all stockholders, bondholders and creditors of the defendant, the costs and expenses thereof, including the bill of the solicitor, are directed to be paid by the receivers out of the common fund, but such bill of the solicitor shall be first presented to and approved by this court.

JOHN C. POLLOCK,
Judge.

No. 673.

Order making Additional Parties Defendants.

[Caption.]

Now on this 11th day of March, 1913, the above entitled cause came on, on the application of the plaintiff for leave to file its supplemental petition and make additional defendants herein as prayed for in said second supplemental petition, and the court having considered said petition and the allegations thereof doth grant and allow said application, and said defendants are hereby made defendants to this suit, and the decree

heretofore and on February 15, 1913, rendered enjoining the various defendants from numerous acts therein mentioned is hereby extended to and made to apply to and binding upon said defendant, The Fidelity Trust Company, trustee, of Philadelphia, Pennsylvania; The Fidelity Title and Trust Company, trustee, of Pittsburg, Pennsylvania; The Delaware Trust Company, trustee; Braden, Bartlett & Macbeth, trustees Kansas City Gas Company, a corporation; Wyandotte County Gas Company, a corporation.

No. 674.

Nunc Pro Tunc Order Admitting Defendants.

[*Caption.*]

Now on this the 22nd day of September, 1915, it appearing to the court that heretofore, and on the 24th day of August, 1914, Charles F. Bissett, and three others hereinafter named, were upon their own application permitted by the court to intervene and become parties defendant to this action, and on said day filed their answer to the amended bill of complaint of the complainant, and it further appearing that no formal order was made and entered making said persons parties defendant,

It is now, as of the 24th day of August, 1914, ordered that the said Charles F. Bissett, Taxaway Oil Company, a corporation; F. L. Moore and J. S. Cosden have leave, and leave is hereby granted to them, to intervene in this suit and to appear herein as defendants in the same manner and with like effect as if they were named in the amended bill of complaint as defendants having or claiming an interest.

RALPH E. CAMPBELL, Judge.

No. 675.**Order Granting Leave to Intervene and File Answer and Cross-Petition.**

[Caption.]

On this the 23rd day of October, 1914, coming on to be heard in Muskogee the application of Fulhohchee Barney, Siah Barney, Tommy Barney and Mollie Barney, for leave to intervene in this cause and to become parties defendant herein and to file an answer and cross-complaint, said parties appearing by Turner & Turner and Owen & Stone, their attorneys, and said plea of intervention having been heard by the court,

It is ordered and adjudged that leave be granted for the said parties to intervene herein and to become defendants in this cause.

And now comes said Fulhohchee Barney, Siah Barney, Tommy Barney and Mollie Barney, by their said attorneys, leave of the court having been first had and obtained, and file their answer to the complainant's bill of complaint and their cross-petition against the other defendants.

RALPH E. CAMPBELL, Judge.

No. 676.**Order Overruling Motion to Strike Joint Answer of Defendants and Intervenors.**

[Caption.]

On this 4th day of May, 1915, came on to be heard the motion of the complainant, the United States of America, to strike the joint answer of the defendants and intervenors, Bessie Wildcat *et al.*, and the court having heard the arguments of counsel and being advised in the premises.

It is ordered that said motion to strike the joint answer of the defendants and intervenors be and the same is hereby overruled. To which action of the court in overruling said motion the complainant, the United States of America, duly excepted and the exceptions were allowed by the court.

No. 677.**Order of Severance.****[Caption.]**

Now on this 5th day of November, 1917, this cause came on to be heard upon the joint motion of the Kansas City Gas Company, the Wyandotte County Gas Company, Fidelity Trust Company and The Kansas City Pipe Line Company, and the motion of the City of Kansas City, Missouri, and the motion in open court of the public service commission of Missouri for an order of severance on appeal in the above entitled cause and was argued by counsel, and thereupon, upon consideration thereof:

It is found by the court that demand in writing has been duly made by the above-named parties upon all their co-defendants to appeal or join in appeals from the final judgment and decree entered in the above entitled case to the supreme court of the United States, and that all said co-defendants have been duly notified in writing to appear and show cause why order of severance should not be made, and have failed to appear, or have appeared and have refused to join in the appeals of the parties above named, and,

It is further found that the [*here name the parties*] have indicated their desire to appeal or join in appeals in this cause, and that they are entitled to a severance from their other co-defendants in this cause; therefore

It is ordered, that the above-named defendants be and they are hereby granted a severance from all their co-defendants for the purpose of an appeal, or appeals, from the final judgment and decree entered in the above entitled cause to the supreme court of the United States.

It is further found and ordered that the rights of the Kansas City Gas Company, The Wyandotte County Gas Company, Fidelity Trust Company and The Kansas City Pipe Line Company are so separate from the rights of all their co-defendants that they are entitled to and are hereby granted a severance

from all their co-defendants for the purpose of prosecuting a joint appeal from the final judgment and decree of this court in this cause, entered on August 13, 1917, to the supreme court of the United States.

JOHN C. POLLOCK,
District Judge.

No. 678.

Writ of Possession or Assistance.(1)

The United States of America,
—— District of ——, ss.

The President of the United States of America to R. P.,
Special Master Commissioner of the District Court of
said District, Greeting:

Whereas, according to the tenor and true meaning of a decree in equity in a certain cause depending in our district court of the United States within and for the district aforesaid, wherein A. B. is plaintiff and C. D. and others, defendants, it was decreed that C. D. deliver possession to A. B. of the messuage, lands and premises, situate in the township of ——, in the county of ——, and state of ——, and bounded and described as follows: [*set forth description*].

The whole tract above described being the same premises heretofore conveyed to T. F., and by him conveyed to C. D. by deed dated the —— day of ——, 1894, and recorded in book ——, page ——, of said —— county records. Yet he, the said C. D., and others, ill-disposed persons, his accomplices, have refused to pay obedience to said decree, and detain and keep possession of the said messuage, lands and premises, in manifest contempt of us, and our said court.

Know ye therefore, that we being willing and desirous that justice should be done to the said A. B. in this behalf, do give unto you full power and authority to place and put the said A. B. and his heirs and assigns, without delay, into the full, peaceable and quiet possession of all and singular the said messuage, lands and premises, with their appurtenances, ac-

ording to the true intent and meaning of the said decree; and herein you are not in any wise to fail.

[*Add teste.*]

(1) See Foster's Fed. Prac., 5th ed., Sec. 440; 9th Equity Rule and Desty's Fed. Proc., p. 1140; Corner v. Felton, 61 Fed. 735, 22 U. S. App. 313; Terrill v. Allison, 21 Wall. 289.

No. 679.

Final Decree Dismissing Bill.(1)

[*Caption.*]

This cause having come on to be heard this — day of —, upon pleadings and proofs, and Mr. R. X. having been heard on the part of the plaintiff, and Mr. R. Y. on the part of the defendant, and due deliberation having been had, it is ordered, adjudged and decreed that the said bill of complaint herein be and the same is hereby dismissed, with costs to the defendant to be taxed.

(1) See Equity Rule 71.

No. 680.

Decree of Dismissal of Bill (Another Form).(1)

[*Caption.*]

This cause coming on, etc., this court doth order that the plaintiff's bill do stand dismissed out of this court [*if these are other defendants who do not appear, or if dismissed against one of several defendants, as against the defendant, C. D.*], with costs to be paid by the plaintiff, A. B., to the said defendant, C. D., and to be taxed by the, etc. [*in case the parties differ*].

(1) See Equity Rule 71.

No. 681.**Decree of Dismissal without Prejudice, Stating Reasons.(1)****[Caption.]**

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed by the court that the plaintiff is entitled to no specific lien or security upon either of the vessels mentioned in the plaintiff's bill, and has no equity to be relieved in respect thereof, and that his bill be dismissed, with costs to the defendants, without prejudice to his right to come in and receive a dividend of the said R.'s estate in common with the other creditors of the said estate.

(1) See Equity Rule 71.

No. 682.**Decree Dismissing Bill with Prejudice.****[Caption.]**

On this the 8th day of May, 1915, at this term, this cause came on further to be heard, and the evidence having been heard, the case having been argued by counsel, thereupon, upon consideration thereof, the court finds the issues against the complainant and in favor of the defendants and intervenors who answered to the complainant's bill of complaint as amended.

It is therefore, ordered, adjudged and decreed that the complainant's bill of complaint as amended be, and the same is hereby, dismissed with prejudice against another action upon the same ground, to all of which the complainant excepts and its exception is allowed, and in open court, and in the presence of counsel of record for the defendants and intervenors, the complainant gives notice of appeal.

RALPH E. CAMPBELL, Judge.

No. 683.**Order Sustaining Motion to Dismiss, and Decree of Dismissal.(1)**

[Caption.]

At this 7th day of October, 1916, said plaintiff, by E. A. Walton and T. D. Walton his solicitors, and the defendant, Denver & Rio Grande Railroad Company, by Henry McAllister, Jr., and W. D. Riter, its solicitors, and the defendants, Utah Fuel Company and Pleasant Valley Coal Company, by A. C. Ellis, their solicitor, also comes. And the motion of The Denver & Rio Grande Railroad Company, and the motion of the Utah Fuel Company and Pleasant Valley Coal Company, to dismiss this suit and the bill herein, coming on now regularly to be heard, are argued by counsel, and the court having duly considered the same and being now well advised in the premises doth sustain said motions. Whereupon said plaintiff, by his solicitor, saith that he will elect and abide his bill of complaint here, and thereupon it is ordered by the court that this cause be and the same is hereby dismissed at plaintiff's costs.

(Decree of District Court, February 21, 1917.)

This cause having been heard upon the amended bill of complaint and defendants' motions to dismiss the same, and said motions to dismiss having been sustained, and the plaintiff having elected to stand upon his pleadings, and the court being fully advised in the premises,

It is by the court ordered, adjudged and decreed:

That the amended bill of complaint of the plaintiff be and the same is hereby dismissed for want of equity.

(1) Notice to parties and solicitors is provided in Equity Rule 4.

No. 684.**Order Dismissing Complaint upon Special Appearance to
Object to Jurisdiction.**

[*Caption.*]

This matter coming on to be heard by the court upon motion by defendants, appearing specially for that purpose, to dismiss the complaint for lack of jurisdiction, and after hearing Ben A. Matthews, Esq., assistant United States attorney in support of said motion, and Charles Recht, Esq., attorney for plaintiff, in opposition thereto, and due deliberation having been had thereon, and the court having handed down its opinion sustaining said motion and holding this court to be without jurisdiction.

Now, upon motion of Francis G. Caffey, Esq., United States attorney for the southern district of New York, attorney for the defendants, appearing specially for that purpose, it is

Ordered, adjudged and decreed that the bill of complaint herein be and the same hereby is dismissed for lack of jurisdiction, without costs.

A. B., Judge.

No. 685.**Decree Dismissing Parties Defendant before Hearing.**

[*Caption.*]

On this the 8th day of December, A. D. 1916, came on to be heard the above numbered and entitled cause, in which Sabine Hardwood Company, Limited, is complainant, and in which West Lumber Company, a corporation organized under the laws of the state of Texas, and W. T. Carter, E. A. Carter and Jack Thomas, composing the firm of W. T. Carter & Brother, Ray Wilson, J. E. Bruce, R. B. Baldwin, Jas. E. Hill, Jr., Wm. Carlisle and Geo. W. Pennell, composing the firm of Wm. Carlisle & Company, and L. M. Oliver are defendants, and J. C. Feagin is intervenor, and the complainant then and there, in open court dismissed L. M. Oliver from

this cause, it appearing that said Oliver had no interest in the subject-matter of this suit, and, it is, therefore, ordered, adjudged and decreed that said L. M. Oliver be dismissed from this cause, and go hence without day, and that all costs incident to his being made a party to this cause of action be taxed against the complainant herein.

It was further made known to the court by their written disclaimers filed in this cause, that Jas. E. Hill, Jr., disclaimed any interest in this cause of action, or the subject-matter thereof, and that Wm. Carlisle and Geo. W. Pennell, composing the firm of Wm. Carlisle & Company, had also disclaimed any interest in this cause of action.

It is, therefore, ordered, adjudged and decreed by the court that said defendants, Jas. E. Hill, Jr., Wm. Carlisle and Geo. W. Pennell, composing the firm of Wm. Carlisle & Company, having no interest in the subject-matter of this litigation which can be partitioned to them, they are, therefore, dismissed from this cause on their disclaimers, and they go hence without day and recover as against the complainant herein all costs in this behalf incurred by them, and all costs incurred in making them parties defendant to this cause shall be taxed against the complainant herein.

No. 686.

Decree for Amount Due under a Contract and Creating a Lien on Property to Secure the same.

[Caption.]

The above entitled matter was duly brought on for trial and hearing before the court, the undersigned district judge presiding, on the 19th day of March, 1914, Messrs. M. H. Boutelle and A. M. Higgins appearing as solicitors for complainant and Messrs. S. H. E. Freund and George T. Simpson as solicitors for the defendant.

The evidence of the respective parties having been seasonably offered, the case was continued for final hearing and argument and by agreement of the parties was regularly assigned for final argument before the court on the 20th day

of December, 1915, at which time the parties appeared by their respective solicitors and the cause was finally argued and submitted.

The court having given the matter due consideration it appears from the pleadings that on the 1st day of February, 1890, the defendant, being the owner of a dock property located in the city of Superior, Wisconsin, leased the same by written instrument of lease, to the Silver Creek and Morris Coal Company, to all the rights and interests of which last mentioned lessee the present complainant succeeded shortly after the execution of said lease. That upon the expiration of the original term of the said lease, the same was renewed to the complainant for a further period of ten (10) years, such renewal expiring on the 1st day of July, 1910, at, or about, which last named date, by agreement of the parties, the lease was continued from month to month until the first day of November, 1910, at which date it was regularly terminated.

That by one of the covenants of said original lease extended and made operative in the renewal thereof, the defendant covenanted and agreed to purchase from the lessee all of the machinery and apparatus erected by lessee on said dock with the lessee's approval and consent during the term of the lease and to pay therefor within thirty (30) days of the expiration of said lease, the fairly appraised valuation of such machinery and apparatus, to be determined by arbitration, all as more fully disclosed by the pleadings as aforesaid.

That various machinery and apparatus was installed on the dock pursuant to the terms of said lease and covenant during the term of said lease for the purpose of carrying on and conducting the business contemplated by said lease to be carried on and conducted thereon, and that the same was installed with the knowledge and consent of the defendant and continued thereon at the date of the lease's termination, all thereof constituting a complete operating plant of its kind.

That following the termination of such lease, arbitration was attempted between the parties for the purpose of ap-

praising the value of such machinery and apparatus, said arbitration proving abortive and it was thereupon mutually agreed between the parties, as appears more fully from the pleadings, that the complainant should surrender possession of said plant without such surrender working any prejudice to its rights under the terms of said covenant and that the defendant should account to the complainant for the fair value of said machinery and apparatus in an appropriate proceeding for such accounting and to determine the value thereof and that the complainant should be entitled to recover against defendant such amount as should be decreed as result of such accounting which should be and constitute a lien on said leased premises. And that it was also mutually agreed in pursuance of the matters last recited, that any arbitration for the purpose of determining the value of said machinery and apparatus should be abandoned.

That previous to the submission of this cause to the court, a written stipulation was made and entered into between the parties, and made a matter of record herein, embracing an inventory of the property above referred to and for which the defendant should be required to account. That at the opening of the trial it was mutually agreed between the parties that notwithstanding said stipulation, the complainant should be permitted to show all of the property claimed by it as comprised within the terms of the said covenant and for which the defendant should be held to account in this proceeding, whether within or without such inventory, but without prejudice to the defendant's right to assert that any additional property not covered or embraced in such stipulation and inventory was not covered by the terms of the covenant aforesaid and that defendant was not therefore obligated to account therefor.

From the foregoing facts shown by the pleadings or embraced within the stipulations or agreements of the respective parties, either in writing or in open court, as aforesaid, and upon the evidence adduced before the court herein, it is found and determined as follows:

That under the covenants of said lease, the defendant was obligated to purchase from the complainant at the expiration thereof, the machinery and apparatus constructed, installed and erected during the term of said lease on said dock with defendant's consent and that the terms "machinery" and "apparatus" as incorporated in said covenant were intended to and did embrace all of the several essential and component parts of the entire operating plant, both mechanical and structural, thereon constructed or installed by the lessee during the term of said lease and which were constructed and installed on said dock at the time of the termination of said lease and the possession whereof came to defendant on such termination. That the fair valuation of said property at the date of the termination of said lease and in the condition in which said property was surrendered to, and received by, the defendant, was the sum of thirty-seven thousand, five hundred (37,500) dollars.

In accordance with the stipulations and the pleadings and the facts as thus ascertained:

It is therefore ordered and decreed that the defendant is held to account to the complainant in the sum of thirty-seven thousand, five hundred (37,500) dollars, with interest thereon at the rate of six (6) per cent. per annum from and after the date of filing the bill herein, viz: March 19, 1914, and for the costs and disbursements of this proceeding to be hereafter taxed; and

It is further ordered and decreed that the complainant is entitled to a lien on said leased premises in the amount herein ascertained to secure the payment of said sum.

The court will reserve jurisdiction of the proceeding to make such other and further orders in the premises as shall be necessary to make the lien herein decreed effectual in the event of non-payment by the defendant of the sum herein ascertained and decreed.

By the court,

PAGE MORRIS,
United States District Judge.

No. 687.**Decree Vesting Title Subject to Easement for Alley Purposes,
and Enjoining from Obstructing, etc.**

[Caption.]

This cause standing ready for hearing and having been heard and duly considered, it is this 11th day of October, 1915, ordered, adjudged and decreed that the title to the strip of land described in the bill, as follows: * * * is vested in the defendants subject to a perpetual easement for alley purposes in the plaintiff in fee simple.

That the structures described in the bill, erected by the defendants, shall be removed by them at their cost and expense on or before the 15th day of October, 1915.

That the said defendants and all persons claiming under them be, and they are hereby, perpetually enjoined from in any wise obstructing the use of said easement of alleyway over said ten (10) foot strip.

That the plaintiff recover against the defendants the costs in this cause to be taxed by the clerk and have execution thereof as at law.

By the court,

WALTER I. MCCOY,
Justice.

No. 688.**Decree Cancelling Release from Liability for Personal Injury.**

[Caption.]

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

That the release set forth in the complaint herein be and the same is hereby upheld and sustained insofar as it purports to release any and all claims for damages for injury to the right foot and for injuries to the arm and shoulder.

It is further considered, adjudged and decreed that said release be and the same is hereby cancelled, annulled, set aside and held for naught insofar as it purports to release any claim for damages for other injuries complained of and set forth in the complaint herein.

It is further ordered that the plaintiff have and recover herein his costs to be taxed and that execution issue therefor.

To all of which the defendant excepts and its exception is allowed.

Done in open court this 14th day of November, 1916.

[Signed]

FRANK H. RUDKIN,
Judge.

No. 689.

Decree Removing Cloud upon Title.

[Caption.]

This cause having been regularly called for hearing and tried by the court, was heard upon the bill, answer, exhibits, agreements of parties, proof in the case, and arguments of counsel and the court being fully advised in the premises:

It is now, therefore, hereby ordered, adjudged and decreed that the plaintiff have judgment as prayed for in his complaint herein against the defendants and each and all of them; that all adverse claims of the defendants and each of them and all persons claiming said premises or any part thereof, through or under said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless; and that the plaintiff be and he is hereby adjudged and declared to be the true and lawful owner of the land described in the complaint, and hereinafter described, and every part and parcel thereof, and that his title thereto is adjudged to be quieted against all claims, demands, or pretensions of the defendants or either of them, who are hereby perpetually estopped from setting up any claims thereto or any part thereof. Said premises are bounded and described as follows:

(Here follows description.)

And it is hereby further ordered, adjudged and declared that the plaintiff do have and recover his costs, hereby taxed at ——— dollars, against the defendant.

O. A. T.,
Judge.

No. 690.

Order Directing that Certain Records of a Named State Court be Filed and made a Part of the Record in a Suit Pending in Federal Court.

[Caption.]

Now on this 24th day of January, A. D. 1914, each and every the following pamphlets, papers and documents having been before the court and considered by the court in this cause, it is hereby ordered and directed that the following papers, pamphlets and documents be filed and made a part of the record in this case, to-wit:

1. The abstract of the record of the district court of Montgomery county, Kansas, in an action therein pending wherein the state of Kansas was plaintiff and the Independence Gas Company, a corporation; The Consolidated Gas, Oil & Manufacturing Company, a corporation, and the Kansas Natural Gas Company, a corporation, were defendants, being No. 13,476.

2. The opinion, findings of fact, conclusions of law, restraining order, injunction, and decree of the Honorable Thomas J. Flannelly, district judge, in a case in the district court of Montgomery county, Kansas, wherein the state of Kansas was plaintiff, and the Independence Gas Company, a corporation; The Consolidated Gas, Oil & Manufacturing Company, a corporation, and the Kansas Natural Gas Company, a corporation, were defendants, being No. 13,476.

3. The transcript of the record in cause No. 4008 in the United States circuit court of appeals for the eighth circuit, wherein John L. McKinney, et al., are appellants, and John M. Landon, et al., are appellees.

4. Certified copy of the motion of the Fidelity Trust Company to quash service of summons in the case above men-

tioned in the district court of Montgomery county, Kansas, No. 13,476.

5. Certified copy of the summons for personal service outside of the state of Kansas on the Fidelity Trust Company in said case in the district court of Montgomery county, Kansas, No. 13,476.

6. Certified copy of the affidavit for publication of the service in said case in Montgomery county, Kansas, No. 13,476.

7. Certified copy of the order of the district court of Montgomery county, Kansas, in said cause, No. 13,476, made and entered of record by the Honorable Thomas J. Flannelly on the 7th day of January, 1914.

8. Certified copy of the supplemental petition filed in said district court of Montgomery county, Kansas, in cause No. 13,476, on the 15th day of February, 1913, and filed as amended on February 27, 1913.

9. Certified copy of the journal entry in said cause No. 13,476, in the district court of Montgomery county, Kansas, made and entered therein on the 25th day of February, 1913.

10. Certified copy of the journal made and entered of record in said case, No. 13,476, in the district court of Montgomery county, Kansas, on the 11th day of March, A. D. 1913.

11. Certified copy of the order of the district court of Montgomery county, Kansas, made and entered of record in said cause, No. 13,476, and filed of record therein on the 21st day of June, A. D. 1913.

12. Certified copy of an order of the district court of Montgomery county, Kansas, made in said case, No. 13,476, and entered of record in said court on the 2nd day of July, A. D. 1913.

And each and every of said papers, pamphlets and documents are ordered filed and now made of record in this cause.

Done in open court this 24th day of January, A. D. 1914.

SMITH MCPHERSON,

Judge

No. 691.**Order Designating and Appointing Judge in One District to Hold Court in Another District, and Certificate Thereto.**

[*Caption.*]

(Minutes Vol. —, Page —, July 21, 1917.)

"Whereas, in my judgment the public interests require the designation and appointment of a district judge of another district in the circuit to hold the district court in the northern district of Texas in place and in aid of the district judge thereof, indefinitely absent by reason of sickness—

Now, therefore, I, Don A. Pardee, senior circuit judge, now present in the circuit, do hereby designate and appoint the judge of the western district of Louisiana in said circuit, to-wit, the Honorable George W. Jack, to hold the district courts in the northern district of Texas in place and in aid of the judge thereof, and therein to have the powers provided in section 14 of the Judicial Code.

Witness my hand this 2nd day of April, 1917.

DON A. PARDEE,
Senior Circuit Judge.

I, Louis C. Maynard, clerk of the United States district court for the northern district of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Honorable Don A. Pardee, senior circuit judge of the fifth circuit of the United States, designating and appointing the Honorable George W. Jack, United States district judge for the western district of Louisiana to hold the sessions of the United States district court for the northern district of Texas.

In witness whereof, I hereunto affix my hand and the seal of said United States district court at Dallas, Texas, this 21st day of July, A. D. 1917.

[*Seal*]

LOUIS C. MAYNARD,
Clerk.

No. 692.**Order to Draft Board to Show Cause.**

[Caption.]

Upon the bill of complaint and summons in this action, and the depositions of Alexander Angelus, John Angelus and Louis Angelus, and it appearing to my satisfaction by the said bill of complaint and depositions that the complainant, John Angelus, is an alien who has not declared his intention to become a citizen of the United States and is as such not subject to draft under the statute known as the Conscription Act, and that the said complainant has been made and directed by the defendants above named to appear and submit himself to the military authorities of the United States in violation of the terms of the said Conscription Act.

Now, on motion of Charles Recht, solicitor for the said complainant herein, let the defendants, John Sullivan, Dr. Louis Aaronson and Dr. Edward Wagner herein, show cause before me or the judge of this court who may be presiding at the motion calendar hereof on the 13th day of September, 1917, at 10 a. m., of that day, or as soon thereafter as counsel can be heard, why they should not be enjoined and restrained from certifying the name of the complainant herein for military service and why the name of the complainant herein should not be stricken from the list of persons who have been certified for military service and why the complainant should not have such other, further or different relief as may be considered equitable.

Service of a copy of this order and all papers upon which it was granted upon the defendants or any one of them on or before the 8th day of September, 1917, shall be sufficient service.

J. M. MAYER,
District Judge.

By granting this order to show cause, I do not indicate that this court has jurisdiction.

J. M. M.,
D. J.

No. 693.**Order Appointing Commissioners to Partition.**

[Caption.]

It also appearing to the court that T. V. Smelker, P. G. Omohundro and B. Irby are resident citizens of Jefferson county, Texas, and the eastern district of Texas, and are competent and disinterested persons, it is further ordered that they be and are hereby appointed commissioners to make a fair, equal, just and impartial partition of said land and premises above described, and in the shares and interests as hereinabove decreed between the complainant and defendants and intervener, in accordance with this decree and the law, and when same is completed to report the same in writing and under oath, at the first day of the next term of this court, describing the real estate divided, value and allotment of each interest, accompanied by such field notes and maps as may be necessary to make same intelligible; said commissioners, however, are not required to do said work or make said report until final disposition of this cause in the event the same shall be appealed to the United States circuit court of appeals.

It is further ordered that the proper writ of partition issue and that all costs incurred in this case be apportioned and adjudged against the parties herein according to their respective interests.

GORDON RUSSELL,
Judge Presiding.

No. 694.**Order Enjoining Transfer or other Disposition of Bonds.**

[Caption.]

This cause came on to be heard on the motion of the Sturtevant Mill Company, intervener herein, filed herein on July 3, 1916, for an order directing the defendant, The Provident Savings Bank & Trust Company, to hold the bonds of The Superior Portland Cement Company, and this cause having

been heard upon the merits and submitted to the court and it appearing to the court that since the original order of injunction herein, sundry persons have been made new parties defendant to this cause and have appeared herein, and all of said parties having appeared in person or by counsel on the hearing of this cause, now it is ordered that all parties to this cause, their officers, agents, attorneys, employes, and all other persons whomsoever, be and they are hereby enjoined and restrained until further order of this court from selling, transferring, pledging, hypothecating, removing or otherwise disposing of any of the bonds of the defendant, The Superior Portland Cement Company, which they or any of them respectively own or hold or have in their possession or under their control either as pledgees, agents or otherwise.

And C. A. Scott and John E. Harper having appeared on the hearing of this cause, and by their counsel stated in open court the ownership of certain of said bonds by said Scott purchased from said Harper, it is ordered on motion of said the Sturtevant Mill Company that said C. A. Scott and said John E. Harper be and they are hereby made parties defendant hereto and included in this order of injunction.

HOLLISTER, Judge.

No. 695.

Order Modifying Injunction Order.

[Caption.]

On motion of the Provident Savings Bank & Trust Company, and for good cause shown, it is ordered that the order of injunction entered herein on July 15, 1916, be and the same is hereby modified and supplemented as follows, to-wit: That nothing contained in said order shall enjoin or restrain said the Provident Savings Bank & Trust Company from re-delivering to those from whom it received them the bonds or other securities deposited with it under the agreement called the "Drach agreement," dated June 6, 1916.

HOLLISTER, Judge.

No. 696.**Order to Show Cause Why Certain Matter Should not be Transmitted Through the Mails.**

[Caption.]

Upon the duly verified bill of complaint, duly verified and filed this 12th day of July, 1917, and the writ of subpoena herein, and the affidavits of Merrill Rogers and Max Eastman, duly verified and filed this 12th day of July, 1917, and upon motion of Gilbert E. Roe, Esq., solicitor for complainant, it is

Ordered, that the defendant show cause, if any he have, before the undersigned, one of the judges of the district court of the southern district of New York, at his chambers in the Woolworth building, in the borough of Manhattan, city of New York, on the 16th day of July, A. D. 1917, at 2 o'clock in the afternoon, or as soon thereafter as counsel can be heard, why an injunction should not issue *pendente lite*, as prayed in the bill of complaint herein, and enjoining and restraining the defendant, his agents, servants and employes, and all other persons whomsoever, from treating the August, 1917, issue of said magazine, or any numbers thereof, known as "The Masses," as non-mailable, under the act of June 15, 1917, or any other act or law whatsoever, and that said defendant, his agents, servants and employes, be forthwith commanded to transmit said magazines through the mail in the usual way, and accord to the complainant thereof the rights and privileges of second-class mail matter, whereon the lawful postage has been duly paid and received by the proper post-office officials. And that the defendant show cause, at the same time and place, why the complainant should not have such other and further relief in the premises as may be just and proper.

Ordered further, that sufficient cause having been shown, service of this order, with copies of said bill of complaint, and of said affidavits, on the defendant on or before the 13th day of July, 1917, shall be sufficient service.

Dated New York, July 12, 1917.

LEARNED HAND, D. J.

No. 697.**Order to Show Cause Against Postponement, Issue of Preliminary Injunction and Delivery of Data into Custody of Court.**

On motion of Charles N. Butler, solicitor for plaintiffs, and due consideration having been had, it is ordered as follows:

1. That on or before the 20th day of November, 1914, a copy of this order and of the annexed affidavits of Edwin J. Prindle, Irene Du Pont and of Warren H. Small be served on solicitors for defendants.

2. That on or before the 23rd day of November, 1914, defendants serve upon solicitor for plaintiffs their answering affidavits.

3. That on or before the 25th day of November, 1914, plaintiffs serve on solicitor for defendants their rebuttal affidavits.

4. That defendants appear before this court at 3 o'clock p. m., or as soon thereafter as counsel can be heard, on the 25th day of November, 1914, in the district court room, in the post-office building, in the city of Philadelphia, and state of Pennsylvania, and show cause, if any there be:

(a) Why the hearing of this cause should not be postponed until after the return to this country of Fin Sparre, one of the plaintiffs' principal witnesses, whose return is expected in the month of February, 1915, based on the said affidavits of Edwin J. Prindle and of Irene Du Pont;

(b) Why a preliminary injunction should not be granted as prayed in the bill of complaint herein, based on said bill of complaint, on the record on motion for preliminary injunction on file in this court, and on the said affidavit of Warren H. Small; and

(c) Why they should not deliver forthwith into the custody of the clerk of the court in sealed envelopes any and all memoranda, drawings, specimens, papers and articles of any description in their possession or under their control,

without making or retaining any copies or duplicates thereof, relating to any and all secret processes, apparatuses, articles of manufacture, or compositions of matter, or any new and useful improvements thereof, which have become known to them by reason of the employment of Walter E. Masland by said plaintiffs or either of them, and particularly all papers containing memoranda which said Walter E. Masland made from time to time during the course of his employment by said plaintiffs or either of them as set forth on the last page of his affidavit filed in this cause in opposition to motion for preliminary injunction, as prayed in the bill of complaint herein.

By THE COURT.

No. 698.

Decree Rescinding Contract for Fraud.

[Caption.]

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is declared by the court that the contract of sale, and the conveyance of the premises, and the notes of the said O. D. thereupon, as set forth in the bill, were made by and between the said O. D. and the said J. T. and other parties, upon material representations and mutual mistakes as to the quality of timber on the premises so sold, and therefore ought to be set aside and held null and void; and the said O. D. ought to be repaid the amount of the said purchase-money actually paid by him thereupon and therefor by the said J. T., who received the notes for the same, and in his aid and for his relief, by such of the other parties, defendants to the bill respectively, for whom the said J. T. acted as agent, or who with a full knowledge of and assent to the said contract of sale and misrepresentations and mistakes, have received any of the said notes, or any part of the purchase-

money paid thereon by the said O. D.; but not for the part thereof received by any other party. And thereupon, in furtherance of the declarations aforesaid, it is further ordered, adjudged, and decreed that the same contract of sale, and conveyance, and notes, be, and hereby are, annulled, rescinded, and declared utterly void and of no effect.

And the said O. D. is further ordered, adjudged, and decreed to convey the premises by such due and reasonable conveyance or conveyances as shall be devised and reported by a master, when and so soon as the purchase-money actually paid by him shall be repaid as hereinafter mentioned.

And it is further ordered, adjudged, and decreed by the court that the said J. T. be, and hereby is, held directly liable to the plaintiff for the whole amount of moneys paid as aforesaid, deducting, however, therefrom the proceeds of timber sold, as well as the value of timber taken from said lands by and under the authority of the said O. D., and remaining unsold, and making all due allowances for all proper charges and expenses incurred in regard to said timber, and for taxes paid on the said lands.

And it is further ordered, adjudged, and decreed that such of the other parties, defendants to said bill, as with a full knowledge of the premises, or for whom the said J. T. acted as agent, or who assented to the said contract of sale and conveyance, with a full knowledge of the premises, shall be, and hereby are, decreed to be liable in aid and relief of the said J. T. to pay and deliver back to the said O. D. such parts or portions of the purchase-money paid by the said O. D. for the said lands as have been received by them respectively in the premises, or on the notes of the said O. D. so received by them, but no one of them to be liable for any purchase-money or notes received by any of the other parties defendants.

And it is further ordered, adjudged, and decreed by the court that no damage or interest on the aforesaid moneys be allowed, except the proceeds of such timber, sold and unsold,

as aforesaid, shall furnish a fund therefor; and in that event, interest upon said purchase-money to be added thereto as an offset *pro tanto* to the excess of said proceeds, not exceeding the amount of such excess.

And it is further ordered, adjudged, and decreed by the court that it be referred to S. L., Esquire, as master, to ascertain the amount due to the plaintiff on the basis of this decree, and also the particular notes and sums received by each of said defendants of said purchase-money, so paid and secured as aforesaid, and to report the same to the court.

And it is further ordered, adjudged, and decreed by the court that the master be clothed with full power to examine, as well the parties as any other witnesses, orally or upon written interrogatories, under oath, in the premises, and to require the production of all vouchers, papers, and other documents pertinent and proper in the premises; and that he state a full account in the premises upon the basis of this decree. And that he be clothed with all the usual powers and authorities of a master in all things touching the premises.

And all further orders and decrees are reserved for the consideration of the court.

No. 699.

Decree for Specific Performance of Agreement for Policy of Insurance.

[*Caption.*]

This case was thence continued from term to term until this present term; when, to wit, on the — day of —, the same came on to be heard on the bill and answer and proofs in the case, and was argued by counsel.

And it appearing to the court that the plaintiffs, through their agent, made a proposal in writing for insurance which contained all the necessary terms of a valid contract for a policy, and that the defendants accepted this proposal.

That this acceptance made a legal contract between the parties, which it is the duty of the court to order to be specifically performed.

That as it is admitted that the plaintiffs would have a good cause for action at law upon a policy, if issued in pursuance of the contract, there should be decreed, to them in this suit what they would be entitled to recover if a policy were issued and that which was agreed to be done were actually done:—

Thereupon it is ordered, adjudged, and decreed that the said agreement so entered into between the said plaintiffs and the said defendants set forth in the bill of complaint, and proven in this cause, be specifically performed.

It is further ordered, adjudged, and decreed, that the plaintiffs recover of the said defendants the sum of eight thousand seven hundred and two dollars and forty-three cents, as and for their damage in this behalf sustained, a deduction having been first made from the sum agreed to be issued for premium and salvage, and also the sum of two hundred and four dollars and twenty-four cents, for their cost in this behalf sustained

No. 700.

Entry Reversing Decree.

[*Caption.*]

The defendant C. D., heretofore appealed to the supreme court of the United States from certain parts of the final decree made by this court in this cause on the — day of —, and the supreme court of the United States having at the October term 1894, duly heard the said appeal upon the transcript of the record, and having thereupon ordered, adjudged, and decreed that so much of the said decree of this court as allows the said plaintiff costs and the sum of — dollars for interest on the damages found for him, was erroneous and should be reversed and annulled, and that the residue of the said decree of this court should be affirmed; and the said supreme court having remanded this cause to this court with

instructions that such proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding, which said decree, order, and instructions appear to this court by the mandate of the said supreme court:

Now, therefore, on filing the said mandate ordered [*here set forth what is required by the mandate*].

No. 701.

Decretal Order Appointing Special Master.

[*Caption.*]

This cause came on to be heard this — day of —, upon the pleadings and proofs, and was argued by counsel for the respective parties, and the court having considered the same, and being of the opinion [*here set forth the facts found by the court*].

And it is further ordered, adjudged, and decreed that the cause be referred to C. G., Esq., as special master, to ascertain and report [*here set forth the matters concerning which the master is desired to report*].

And upon the coming in and confirmation of the said report that said plaintiff have a decree and execution for the amount found due him and also for the costs in this suit to be taxed.

No. 702.

Decree with Order on Receiver to Pay over Funds (1).

[*Caption.*]

This cause came on this day for hearing upon a report of the master, filed herein August —, the exceptions of A. C. thereto, and the pleadings and proof, and was argued by counsel.

Whereupon it was ordered, adjudged and decreed that said report be confirmed except as to the items of payment made

by the receiver out of the net rents in his hands, to wit: \$—— paid to the solicitor for the complainant, and interest thereon from November 26, ——, to July 10, ——, amounting to \$——, and \$—— erroneously paid out by the receiver for insurance upon the property in controversy, said insurance covering the period of time elapsing after the sale of said property under the order of this court. As to these items, it is ordered that the receiver pay the same to the defendant, A. C., or to her counsel of record, T. W. It is further ordered that the receiver pay to the said A. C., or to T. W., her counsel of record, the sum of \$——, the balance remaining in his hands, according to the report filed herein August 22, ——.

The court is of the opinion that these sums of money, the net rents arising from the property impounded by its receivership, are the property of A. C., and are not subject to the mortgage foreclosed in this court or applicable to the deficiency decree in favor of the complainant, and it so adjudges and decrees.

It is ordered that the receiver pay these sums, amounting to \$—— within ten days from the entry of this order.

On motion of the attorney of record of A. C., he has leave to file notice of his lien under Act of General Assembly of the state of ——, passed April 13, ——, and the said receiver and the defendant company are hereby required to take notice thereof.

(1) See Equity Rule 71. The decree should not recite the pleadings. *Whiting v. U. S.*, 13 Pet. 16.

No. 703.

Decree for Plaintiff on Bill to Enjoin the Transfer of Title in Patents by a Copartner.

[*Caption.*]

This day this cause came on to be heard upon the pleadings, evidence adduced by the parties and argument of counsel, and the court being fully advised in the premises, finds:

That the plaintiff, R. C., has succeeded to all estate, property, rights and choses in action of the partnership known as J. W. & Son, of —, including the claim herein sued upon; that the said J. W. & Son, on or about —, being desirous of purchasing the entire interest of D. E., of —, in letters patent of the United States, No. 336,434, issued to D. E. on February —, for an improvement in automatic brick-cutting machinery, and reposing confidence in the integrity and fidelity of the defendant, B. E., who was then in the employ of said J. W. & Son, requested him, as their agent, to go to —, call upon said D. E., and obtain from him an option for the purchase of his interest in said patent; that in pursuance of said instructions, the said defendant, on or about the — day of —, while acting as agent and representative of said partnership, called upon said D. E., and obtained from him an option to purchase, on or before — his entire interest in said patent for the sum of \$—, and also an option to have issued to him, the said B. E., or his assigns, at any time prior to said date, license to manufacture said patent at one point only on payment of the sum of \$— for each license; that said defendant, fraudulently and in violation of said instructions and of his obligations to said J. W. & Son, took said options in his own name; that thereafter, to wit, on or about —, said defendant procured the said D. E. to issue under the terms of said option to W. R., of —, a license to manufacture said improvement in said city of —, and to sell the machines so manufactured throughout the United States until the end of the term of said patent, for which license said defendant B. E. was paid by the said W. R. the sum of \$—, that thereafter, to wit, on —, said defendant acquired the remaining interest of said D. E. in said patent under and by virtue of the terms of said option for the sum of \$—; that thereafter, to wit, on —, said defendant, B. E., with intent to defraud said J. W. & Son, assigned and transferred, without receiving any consideration therefor, to

the defendant, J. E., a license to manufacture at any place and sell throughout the United States said invention under said patent; that the interest in said patent so assigned to said J. E. is held by him in trust for plaintiff; that thereafter, to wit, on or about —, said defendant, B. E., with like intent and without consideration, assigned and transferred another shop right under said patent to W. H., of —, which assignment is still in the possession and under the control of the defendant, B. E.

The court further finds that the defendant, B. E., has received from the sale of interests in said patent the sum of —, and that he expended in acquiring said interests the sum of \$—.

Wherefore, it is ordered, adjudged and decreed that the defendants, B. E. and J. E., hold all interest in said patent so transferred to them in trust for the plaintiff, and they are, and each of them is, hereby ordered and directed, within ten days from the entry of this order, to assign and transfer to the plaintiff all right, title and interest so acquired by them, or either of them, in said patent under and by virtue of said assignments and transfers; and the said B. E. is further ordered and directed, within ten days from the entry of this order, to surrender to the clerk of this court the assignment of the shop right in said patent executed by him in favor of said W. H.; and the said B. E. and J. E. are, and each of them is, enjoined from in any manner assigning, transferring or disposing of said patent, or of any interest therein.

And the defendant, B. E., is ordered to pay to plaintiff the sum of — dollars, in default of which execution is awarded as in proceedings at law.

Judgment is also rendered against defendant, B. E. and J. E., for the costs of this action, taxed at \$—.

No. 703a.**Decree for Property Under a Will and Reference to Master.**

[*Caption.*]

This cause came on to be heard upon the pleadings and proofs at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

That the complainant is the widow of S. B., deceased, and as such became entitled, on his death, to all of the property remaining at the death of S. B., in the hands of J. B., and to which said S. B. was entitled under the sixth clause of the will of H. B., deceased, and also to all property which came into the hands of said J. B. from any other source and belonged to the said S. B. in his lifetime.

That all proceedings had in the Probate Court for the county of —, state of —, in the matter of the estate of H. B., deceased, after the death of S. B. are null and void as to the complainant, A. B.

That the said J. B. died in the year 1899, at —, and that he left a last will and testament which has been duly admitted to probate by the Probate Court of — county, and that by the provisions of said last will and testament and the order and judgment of the Probate Court of — county, the defendants, F. B. and C. B., have been duly appointed executrix and executor of the estate and last will and testament of the said J. B., deceased.

That this cause by proceedings duly had in this court has been revived after the death of the defendant J. B. and the said executor and executrix made defendants herein.

That the executor and executrix of the estate of J. B., deceased, as defendants herein account to the complainant for all property remaining in the hands of said J. B. at the time of the death of said S. B. which came to him under and by virtue of the sixth clause of the said will of H. B., deceased,

and do also account to the complainant for all property that came into the hands of said J. B. from any other source and belonged to the said S. B. in his lifetime.

That this cause be referred to E. M., Esq., as special master to take testimony and report as to the amount and value of all the property remaining in the hands of J. B. at the time of the death of S. B. and to which the said S. B. was entitled in his lifetime under the sixth clause of the will of H. B., deceased, and also to take testimony and report as to the amount and value of all property which came into the hands of said J. B. from any other source and belonged to the said S. B. in his lifetime, and to state an account between the parties in this cause according to and in conformity with the rules and practice of this court.

And upon the coming in and confirmation of said report that the said plaintiff have a decree and execution for the amount due to her and also for the costs in this cause to be taxed.

No. 704.

Decree on Bill of Interpleader.

[Caption.]

This cause coming on to be heard, it appeared that the said Israel Thorndike the elder by his last will directed his executors, of whom the complainant is the survivor, to place the sum of twenty thousand dollars in the office of the Massachusetts Hospital Life Insurance Company in trust, to receive the income and pay it annually to his son, Andrew Thorndike, during his life, and at his decease to take up the sum and pay it to the heirs-at-law of the said Andrew; that said deposit was made, and the income paid to the said Andrew during his life; that upon his decease, Israel Thorndike, a brother of the said Andrew, brought his action at law against the said executors, claiming one-sixth part of said fund as one of the heirs-at-

law of the said Andrew; that thereupon the said complainant filed his bill and amended bills in equity against the said Israel and other persons, who would be the heirs-at-law of the said Andrew if he had died unmarried and without unlawful issue; and also against Katharina Bayerl Thorndike, claiming to be the lawful widow of the said Andrew; and against Andreas Thorndike and Anna Loring Thorndike, infants, claiming to be the lawful issue and heirs-at-law of the said Andrew, praying that the said Israel might be enjoined from prosecuting the said suit at law, and that the several parties might interplead and present their respective claims for the consideration and determination of the court; and thereupon the said parties did appear by their respective counsel and guardians, and proofs being taken and read, upon arguments of counsel, it was considered and now adjudged and decreed that the said Andreas Thorndike and Anna Loring Thorndike are both children of the said Andrew, begotten upon the body of the said Katharina, before marriage; that afterwards the said Andrew was duly and lawfully married to the said Katharina, lived with her as his lawful wife, and openly and publicly acknowledged the said Andreas and Anna Loring to be his children and heirs-at-law; that by reason thereof they are entitled under the will of the said Israel Thorndike the elder to the said sum of money to be divided between them in equal shares; and that the said Katharina is not entitled to any part thereof; and that the other defendants are not entitled.

And it appearing to the court by the statement of the said complainant that he holds the sum of twenty thousand seven hundred and forty-five dollars and twenty-seven cents subject to the order and direction of the court: It is further ordered and decreed that he do pay to the solicitors, F. C. L., C. W. L. and A. D., their costs of counsel fees to be taxed as between solicitor and client, and that the residue thereof be paid one-half part to J. G., guardian of the said Andreas

Thorndike, and one-half part to W. I. B., guardian of the said Anna Loring Thorndike; and that the bill be dismissed as to the other defendants without costs.

No. 705.

Decree on Stockholders' Petitions in a Suit against a Building Association.

Be it remembered that this cause came on to be heard on this —— day of ——, before the Hon. C. D., judge, etc., upon the bill, answer, intervening petition of W. L. *et al.*, the agreement of stockholders exhibited with said petition, the report of the receiver (attested by the secretary of the association), made pursuant to said agreement of stockholders and filed September, 1897, and the exhibits to said report, which report and exhibits were presented and relied upon as evidence by said intervening petitioners, and were so admitted in open court by the defendant association; and thereupon it is ordered, adjudged and decreed as follows:

. *First.* That the agreement between the stockholders of said association, dated ——, 1897, and filed with said petition to W. L. *et al.*, as Exhibit "A" thereto, be and the same is hereby approved, ratified and affirmed by the court; and that the same be carried out by all proper orders, decrees and proceedings in this cause necessary to carry it out according to its terms.

Second. That the defendant, the C. D. Building & Loan Association, is justly indebted to each of the following named investment and paid-up stockholders in said association, after making all proper deductions and charges in the several amounts set after the names of said stockholders, respectively, said amounts being the values of said stocks belonging to said stockholders, calculated according to said agreement, to wit: [*Specify indebtedness.*]

The aforesaid indebtedness to said non-borrowing stock-

holders shall be paid and satisfied, as far as practicable, and *pro rata* by applying to and upon the same the notes of the borrowing stockholders hereinafter provided for and the property of the defendant association remaining after satisfaction of the expenses of this winding up proceeding, and the payment of prior claims as the same in this cause shall be hereinafter adjudged; and orders and decrees shall be had and taken in this cause from time to time whenever and so long as necessary to that end until the affairs of said association are finally wound up.

Third. That the petitioner, C. S., is justly indebted to said C. D. Building & Loan Association in the sum of — dollars, after allowing petitioner all credits and set-offs to which he is entitled, including a credit for ninety per cent. of the value of his stock in said association.

[In like manner set out the finding with reference to the other petitioners and stockholders.]

Fourth. That each of said petitioners adjudged and decreed to be indebted to said C. D. Building & Loan Association in the foregoing sections of this decree, numbered —, inclusive, pay to said association the amounts of indebtedness severally adjudged against them in said sections, together with interest thereon from January —. But said debtors may pay the amounts thus adjudged against them by executing to P. S., receiver in this cause, their several promissory notes for the amounts severally found and adjudged due from them, as aforesaid, the notes to be in such sizes as the receiver may determine, said notes to be dated and bearing interest from January —, and to be substantially in the form set out in section No. 7 of the agreement of stockholders, dated —, and filed as Exhibit "A," to said petition of W. L., *et al.*, in this cause, the said debtors in each instance securing payment of said notes by executing mortgages upon the properties now mortgaged by them to said association; or, in case such mortgages cannot be given, by giving such other secu-

erty as shall be satisfactory to said receiver, said mortgages to be executed to a trustee, to be named by said receiver, and to each provide for foreclosure in bar of redemption, when the notes secured thereby shall become due and enforceable, and also provide that the mortgagors shall keep the property insured for the benefit of the mortgagee, and keep the taxes paid. And the receiver in this cause is authorized and directed to make settlements with said debtors to the association, as provided in said agreement of February —, and this decree, and report said settlement, together with the notes and mortgages received by him, to this court as soon as practicable. But the court hereby expressly reserves the right to make all further and additional orders and decrees to foreclose the mortgages, executed by said debtors and borrowing stockholders, to said association for the security of their several loans received from said association, in all cases where said debtors refuse or fail to make settlements of their said indebtedness, as hereinabove provided; and to take all necessary further steps by sales of said property under said mortgages to enforce satisfaction of the aforesaid decrees in favor of said association; and to take such other and different steps and proceedings by transfers of the present mortgages to the association, or otherwise, as may be deemed necessary to secure payment of the indebtedness from said borrowers to said association.

Whereas it appears to the court said debtors of said association have hereinbefore been credited with only ninety per cent. of the ascertained value of their stock, and ten per cent. thereof has thereby been held back to meet possible losses on stock arising from litigation, expenses and depreciation of property.

It is further ordered and decreed: That if, after the winding up of said association in this cause, it shall appear that all of said — per cent., thus retained, is not necessary for said purposes, that part of said — per cent. which shall

appear to have been kept back unnecessarily shall be credited and distributed pro rata to the stockholders from whom it has been thus retained, and the amounts going to the aforesaid borrowing stockholders respectively shall be credited upon their notes executed to the receiver, as aforesaid.

Fifth. That this cause be retained upon the docket of the court to pronounce all further orders and decrees, and take all further proceedings necessary to carry out and execute the terms of this decree, and to secure payment of the decrees hereinbefore pronounced in favor of said association, and to make distribution of said notes and mortgages and the real estate and other property of the association upon its indebtedness and to its creditors, hereinbefore adjudged in accordance with said agreement of —, and to wind up said association. The receiver in this cause is hereby authorized to have necessary blank notes and mortgages printed to carry out the directions of this decree.

Sixth. And it appearing to the court that there are a number of petitions in this cause setting up small claims for taxes, etc., and that the receiver is able to make favorable compromises of said claims, he is hereby authorized and empowered to make compromises of any and all of said claims in such manner as his judgment may dictate, and to carry out any compromise which he has already prepared of such claims; and he will report to this court any and all compromises thus made by him. This is not to restrict the power heretofore given him by decree to make compromises with borrowing stockholders.

No. 706.

Decree in Stockholders' Suit against Building Association.

[Caption.]

This cause coming on for decretal order on this — day of —, before the Hon. C. D., upon the pleading, exhibits

on file, including the agreement for settlement between the stockholders filed with stockholders' petition, the reports of receiver, and the whole record in the cause, from all of which it appears that at the time of the appointment of the receiver the C. D. Building & Loan Association was the owner of the following described 16 pieces of real estate, situate in — county, —, viz.: [*Here copy descriptions of said real estate from Exhibit to report of receiver*]; that the investing of non-borrowing stockholders of defendant corporation agreed, for the purpose of saving expenses and preventing depreciation of said real estate by forced sale of the same to take said real estate at a fair valuation; that the respective values set after the several pieces of real estate hereinabove described were fixed in pursuance of the agreement of settlement filed in this cause, by a committee consisting of borrowing and non-borrowing stockholders, and that said values are fair and reasonable:

It is therefore ordered and decreed that all the right, title, interest and demand, both legal and equitable, of the defendant, C. D. Building & Loan Association, in and to said 16 parcels of real estate, hereinabove described, be and the same hereby is divested out of said C. D. Building & Loan Association and vested in Peter Staub, as trustee for the non-borrowing or investing stockholders as a class, said non-borrowing stockholders being as follows, and their holding of stock being the amounts severally set after their respective names, to wit:

And it is decreed that the amount of said valuation, to wit, \$——, be charged against said stockholders as a payment *pro tanto* upon their said stock.

It further appearing to the court that in pursuance of said agreement between the stockholders and the decree passed and entered in this cause —, the receiver, P. S., has in settlement with borrowing stockholders received from them notes secured by mortgages upon real estate as follows:

And that the investing or non-borrowing stockholders agreed to accept said note and mortgages at their face value as a payment *pro tanto* upon their stock as a class.

It is therefore ordered, adjudged and decreed that the amount of said notes and mortgages, to wit, \$——, be charged against said stockholders as a payment *pro tanto* upon their said stock, and that said P. S., as trustee for the aforesaid investing stockholders, take and hold said notes and the mortgages made to him to secure the same in accordance with the terms of the aforesaid agreement between stockholders.

It is further decreed that said P. S. hold said 16 pieces of real estate and said notes and mortgages in trust for the use and benefit of the aforesaid investing stockholders, according to the amount of stock owned or held by them as hereinabove stated, and upon the following trusts, to wit: He shall hold said titles until there shall be a meeting of said stockholders, and they shall decide by a vote of a majority in interest whether said notes and realty shall be divided or partitioned among said stockholders, or sold for distribution of proceeds by a committee of three, to be appointed by them equitably according to the value and solvency of said properties and notes divided, or shall be sold in whole or in part for distribution and until said properties and notes shall be divided and partitioned among said stockholders in some manner according to law, and he shall, in accordance with such vote of said stockholders, make or cause to be made partition of said properties, or the proceeds thereof among those entitled as aforesaid; and he shall have full power and authority to assign said notes and the mortgages securing the same, and such parts of the same, to the several stockholders as may be necessary to make proper division thereof among the same; and he also shall have power in carrying out the wishes of said stockholders aforesaid to make all proper conveyances of said real estate and of said notes and mortgages.

It is further decreed that the amount of said notes as afore-

said be charged to said investing stockholders as assets of said association, and be credited as having been paid to said investing or non-borrowing stockholders.

It is further ordered and decreed by the court that in furtherance of this decree the President and Secretary of the C. D. Building & Loan Association execute, acknowledge and deliver in the name and on behalf of said association a deed, in proper form, to the said P. S., trustee, for said 16 pieces of real estate above described.

It further appearing to the court that P. S., trustee, has in his hands sums amounting to \$——, received as payment of principal and interest upon the aforesaid notes executed to him under and by virtue of said agreement of stockholders, and the decree of this court of September ——, and that said amount belongs to the aforesaid non-borrowing stockholders, said P. S. is ordered and directed to make division of said moneys among said stockholders upon their said stock holdings *pro rata*, or in such manner as said stockholders shall direct.

It further appearing that said P. S., as receiver has the sum of \$—— in his hands belonging to the association and received from other sources, it is ordered that the sum of \$—— be retained for the present to pay the expenses of this cause under the further orders of the court, and that the remainder be distributed to and among said non-borrowing stockholders *pro rata*. The case is retained in court for such future orders and direction as may be necessary.

Enter this.

No. 707.

Decree Dissolving Restraining Order and Refusing Leave to Intervene by Purchaser.

[Caption.]

This cause came on this day to be heard upon the petition filed herein by C. M., receiver of the C. & D. Railroad Com-

pany, appointed under a decree in this cause against the city of — and the individuals named as defendants constituting its legislative council and upon the answers of said defendants thereto and upon the orders heretofore had in this cause and the depositions and other proofs on file herein; and thereupon the defendants moved to the court to dismiss said petition and dissolve the restraining order heretofore issued in this cause upon the ground that it appeared by decree entered herein that said C. M. as such receiver was discharged from further service as such by decree of this court entered herein —, and upon the further ground that it appeared that the properties and assets of the said railroad company had been sold by decree of the court entered in the cause of A. B. Trust Company *vs.* C. D. Railroad Company pending in this court, on the — day of —, and all of said properties and assets had been delivered to the purchaser by said receiver. And thereupon came the Southern Railway Company and presented its petition in open court asking leave as the purchaser of said properties and assets, rights of action and choses in action to be substituted as a party complainant herein in lieu and stead of said C. M., receiver. The court having considered said motion refused to allow said petition of the Southern Railway Company to be filed herein and to allow said company to be substituted as a party complainant hereto in the room and stead of C. M., receiver. And thereupon the court having considered the motion made by said defendants to dismiss the petition filed by said receiver and to dissolve the restraining order heretofore issued herein does grant the same. It is therefore ordered, adjudged and decreed that the petition filed herein and the amendment thereto, by said C. M., receiver against the city of — be and the same is hereby dismissed, the court being of opinion that the sale of said property and the order entered discharging said receiver operate to and did abate this action. It is further ordered that the restraining order here-

tofore issued in this cause on said petition be and it is hereby dissolved and discharged. The court having reached this conclusion did not consider the case upon its merits. This decree is entered without prejudice to the rights of the Southern Railway Company to bring any new and independent action to protect its purchased interest. All of which is finally ordered and decreed.

No. 708.

Decree for the Plaintiff with Lien and Order for Sale.

[Caption.]

This cause came on to be heard at this term upon the pleadings, proof and report of the Special Master filed herein July 1st, —, and annexed hereto, and the exceptions thereto, and was argued by counsel. And thereupon, upon consideration thereof, it was ordered, adjudged and decreed that said report of the Special Master filed herein July 1st, —, and hereto annexed, be, in all things, confirmed. And it appearing from an inspection of said report that the defendants, P. C. and A. C., are indebted to the Southern Building & Loan Association in the sum of \$—, with \$— accrued interest, aggregating \$—, the amount of said indebtedness so adjudged, it was further ordered, adjudged and decreed that complainant, the Southern Building & Loan Association, have and recover of the defendant, P. C., the said sum of \$—, with interest until paid, and the costs of this cause, for which execution will issue.

And it was further ordered, adjudged and decreed that said sum of \$—, with accruing interest, is a lien upon the lot or parcel of ground described in the bill, situate in the city of —, county of — and state of —, to wit: *[Describe the property on which the lien is to attach.]*

And it was further ordered, adjudged and decreed that if said sum of money with accruing interest, and the costs of this

cause, are not paid or caused to be paid by the defendants, P. C. and A. C., within ninety (90) days from the entry of this decree, then J. N., special master, after giving thirty (30) days' notice, by advertisement in the — Evening Scimitar once a week for four successive weeks, will sell said lot or parcel of ground to the highest bidder for cash at public vendue, at the door of the court-house of — county, in the city of —, in bar and free of all right and equity of redemption in said defendants.

The costs in this cause will be paid in the first instance out of the proceeds of such sale.

No. 709.

**Interlocutory Decree Granting Permanent Injunction and
Appointing Special Master.**

[*Caption.*]

This cause came on to be heard at this term on January 4, 1916, in the federal court at St. Paul, Minnesota, upon the motions of both complainant and defendant, for judgment upon the pleadings, and was argued by counsel, Mr. Amasa C. Paul appearing for the complainant and Mr. C. D. O'Brien for the defendant; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

1. That the complainant, the B. V. D. Company, is and has been since the 2nd day of January, 1914, the owner and sole proprietor of a certain print for which it duly obtained a copyright on January 2, 1914, and for which the commissioner of patents issued to complainant, as provided by law, a copy of the copyright record under the seal of the commissioner of patents, No. 3476, dated January 27, 1914; that said copyright is good and valid at law, and that a specimen of the reproduction of the said copyrighted print is annexed to the bill of complaint as Exhibit "A."

2. That the defendant, The Golden Rule, Inc., has unlawfully and wrongfully duplicated, copied and reproduced, without permission from the complainant, the said copy-

righted print, and has caused said copies to be reproduced in the public press for its own benefit and without right, and in infringement of the exclusive right granted and secured to the complainant under and by virtue of said copyright; that a specimen of defendant's infringing print is attached to the complaint herein and marked Exhibit "B."

3. That a perpetual injunction be issued enjoining and restraining the defendant, its servants, agents, attorneys and workmen, and each and every of them, from in any manner violating the complainant's said copyright, or exhibiting, reproducing, copying, or causing to be reproduced or copied, printing, or causing to be printed, the complainant's said copyrighted print, and from in any manner whatsoever infringing upon complainant's copyright.

4. That this cause be referred to Samuel Whaley, Esq., of St. Paul, Minnesota, as special master, to ascertain and report to this court the amount of damages that complainant has sustained by reason of the infringement of said copyright by the defendant.

5. That the complainant recover its costs of suit, the amount of which shall be determined by the court, or under its direction, after the coming in of the master's report.

WILBUR F. BOOTH, Judge.

Taken from *The Golden Rule v. B. V. D. Co.*, 155 C. C. A. 517.

No. 710.

Decree Embodying Findings of Fact and Conclusions of Law, Granting Injunction.

[Caption.]

This cause coming on for final hearing this 21st day of October, 1915, pursuant to the order of the court heretofore, to-wit, on the 21st day of September, 1915, made and entered herein, and the complainants, Theo. Hamm Brewing Company, Minneapolis Brewing Company, G. Heileman Brewing Company and Rock Island Brewing Company, appearing by their solicitors, F. W. Zollman and E. B. Cresap, and the defendant, The Chicago, Rock Island and Pacific

Railway Company, appearing by its solicitor, A. B. Enoch, and the defendant, Jacob M. Dickinson, as receiver of The Chicago, Rock Island and Pacific Railway Company, and successor to the defendants, Jacob M. Dickinson and Henry U. Mudge, as receivers of The Chicago, Rock Island and Pacific Railway Company, appearing by his solicitor, M. L. Bell, and the state of Iowa, pursuant to leave of court heretofore granted, having this day filed its intervening petition herein and appearing by its solicitor, C. A. Robbins, the assistant attorney general of said state of Iowa, and the said parties so appearing by their respective solicitors, as aforesaid, having agreed and stipulated in open court that the answer heretofore filed by Jacob M. Dickinson and Henry U. Mudge, as receivers of The Chicago, Rock Island and Pacific Railway Company, may stand and be taken as and for the answer of Jacob M. Dickinson, now sole receiver of said The Chicago, Rock Island and Pacific Railway Company, and having further stipulated and agreed in open court that this cause now proceed to final hearing and decree on the bill of complaint, the answer of The Chicago, Rock Island and Pacific Railway Company, the answer of Jacob M. Dickinson and Henry U. Mudge, as receivers of The Chicago, Rock Island and Pacific Railway Company, treated as the answer of the said Jacob M. Dickinson, now sole receiver of said The Chicago, Rock Island and Pacific Railway Company, and the intervening petition of the state of Iowa, all heretofore filed herein, and the court having heard the arguments of counsel, and being fully advised, now makes the following findings of fact and conclusions of law:

Findings of Fact.

1. That the facts set forth in the bill of complaint are true.
2. That at the time this suit was begun and the bill of complaint, answer of The Chicago, Rock Island and Pacific Railway Company, and the answer of the defendants, Jacob M. Dickinson and Henry U. Mudge, as receivers of The Chicago, Rock Island and Pacific Railway Company, were

filed, the said Jacob M. Dickinson and Henry U. Mudge were the receivers of the said The Chicago, Rock Island and Pacific Railway Company, duly appointed by the court, qualified and acting, and that since said time said Henry U. Mudge resigned as such receiver and the said Jacob M. Dickinson is now the sole receiver of the said The Chicago, Rock Island and Pacific Railway Company.

Conclusions at Law.

1. That the court has jurisdiction of the parties to this suit and of the subject-matter thereof.

2. That complainants are entitled to the relief prayed for in their said bill of complaint.

3. That the intervening petitioner, the state of Iowa, is not entitled to the relief prayed for in its said intervening petition, or any part thereof.

Wherefore it is now by the court ordered, adjudged and decreed as follows, to-wit:

1. That the answer of the defendants, Jacob M. Dickinson and Henry U. Mudge, receivers of The Chicago, Rock Island and Pacific Railway Company, heretofore filed herein, stand and be taken as and for the answer of Jacob M. Dickinson, sole receiver of said railway company.

2. That the defendant, Jacob M. Dickinson, as receiver for the said The Chicago, Rock Island and Pacific Railway, be and he hereby is permanently restrained and enjoined from refusing or failing to accept, receive, transport, carry and deliver any beer or other fermented malt liquors, sold and consigned in Minnesota, Wisconsin or Illinois by the complainants, or either or any of them, or any other person or corporation similarly situated, to persons residing in the state of Iowa who shall have purchased the same for their own lawful purposes and private consumption, whenever such *bona fide* purchaser and consignee shall, in each instance, in writing authorize the delivery of the same by the carrier to some designated drayman or other person, for the purpose of carrying the same from the railway stations of The Chicago, Rock Island and Pacific Railway Company to

the residences of such purchasers and consignees, in which said writing the said purchasers or consignees shall also have certified that said beer and fermented malt liquors are for his own private consumption, and said Jacob M. Dickinson, as receiver aforesaid, is hereby commanded to accept, receive, transport and deliver all of such shipments upon said terms, provided further that each shipment of such beer or other fermented malt liquors be, before delivery to said carrier for transportation aforesaid, plainly marked or branded "Intended for Personal Use and Private Consumption."

Further ordered, adjudged and decreed that a writ of injunction issue out of this court in accordance with the foregoing order. ✓

Further ordered, that the exceptions of the defendant, Jacob M. Dickinson, as receiver of the said The Chicago, Rock Island and Pacific Railway Company, and the exceptions of the said intervening petitioner, the state of Iowa, taken in open court to this decree and every part thereof, be noted and allowed, and leave to them and each of them to appeal is hereby granted, on the filing of a bond in the sum of \$100 within 30 days from the entry of this order.

Dated October 21, 1915.

Enter: CARPENTER, Judge.

No. 711.

Interlocutory Decree in Suit Involving Water Rights.

[Caption.]

This cause coming on to be heard at this term of this court and having been duly presented, thereupon, on consideration thereof, it is ordered, adjudged and decreed as follows:

That the defendant, Twin Falls Salmon River Land and Water Company, contracted with the state of Idaho and with the settlers holding agreements for the purchase and sale of water rights, that it, the said defendant, would provide a system of canals and reservoirs on what is known as

the Salmon river project, in Twin Falls county, state of Idaho, which in ordinary seasons would furnish a supply of water for irrigation purposes sufficient for the acreage covered by such settlers' agreements at the rate of two and three-fourths acre feet per acre, measured at the points of delivery from the system into the consumers' laterals; and further, that it would not sell rights in excess of such available supply. That the said defendant be restrained from making additional contracts for the sale of water rights and also from waiving the right to forfeit any existing contract. That the said defendant and the Commonwealth Trust Company of Pittsburgh, a corporation, trustee, and A. C. Robinson be, and each of them is, hereby enjoined and restrained from collecting or attempting to collect, or from enforcing payments upon said water right agreements, including any overdue payments or installments on said agreements, until such time as the holders thereof have been provided with the water supply so contracted for, or are given trustworthy assurance, to be approved by the court, that said water will be provided, or until the further order of this court.

It is further ordered and decreed that jurisdiction be retained for the purpose of making final disposition of the cause, and leave is hereby granted to either party to make application at any time for the introduction of further proof touching the available water supply, and more particularly relating to (1) the amount and dignity of the rights awarded to adverse claimants in the suit of Twin Falls Salmon River Land and Water Company et al. *vs.* Vineyard Land and Stock Company, now pending in this court and numbered 405; (2) seepage in the reservoir basin and the canal system; and (3) the aggregate amount of water agreements actually outstanding at the time of such application, and upon the submission of such proof for the entry of final decree.

Dated this 29th day of November, 1915.

FRANK S. DIETRICH, Judge.

No. 712.**Final Decree in Copyright Infringement.****[Caption.]**

This cause came on to be heard on the bill of complaint, answer and the proofs taken in open court during the May, 1916, term, and was argued by counsel, and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed:

1. That the plaintiff is and has been at all times the owner of a good and valid copyright of the publication entitled "Hendricks' Commercial Register of the United States, for Buyers and Sellers, Twenty-third Annual Edition," duly registered in the United States copyright office, upon which a certificate of copyright registration was duly issued by the register of copyrights, dated and identified as follows: "September 14, 1914, Class A-XXc, No. 379,504."

2. That the defendant herein has infringed upon the said copyright and upon the exclusive rights of plaintiff thereunder by making, copying, printing, publishing, selling and advertising books or publications known as "Thomas' Register of American Manufacturers, Seventh Edition," containing and embodying in the appendix thereto the lists of "architects" and "machinists and founders" appearing in said copyrighted publication.

3. That a perpetual injunction issue out of and under the seal of this honorable court, directed to the said defendant, Thomas Publishing Company, its officers, servants, agents, attorneys, workmen, and each and every of them, enjoining and restraining them and each of them from directly or indirectly making or causing to be made, copying or causing to be copied, printing or causing to be printed, publishing or causing to be published, selling or causing to be sold, advertising or causing to be advertised, vending or offering for sale, or being in any wise concerned in the making, copying, printing, publishing, selling, advertising, vending or offering

for sale, or giving away any work containing any list of "architects" or list of "machinists and founders" in infringement of said copyrighted book or publication, and from in any wise doing said or any of said acts in respect to said "architects" and "machinists and founders" lists in any future publication in infringement of said copyrighted book or publication.

4. That the defendant, Thomas Publishing Company, deliver up to the marshal of this district, on oath, forthwith on the service of said perpetual injunction by said marshal, all of the lists of "architects" and lists of "machinists and founders," which lists are infringements of plaintiff's said copyrighted publication, in the possession of said defendant, Thomas Publishing Company, or in the possession of its officers, servants, agents, attorneys and workmen, and each and every of them, all such copies so delivered up, and also lists of "architects" and lists of "machinists and founders" contained in the twenty-nine books or publications entitled "Thomas' Register of American Manufacturers, Seventh Edition," herein and now in the possession of the marshal, to be destroyed by the marshal thirty days after the service of said perpetual injunction.

5. That plaintiff, having waived an accounting of profits, the damages which the defendant is hereby ordered to pay to the plaintiff by reason of the infringement of said publication are hereby assessed at twenty-five hundred (\$2,500) dollars, and judgment issue against the defendant therefor.

6. That Schechter & Lotsch, Esqs., of No. 10 Wall street, New York, solicitors for plaintiff herein, be and they hereby are awarded and allowed the sum and amount of twenty-five hundred (\$2,500) dollars as a reasonable attorneys' fee in the premises, which the defendant is hereby ordered to pay, and judgment issue against the defendant therefor.

7. That the plaintiff recover of the defendant its costs of this suit, to be taxed, and judgment issue against the defendant therefor.

8. That the bonds given by the plaintiff herein, with the National Surety Company as surety, to-wit, bond for one thousand (\$1,000) dollars, dated the 10th day of March, 1916, and bond for two thousand (\$2,000) dollars, dated the 29th day of March, 1916, both in favor of said defendant, be and the same are hereby cancelled and discharged, and the plaintiff and its surety released and discharged from all liability thereon.

LEARNED HAND,
United States District Judge.

No. 713.

Final Decree where Trustee Sues for Mortgage Bondholders.

[Caption.]

On this the 28th day of July, 1917, came on to be heard at this term, upon the pleadings, proof and report of the special master filed herein on the 8th day of February, 1917, and the exceptions to said report, and was argued by counsel, and thereupon the court examined and carefully considered the testimony taken by the special master as well as the pleadings of all the parties herein, and without adopting as a whole the report of said master, the court thereupon proceeded to render judgment in accordance with its findings from the pleadings and said proof so taken, and thereupon, it is ordered, adjudged and decreed that the defendant, Amarillo Street Railway Company, a corporation incorporated under the laws of the state of Texas, is indebted to the plaintiff, Emile K. Boisot, trustee, representing the holders of the bonds issued by said Amarillo Street Railway Company and outstanding, in the sum of ninety-eight thousand, five hundred dollars (\$98,500), with interest thereon from the first day of July, 1916, at the rate of six per centum per annum, aggregating one hundred and four thousand, seven hundred eighty-seven and 43/100 dollars (\$104,-

787.43), the amount of said indebtedness so adjudged, and that said sum, \$104,787.43, with accruing interest at the rate of six per centum per annum from date hereof, is a lien upon all and singular the property, real and personal, of said Amarillo Street Railway Company, including the franchise granted by the city of Amarillo and under which said Amarillo Street Railway Company is being operated, said property being more particularly described in that certain mortgage dated the first day of July, 1910, and recorded in the deed of trust records of Potter county, Texas, in volume 11, pages 175-196, inclusive, and being as follows:

All of the following described tracts of land lying and being situate in the county of Potter, and state of Texas, to-wit: * * *

Third. The company's street railway in the city of Amarillo, and additions thereto, including cars, poles, electric wires and all equipment therewith connected, including the company's franchise and franchise rights, together with all appurtenances thereto connected.

Also, all property of every name and nature acquired by said company after the execution and delivery of said mortgage.

It is expressly decreed, however, that there is located on that certain strip of land described in the first section of the description of the said property of said Amarillo Street Railway Company herein above set out, certain machinery and boilers belonging to the City Light & Water Company and not to Amarillo Street Railway Company, which is expressly excepted from this decree and is not to be considered in the sale of the property herein decreed to be made, to-wit: * * *

It was further ordered, adjudged and decreed that said mortgage set forth in the bill of complaint herein, and hereinabove referred to, made by defendant, Amarillo Street Railway Company to Emile K. Boisot, trustee, for the hold-

ers of its bonds, dated July 1, 1910, is a valid and subsisting mortgage and constitutes a lien upon all the property of said Amarillo Street Railway Company, as hereinabove set forth.

It was further ordered, adjudged and decreed that all and singular property of Amarillo Street Railway Company, as hereinbefore described, shall be sold by the receiver, Guy W. Faller, who is hereby appointed special commissioner to sell the same, which sale shall be at public auction at the door of the county court-house in Potter county, Texas, on the first Tuesday in September, 1917, between the hours of 10 o'clock a. m. and 4 o'clock p. m., and said receiver shall first give notice of said sale by posting at three public places in Potter county, Texas, one of which shall be at the door of the county court-house, and by publishing in the Amarillo Daily News, once each week for four consecutive weeks prior to said sale, a copy of said notice; and said property shall be sold by said receiver to the highest bidder, for cash to him in hand paid, and said receiver will, after said sale, report the same to this court for approval or rejection.

It was further ordered, adjudged and decreed by the court that the special master shall receive no bid from any one offering to bid for the property above described who has not first deposited with him, as a pledge that he make good his bid in case of its acceptance, the sum of one thousand (\$1,000) dollars in money or by certified check upon any national bank or trust company in the city of New York or Amarillo, Texas.

Upon acceptance of any bid for such property, the purchaser shall, within ten days after the approval by the court of said sale, deposit with said receiver, acting as special master, the amount of his bid for said property; provided, however, that in case the plaintiff herein or G. Gordan Brownell, the owner and holder of said bonds, shall purchase said property it shall not be necessary for him to deposit the full amount of his bid, provided however, that he shall pay

over to the receiver, within ten days after the approval by the court of said sale, the sum of seven thousand (\$7,000) dollars in cash or by certified check upon any national bank or trust company in the city of New York or Amarillo, Texas, which said amount is the smallest bid that the said special master is authorized to accept for said property.

The deposit received from any unsuccessful bidder shall be returned to him when the property shall be struck down.

The deposit received from the successful bidder or purchaser shall be held and applied on account of the purchase price of the property for which said bid was made.

In case any bidder or purchaser shall fail to make good his bid upon its acceptance by the special master, or after such acceptance shall fail to comply with any order of the court relative to the payment thereof, or the consummation of the purchase, then the sums in cash deposited by such purchaser or purchasers, as hereinbefore provided, shall be forfeited as a penalty for such failure, and shall be applied towards the expense of the resale and towards making good any deficiency or loss in case the property shall be sold at a price less than that bid at the prior sale. If the court shall not confirm the sale for which the deposit shall have been made, such deposit shall be returned to the purchaser.

In case said property shall be purchased by the holder of said bonds, or the trustee, then he may make good any part of his bid not required to be paid in cash, as hereinbefore provided, by turning in to be cancelled or credited, as hereinafter provided, any bonds or coupons payable out of the proceeds upon distribution thereof, and such purchaser shall be credited therefor on account of his bid with such sums as would be payable on such bonds and coupons had all of the purchase price or the whole amount thereof been paid in cash.

It was further ordered that any purchaser at said sale may satisfy any part of his bid over and above the sum of \$7,000

by the cancellation and surrender of any receiver's certificates heretofore issued by the receiver, being four certificates in the sum of five hundred (\$500) dollars each, dated the 30th day of January, 1917, in accordance with the order of this court made and entered herein on the 26th day of January, 1917, and recorded in the minutes hereof at volume 1, pages 35 to 37.

The court reserves the right to sell the property upon such notice as the court shall direct in case the purchaser thereof shall fail or omit to make any payment on account of any unpaid balance of the purchase price after the entry of the order approving such sale.

It was further ordered that in case the receiver shall not be able to properly advertise said sale as herein provided for the length of time required by this decree so as to sell the same on the first Tuesday in September, then he shall proceed in like manner to advertise said property for sale, and sell the same on the first Tuesday in October, 1917.

It was further ordered that said Guy W. Faller, as special master, shall execute and deliver a deed of conveyance to the purchaser or purchasers thereof, on the order of the court, of judge thereof, confirming such sale, the court having reserved the right to appoint in term time or at chambers another person as such special master with like power in case of the death or disability to act of the special master hereby designated, or in case of his resignation or failure to act, or removal by the court.

It was further ordered and decreed that the master in chancery, Ben H. Stone, Esq., be and he is hereby allowed the sum of four hundred (\$400) dollars for his services as such master, to be taxed as a part of the costs herein, but the city of Amarillo, intervener, is adjudged and decreed to pay the sum of one hundred (\$100) dollars thereof, and the receiver the other \$300 so adjudged.

It was further ordered, adjudged and decreed that Alex M. Mood be and he is hereby allowed the sum of one hundred and twenty-six and 30/100 dollars, for taking down, as stenographer, the testimony before the master, of which sum one-fourth is hereby adjudged to be paid by the city of Amarillo, intervener, and three-fourths by the receiver.

It was further ordered, adjudged and decreed that the fund arising from said sale shall be applied as follows:

(1) To the payment of all the expenses attendant upon said sale as such expense may be hereafter fixed and allowed. (2) To the payment of all costs in this suit, other than that part hereinbefore adjudged against the city of Amarillo. (3) The receiver will retain in his hands the sum of \$6,050 and deliver to the city of Amarillo upon completion of the work of paving along the track of Amarillo Street Railway Company, on Polk street in Amarillo, Texas, from the south side of Tenth street to the south side of Seventeenth street, said paving to be made uniform with the pavement already laid on either side of said track along said street, said paving to include the space between the rails and for a distance of two feet on the outside of each rail: and upon satisfactory evidence being made to the court of the completion of said pavement said sum of \$6,050, or so much thereof as may be necessary to reimburse the city for the cost of said pavement, shall be paid over by said receiver to said city, upon the order of this court. (4) The receiver shall pay the amount due upon those four certain receivers' certificates hereinbefore described upon the surrender and cancellation thereof, by the holder or holders of same, which payment shall include the accrued interest on such certificates. (5) In case any other money shall remain in his hands after said payments he will report the same to this court, showing the amount thereof, when an order will be made as to the disposition thereof.

It was further ordered, adjudged and decreed that the city of Amarillo, intervener, take nothing by its claim and demand upon the receiver for the laying and establishing of an eight-inch concrete sub-base under its track, as prayed for in its plea of intervention, and that the receiver shall be compelled to pay nothing on account thereof, nor shall any part of the proceeds of the sale of said property be applied to the payment of said demand, or any part thereof, for such eight-inch sub-base.

It was further ordered, adjudged and decreed that the motion of receiver and of the plaintiff and defendant to disregard the findings of the master as a whole was by the court overruled, but the court, after examining said findings, rejects and disregards all that part of said findings to the effect that the bonds of Amarillo Street Railway Company were never regularly issued nor sold to Henry L. Doherty & Company, but the court, on the contrary, finds that \$98,500 of said bonds were regularly issued by said Amarillo Street Railway Company and by regular and valid assignment have become, and were at the time of the institution of this suit, legally owned and held by G. Gordan Brownell, and that plaintiff, Emile K. Boisot, as trustee, had a right to bring this suit and that said bonds are outstanding and constitute a valid debt against Amarillo Street Railway Company secured by a mortgage which is hereinbefore foreclosed. The findings of the master that the city of Amarillo has no lien for the extra eight-inch sub-base demanded by it is sustained as being correct. The court finds as a fact that the city of Amarillo, intervener, has a valid and subsisting lien upon the property and franchises of Amarillo Street Railway Company for the cost of the pavement along Polk street, from the south side of Tenth street to the south side of Seventeenth street, between the rails of said company and for a space of two feet on the outside of each rail, which lien is

superior to the lien of the plaintiff herein, securing said bonds. All other findings of the master the court held were immaterial, and therefore did not pass on same.

The court finds as a fact that the Amarillo Street Railway Company is, and has been for a number of years, operating at a steady and continuous loss.

GEO. WHITFIELD JACK, Judge.

Taken from *Faller v. Boisot*, 249 Fed. 193, C. C. A.

No. 714.

Decree of Foreclosure of a Railroad Mortgage.(1)

The District Court of the United States within and for the Western Division of the Western District of Tennessee.

The Farmers' Loan & Trust Company

vs.

The Memphis & Charleston Railroad Company, The Central Trust Company of New York, and Samuel Thomas.

No. 491.
Decree of
Foreclosure.

This cause came on to be heard at this term upon the pleadings and proofs and was argued by counsel, and thereupon, upon consideration thereof,

It was ordered, adjudged and decreed that the mortgage set forth in the bill of complaint herein, made by the defendant, The Memphis & Charleston Railroad Company, to the complainant, The Farmers' Loan & Trust Company, bearing date the 20th day of August, 1877, is a valid and subsisting mortgage, and constitutes a lien prior to the estates, interests or liens of any of the parties defendant to this cause upon the mortgage premises, property and franchises, to-wit:

All and singular the main line of railroad of the said Memphis & Charleston Railroad Company, extending from the point of commencement thereof, in the city of Memphis, in the state of Tennessee, via Corinth, in the state of Mississippi, and Huntsville, in the state of Alabama, to the terminus thereof in Stevenson in the said state of Alabama, connecting there with the Nashville & Chattanooga Railroad, being a distance of two hundred and seventy-two miles, be the same more or less; and also the branch of said railroad, situate in the state of Tennessee, known as the Somerville & Moscow branch, extending from Moscow, on the main line, to Somerville, a distance of about fourteen miles, be the same more or less; and also the branch of said railroad, situate in the state of Alabama, extending from Tuscumbia, on the main line, to Florence, a distance of about five miles, be the same more or less, and including the bridge across the Tennessee river, near Florence; and also the Washington Street Branch, so-called, of said railroad, extending from the depot of said main line in the city of Memphis, through Washington street and Centre Landing to the Mississippi river, and the depot grounds and wharves on said river, and all the right and privileges of said railroad company in respect of the use of the streets and wharves and levee on the Mississippi river; and also, all and singular the right of transportation of the passenger cars and freight cars of the said The Memphis & Charles Railroad Company on and over the railroad between Stevenson, in Alabama, and Chattanooga, in Tennessee, which said Memphis & Charleston Railroad Company, at the date of the execution of said mortgage, namely, August 20th, 1877, had or was entitled to, or could then, or since then, claim under or in virtue of the contract of the date of June twenty-third and July twenty-sixth, eighteen hundred and fifty-eight, made between the Memphis & Charleston Railroad Company and the Nashville & Chattanooga Railroad Company, and all the rights and privileges whatsoever, for or in respect of the use

of, or transportation over, the line of railroad between Stevenson and Chattanooga, now belonging to the Nashville, Chattanooga and St. Louis Railway, which the said Memphis & Charleston Railroad Company holds or is in anywise entitled unto, or could, at the date of execution of said mortgage, namely, August 20th, 1877, or at any time since then, claim either under or in virtue of the before-mentioned contract of June and July, eighteen hundred and fifty-eight, or otherwise howsoever, together with all and singular the roadway or track of the aforesaid main line of railroad extending from Memphis to Stevenson, as aforesaid, and of the said several branches respectively, and the superstructure and rails laid or to be laid thereon respectively, and all the appurtenances thereof, and all the sidings, turnouts, bridges, wharves, viaducts, culverts, walls, fences, ways and rights of way, depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses, depot grounds and lands procured, provided, or intended for use for that purpose; building and repair shops, machine shops, and lands used or procured, or intended for sites thereof, and other buildings, structures, lands and improvements whatsoever, leases and leasehold interests, contracts, easements and privileges belonging or appertaining to, or used or procured, or designed to be used for the purpose of or in connection with the said main line of railroad and branches respectively, or the maintenance or operation thereof, or of any part thereof, at the date of the execution of said mortgage, namely on the 20th day of August, 1877, or at any time thereafter; and also all the locomotives, tenders, passenger cars, baggage cars, freight cars and other cars, and all other rolling-stock or equipment, and all machinery, tools and implements; rails, chairs and spikes and other materials whatsoever, owned or possessed by the said Memphis & Charleston Railroad Company at the date of the execution of said mortgage, namely, on the 20th day of August, 1877, or at any time thereafter for the uses or purposes of, or designed for

use in connection with, or for the operation, maintenance or reparation of the said main line of railroad and branches respectively, or the equipment or appurtenances thereof, and all of the engines, cars and rolling-stock or equipment of any kind, machinery, tools, implements, rails and other materials which now belong or appertain to, or are in use, or on hand, designed for use for the purpose of said main line of railroad and branches respectively, or any part thereof, or have belonged or appertained to, or been in use, or on hand, designed for use for the purposes of said main line of railroad and branches respectively, or any part thereof, at any time or times after the date of the execution of said mortgage, namely, August 20th, 1877, and all the lands and real estate whatsoever of any and every kind whatsoever, and all improvements thereon situate in the states of Tennessee, Alabama and Mississippi respectively, which were owned or possessed by, or which belonged to the said Memphis & Charleston Railroad Company at the date of the execution of said mortgage, namely, August 20th, 1877, and also all and singular the rights, privileges and franchises whatsoever, which the said Memphis & Charleston Railroad Company has acquired or become possessed of or entitled unto, since the said date of the execution of said mortgage, for or in respect of or for the uses or purposes of the said main line of railroad and branches respectively, or the operation or maintenance thereof, and also all the tolls and income of the said main line of railroad and branches respectively, together with all and singular the tenements, hereditaments and appurtenances unto the premises aforesaid, or any of them, or any part thereof belonging or in any wise appertaining; and the reversion or reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the said Memphis & Charleston Railroad Company, of in and to the

same, and every part and parcel thereof, with the appurtenances.

It was also ordered, adjudged and decreed, that the lien of the said mortgage is prior to all other liens of whatsoever nature, except only the following liens, to which it was ordered, adjudged and decreed to be subject, that is to say:

First. A certain statutory lien in the nature of a mortgage, originally created and existing in favor of the state of Tennessee, and mentioned and described in the said mortgage of August 20th, 1877.

Second. The lien of a certain mortgage or deed of trust, dated May 1st, 1854, made by the said The Memphis & Charleston Railroad Company to James Punnett, G. B. Lamar and Thomas Fearn, as trustees, mentioned and described in the said mortgage of August 20th, 1877, and known as the first mortgage and extended by an indenture dated September 7th, 1880, to which indenture the complainant, The Farmers' Loan & Trust Company, as trustee under the said mortgage of August 20th, 1877, was a party, and duly executed the same in accordance with certain provisions to that end in the said mortgage of August 20th, 1877, contained.

Third. The lien of a certain other mortgage or deed of trust, dated January 1st, 1867, made by the said The Memphis & Charleston Railroad Company to Gustavus L. Masten, George W. Neal and William C. Rehren, as trustees, mentioned and described in the said mortgage of August 20th, 1877, and known as the second mortgage, and extended by an indenture dated September 7th, 1880, to which indenture the complainant, The Farmers' Loan & Trust Company, as trustee under the said mortgage of August 20th, 1877, was a party, and duly executed the same, in accordance with certain provisions to that end in the said mortgage of August 20th, 1877, contained.

It was also ordered, adjudged and decreed, that default has been made in the payment of interest due upon said mort-

gage of August 20th, 1877, entitling the complainant to a sale of said mortgaged property and premises, unless the defendant, the Memphis & Charleston Railroad Company, shall pay the amount of the entire bonded indebtedness secured by said mortgage, at a short day, to be fixed by the court; that there are secured by said mortgage lien the following amounts of bonds and coupons, with interest thereon, of the said The Memphis & Charleston Railroad Company, which are outstanding and past due, viz.:

First. The amount of \$79,240, for coupons due January first, 1895, with interest on the amount of said coupons at the rate of six per centum per annum from that date; \$10,-235.16, making \$89,475.16.

Second. The amount of \$79,240 for coupons due July first, 1895, with interest at a like rate from that date; \$7,857.97, making \$87,097.97.

Third. The amount of \$79,240, for coupons due January first, 1896, with interest at a like rate from that date; \$5,-480.76, making \$84,720.76.

Fourth. The amount of \$79,240 for coupons due July first, 1896, with interest at a like rate from that date; \$3,103.57, making \$82,343.57.

Fifth. The amount of \$79,240 for coupons due January first, 1897, with interest at a like rate from that date; \$726.37, making \$79,966.37.

Sixth. The amount of \$2,264,000 for the principal of said bonds, with interest at the rate of seven per centum per annum from January first, 1897, \$24,214.22; so that the entire sum due for principal and interest, and interest on the unpaid coupons up to the day of the date of this decree, is the sum of \$2,711,816.05 and,

It was further ordered, adjudged and decreed that the mortgaged property and premises above described are so situated that they cannot be sold except as an entirety, due regard being had to the best interests of those interested in the same;

and further, that the said defendant, The Memphis & Charleston Railroad Company, is utterly insolvent and unable to pay its debts and liabilities; and,

It is further ordered, adjudged and decreed, that unless the parties defendant, or some of them, shall, on or before the 31st day of March, 1897, pay the complainant the entire sum hereinbefore found to be due for principal and interest, including interest on unpaid coupons up to the date of this decree, as hereinbefore fixed and determined, with interest thereon from the date hereof, then the said mortgaged premises and property shall be sold as hereinafter directed, and all the right and equity of redemption of the defendants, and each and all of them, of, in and to the said mortgaged premises, property, rights, assets and franchises, and every part and parcel thereof, shall be forever barred and foreclosed.

In case the said sum shall be paid as herein decreed, then any party hereto may apply to this court for such further relief and for such further directions as may be just and equitable.

It was further ordered, adjudged and decreed, that if default be made in making said payment on or before the said 31st of March, 1897, then all the said mortgaged premises and property, real, personal and mixed, rights and franchises, wherever situated, shall be sold as an entirety, and without an appraisement or right of redemption, subject, however, to the said statutory lien and to the said first mortgage or deed of trust, dated May 1st, 1854, executed by said The Memphis & Charleston Railroad Company to James Punnett, G. B. Lamar and Thomas Fearn, as trustees, and said second mortgage or deed of trust, dated January 1st, 1867, made by said The Memphis & Charleston Railroad Company to Gustavus L. Maston, George W. Neal and William C. Rehren, as trustees, said first mortgage and second mortgage having been extended by certain indentures, both dated September 7th, 1880, and hereinbefore mentioned. The said sale shall be

made at public auction to the highest bidder therefor, at twelve o'clock noon, at the railroad station upon said railroad of the Memphis & Charleston Railroad Company, in the city of Memphis, in the state of Tennessee, on a day to be named by the Special Master herein appointed, in his notice of sale; that before making said sale, the Special Master shall publish a notice thereof once a week for at least four weeks prior to such sale, in one newspaper, printed, regularly issued and having a general circulation in the county of Shelby and state of Tennessee; in one newspaper, printed, regularly issued and having a general circulation in the county of Madison and state of Alabama; and in one newspaper, printed, regularly issued and having a general circulation in the county of Monroe and state of Mississippi, and in the New York Times.

And further, that the Special Master making such sale may, either personally or by some person to be designated by him to act in his name and by his authority, adjourn the sale from time to time without further advertisement, but only on the request of the complainant or its solicitors or by order of the court or a judge thereof.

It was further ordered, adjudged and decreed that the Special Master shall receive no bid from any one offering to bid for the premises above described, who shall not first deposit with him as a pledge that he will make good his bid in case of its acceptance, the sum of \$50,000 in money, or by certified check upon any National Bank or Trust Company in the city of New York, or \$100,000.00 par value of bonds secured by the said consolidated mortgage of August 20, 1877.

Upon the acceptance of any bid for such property, the purchaser shall forthwith deposit with the said Special Master the sum of \$50,000.00 in cash, or by certified check upon any National Bank or Trust Company in the city of New York, but any cash which may have been previously deposited by the successful bidder as a pledge that he would make good

his bid, shall be received on account of the amount so required on the acceptance of his bid.

In case any bidder shall fail to make the deposit herein required upon the acceptance of his bid, the Special Master shall then and there again offer the property for sale, without further notice or advertisement.

The Special Master shall accept no bid for the mortgaged property unless the same shall be at least equal to the sum of \$2,500,000.00. In case such amount above required shall not be bid therefor, the Special Master shall adjourn the sale, and shall apply to the court for further instructions.

The deposit received from any unsuccessful bidder shall be returned to him when the property shall be struck down.

The deposit received from the successful bidder shall be held and applied on account of the purchase price of the property for which such bid was made.

In case any bidder or purchaser shall fail to make good his bid upon its acceptance by the Special Master, or after such acceptance shall fail to comply with any order of the court relating to payment thereof, or the consummation of the purchase, then the sums in cash or bonds deposited by such purchaser or purchasers as hereinbefore provided shall be forfeited as a penalty for such failure, and shall be applied towards the expenses of a resale and towards making good any deficiency or loss in case the property shall be sold at a price less than that bid at the prior sale. If the court shall not confirm the sale for which the deposit shall have been made, such deposit shall be returned to the bidder.

The complainant, The Farmers' Loan & Trust Company, as trustee, or any holder or holders of any of said bonds, or any party to this suit, may bid and purchase at any such sale.

Upon confirmation of the sale by the court, the purchaser shall make such further payment or payments in cash on account of his bid as the court from time to time may direct.

The purchaser may satisfy and make good any part of his

bid not required to be paid in cash, by turning in to be canceled or credited, as hereinafter provided, any bonds or coupons payable out of the proceeds upon distribution thereof; and such purchaser shall be credited therefor on account of his bid with such sums as would be payable on such bonds and coupons out of the purchase price if the whole amount thereof had been paid in cash.

The court reserves the right to resell the property upon such notice as the court shall direct, in case the purchaser thereof shall fail or omit to make any payment on account of any unpaid balance of the purchase price within thirty days after the entry of an order requiring such payment.

All sums of money received by the Special Master shall forthwith be deposited with the designated depository of this court at Memphis, Tennessee, and all bonds received by the Special Master, with The Farmers' Loan & Trust Company; in each case subject to the order of this court; and the certificate of said Trust Company or of the Guaranty Trust Company of the city of New York, that it holds bonds as therein described subject to the order of the party named, and transferred to the order of said Special Master, shall by him be received and accepted in lieu of such bonds, as a deposit at the time of sale and on account of the payment of the purchase price bid, with like force and effect as though the bonds therein named had been delivered to such Special Master.

The purchaser shall, as part consideration, and in addition to the sum bid, for such property, take the same and receive the deed therefor upon the express condition that to the extent that the assets or the proceeds of assets in the receivers' hands shall be insufficient, such purchaser, his successors or assigns, shall pay, satisfy and discharge (a) any unpaid compensation which shall be allowed by the court to the receivers; (b) any unpaid indebtedness and obligations or liabilities which shall have been duly contracted or incurred by the receivers before delivery of possession of the property sold; and

(c) also any unpaid indebtedness or liability contracted or incurred by said defendant Railroad Company in the operation of its railroad, payment whereof was provided for in the order appointing receivers herein, and which is prior in lien or superior in equity to said consolidated mortgage of August 20, 1877, except such as shall be paid and satisfied out of the income of the property in the hands of the receivers, or out of such other assets upon the court adjudging the same to be prior in lien or superior in equity to said mortgage and directing payment thereof; provided, however, that no obligation is hereby imposed upon or is required to be assumed by the purchaser to pay or discharge either the statutory lien or the first mortgage bonds, or the second mortgage bonds of the defendant, hereinbefore described, and subject to which such property is to be sold.

All payments for any such purpose made by the purchaser in advance of the final accounting and discharge of the receivers, shall be treated as advances and subject to final adjustment upon such accounting.

In the event that the purchaser of such property, after demand made, shall refuse to pay any of the before mentioned indebtedness or liabilities, the person holding the claim therefor, upon fifteen days' notice to such purchaser and his successors and assigns may file his petition in this court to have such claim enforced against said property in accordance with the usual practice of this court in relation to claims of similar character, and such purchaser and his successors or assigns shall have the right to appear and to make defense to any claim, debt or demand so sought to be enforced, and any party shall have the right to appeal from any judgment, decree or order made thereon.

For the purpose of enforcing the foregoing provisions of this decree, jurisdiction of this cause is retained by this court, and the court reserves the right to retake and resell the property in case such purchaser or his successors or assigns shall

fail to comply with any order of the court in respect to the payment of such prior indebtedness or liabilities, within thirty days after service of a copy of such order.

The Special Master, when ordered by this court, shall publish, at least once a week for the period of six weeks, in one or more newspapers published in the city of Memphis, Tennessee, a notice requiring holders of any claims to present the same for allowance; and any such claims which shall not be so presented or filed within the period of six months after the first publication of such notice, shall not be enforceable against said receivers or against the property sold, or against the purchaser or his successors and assigns.

Any such purchaser or purchasers, and his or their successors and assigns, shall have the right to enter his or their appearance in this court; and he or they or any of the parties to this suit shall have the right to contest any claim, demand or allowance existing at the time of the sale and then undetermined, and any claim or demand which thereafter may arise or be presented, which would be payable by such purchaser or his successors or assigns or which would be chargeable against the property purchased, in addition to the amount bid at the sale; and he or they may appeal from any decision relating to any such claim, demand, or allowance.

The purchaser of such property shall also take the same subject to the performance by him or his successors or assigns, of all pending contracts in respect thereof, theretofore lawfully made by the receivers.

The purchaser at any such sale, and his successors and assigns, shall have the right, within ninety days after the completion of the sale and delivery of the deed as hereinafter provided to elect whether or not to assume or adopt any lease or contract sold with the railroad and other property and franchises; and the purchaser, his successors or assigns, shall not be held to have assumed any of said leases or contracts which he or they shall so elect not to assume.

It was further ordered, that L. B. McFarland he and he hereby is designated and appointed a Special Master to make the sale hereby ordered and decreed, and to execute and deliver a deed of conveyance of the property so to be sold to the purchaser or purchasers thereof, on the order of the court, or of a judge thereof, confirming such sale; the court, however, reserving the right to appoint, in term time or at chambers, another person such Special Master, with like powers, in case of the death or disability to act of the Special Master hereby designated or in case of his resignation or failure to act, or removal by the court.

It was further ordered and decreed, that within thirty days from the confirmation of said sale or sales, or such further time as the court may allow on application of the purchaser for good cause shown, the purchaser or purchasers of said property shall complete payment of the entire amount bid to the said Special Master; and that on such payment the said purchaser or purchasers shall be entitled to receive a deed of conveyance thereof from the Special Master and as herein provided, from the Memphis & Charleston Railroad Company, and The Farmers' Loan & Trust Company as trustee under the said mortgage of August 20th, 1877, and to receive possession of the property so purchased from the parties holding possession of the same, and upon the execution and delivery of such deed, the receivers shall deliver all the premises sold which may be in their possession over to the purchaser or purchasers, his or their successors or assigns, including all income, proceeds of income, bills and accounts receivable, cash and other property received by the receivers in the management or operation of the mortgaged premises embraced in such conveyance or pertaining thereto; subject, nevertheless, to the condition that the court may retake and resell the property in case the purchaser or purchasers thereof, his or their successors or assigns respectively, shall fail to pay any balance of the purchase price remaining unpaid by him or them or

to comply with any order of this court with respect to the payment of any prior indebtedness, obligations and liabilities as hereinbefore provided, within thirty days after the service of copy of such order.

It was further ordered and decreed, that the fund to arise from said sale shall be applied as follows:

First. To the payment of all proper expenses attendant upon said sale, including the expense, outlays and compensation of the Special Master to make said sale, as such expense, outlays and compensation may be hereafter fixed and allowed.

Second. To the payment of the costs of this suit and the compensation of the complainant herein for its services, charges and expense in the execution of its trust under said mortgage so made to it as aforesaid, including its own compensation and commissions and its disbursements for solicitors and counsel fees in the execution of said trust, as such charges, expenses and compensation may be hereafter fixed and allowed by this court.

Third. To the payment of the bonds and coupons of the defendant, The Memphis & Charleston Railroad Company, secured by the mortgage foreclosed hereby, with interest thereon to the amount hereinbefore specified, or if the fund be not sufficient to pay the same, then to the payment of same *pro rata*; that each of the said bonds presented to the Special Master shall, if the holder thereof shall also request, be stamped or endorsed in some way by said Special Master, so as to show the amount that has been paid on account of the same, and on account of the coupon interest due thereon, and be returned so stamped or endorsed to the holder thereof; that in case of payment in full of said bonds and coupons, with interest thereon, the same shall be delivered with payment in full stamped thereon by the Special Master, to the purchaser or purchasers at the sale, to be held by said purchasers as a muniment of title; and

Fourth. If, after making all the above payments, there

shall be any surplus, the same shall be paid according to the further order of court in that regard.

And further, that in case there shall be any deficiency in the amount required to be paid in full of the several amounts directed and allowed to be paid, then the said Special Master shall report to the court the amount of the deficiency, and the plaintiff as trustee shall have judgment against the said defendant mortgagor corporation for the amount due, and shall have execution therefor, pursuant to the rules and practice of this court; and

It was further ordered and decreed that the defendant, The Memphis & Charleston Railroad Company, and the complainant, The Farmers' Loan & Trust Company, be, and they are hereby authorized and directed to execute and deliver, under the direction of the Special Master conveyances executed by them, respectively, by way of confirmation and further assurances of title to the said purchaser or purchasers, his, its or their assigns, of all and singular the mortgaged property and premises, and every part and parcel thereof, of every kind and description, and wherever situated, hereby directed to be sold by the Special Master; and that the form of said conveyance and mode of execution thereof shall be settled and approved by the Special Master, or by the court or judge thereof, if any question should arise as to the form and sufficiency thereof, and that such conveyance shall be delivered to said purchaser or purchasers, his its or their assigns, contemporaneously with the deed or deeds of the Special Master; and

It was further ordered and decreed that if none of the said parties defendant shall pay, or cause to be paid, to the Farmers' Loan & Trust Company on or before the 31st day of March, 1897, the amounts hereinbefore found to be due and to be paid to the said The Farmers' Loan & Trust Company on or before said 31st day of March, 1897, together with the costs, expenses and allowances in this suit, then, and in that event, the said defendant, The Central Trust Company of New

York, as trustee, under the mortgage of said railroad company, bearing date the first day of January, 1884, and known as the general mortgage of said railroad company, or the holders of a majority of the bonds secured by the said general mortgage, may, at any time prior to the sale of the said property and franchises of said Memphis & Charleston Railroad Company, as hereinbefore provided, pay to the said The Farmers' Loan & Trust Company the amounts herein found to be due in respect to the said bonds and coupons secured by the said mortgage, dated August 20th, 1877, hereby foreclosed, together with an amount sufficient to cover all the costs, expenses and allowances of this suit and thereupon the said The Central Trust Company, or the holders of a majority of the said bonds secured by the said general mortgage, so redeeming shall become subrogated to all the rights of the holders of the said bonds and coupons secured by the said mortgage, dated August 20, 1877, hereby foreclosed, under this decree, in respect to the said last mentioned bonds and coupons and the mortgage securing the same. The said The Farmers' Loan & Trust Company shall pay over to the respective holders of the said bonds and coupons secured by the mortgage foreclosed hereby the amounts due upon the said bonds and coupons only upon receipt of the said bonds and coupons, which shall thereupon be transferred and delivered by the said The Farmers' Loan & Trust Company to the party or parties making such payment, and upon such payment being made to the said The Farmers' Loan & Trust Company, the sale of the said property and franchises of the said Memphis & Charleston Railroad Company shall be stayed, and the said stay shall then continue, and said sale shall not then be made, as herein provided, until the further order of this court, upon notice to the said The Farmers' Loan & Trust Company, and said Central Trust Company of New York.

It was further ordered that any party to this proceeding

may apply to the court for further orders and directions at the foot of the decree.

Done this February 25th, 1897.

(1) The foregoing decree is copied from the record in the case of *The Farmers' Loan & Trust Co. vs. Memphis & Charleston R. Co.*, in the Circuit Court of the United States for the western district of Tennessee.

No. 715.

Order of Delivery of Property to Reorganized R. R. Co.

[*Caption.*]

Now, this day comes Toledo, St. Louis & Western Railroad Company, by Butler, Notman, Joline & Mynderse, its solicitors, and presents to the court its petition for an order directing Samuel Hunt, the receiver heretofore appointed of the property of the Toledo, St. Louis & Kansas City Railroad Company, to surrender and deliver to the petitioner, or its duly authorized representatives on August 1st, 1900, all and singular the line of railroad, rights, privileges, franchises and other property now in the possession of said receiver, formerly owned by the Toledo, St. Louis & Kansas City Railroad Company, and purchased and acquired by said petitioner, Toledo, St. Louis & Western Railroad Company.

And also come Samuel Hunt, as receiver of the property of the respondent, Toledo, St. Louis & Kansas City Railroad Company, by Clarence Brown, Esq., his solicitor, Continental Trust Company of the city of New York, by Cary & Whitridge, its solicitors, James N. Wallace, by Arthur H. Van Brunt, his solicitor, and Toledo & East St. Louis Railroad Company by Adrian H. Larkin, its solicitors, and all and singular the matters contained in said petition being considered and by the court fully understood, it is

Ordered and decreed that said petition be, and the same hereby is, granted, and it is further

Ordered and decreed that Samuel Hunt, receiver of the property of the Toledo, St. Louis & Kansas City Railroad Company, upon the filing with him of a certified copy of this order and the exhibition to him of the following deeds (or certified copies thereof), viz.:

First. Frank Shaffer and Merrill Moores, as Special Masters to Toledo, St. Louis & Western Railroad Company.

Second. Frank H. Shaffer and Merrill Moores as Special Masters to Toledo & East St. Louis Railroad Company; and

Third. Toledo & East St. Louis Railroad Company to Toledo, St. Louis & Western Railroad Company, each of said deeds to be substantially the same in form as the form of deed annexed to the said petition of Toledo, St. Louis & Western Railroad Company, and on the 1st day of August, 1900, surrender and deliver to the Toledo, St. Louis & Western Railroad Company, or its duly authorized representative, all and singular the line of railroad, property, rights, privileges and franchises formerly belonging to the Toledo, St. Louis and Kansas City Railroad Company, and purchased, acquired and now owned by said Toledo, St. Louis & Western Railroad Company.

It is further ordered and decreed, that the transactions and accounts of the said receivership be closed as of midnight, July 31st, 1900, and that the receiver file his accounts and reports of his transactions with all convenient speed thereafter.

It is further ordered and decreed, that the said petitioner, the Toledo, St. Louis & Western Railroad Company, be, and it hereby is, made a party to this cause, as the successor in right and obligation to Morton S. Paton and Richard B. Hartshorne, purchasers, and of James N. Wallace, as their assignee, and that the petitioner be bound by all the proceedings taken herein since the seventeenth day of April, 1900, including the order of confirmation of sale made on said last named date.

It is further ordered and decreed, that said James N. Wallace, be and he hereby is, dismissed from the record as such purchaser and assignee, and discharged from all obligations incurred by him on account of the purchase by said Paton and Hartshorne, of said railroad, equipment, franchises and property, constituting the mortgaged premises, and on account of the assignment by said Paton and Hartshorne to said Wallace of their said bid and the assumption by him of the rights and obligations of said purchasers.

It is further ordered and decreed, that there be paid, out of the funds in the registry of this court, the costs of this case to date, taxes at \$——.

It is further ordered and decreed, that there be allowed as compensation to Samuel Hunt, the receiver, for his services, herein, the sum of twelve thousand dollars, in addition to the compensation heretofore paid to, and drawn by, the receiver, and that said sum be paid out of any funds in the custody of the receiver, or out of any moneys in the registry of the court.

It is further ordered and decreed, that there be allowed to Clarence Brown, counsel for the receiver herein, for his services in that behalf, the sum of \$4,000.00, in addition to the compensation heretofore paid to and drawn by said counsel, and that said sum be paid, in like manner, out of any funds in the custody of the receiver, or out of any moneys in the registry of the court; but such sum shall not be paid without a further order of court unless within thirty days from the entry hereof, the purchasers of the mortgaged premises, or the Toledo, St. Louis & Western Railroad Company, substituted for the purchasers herein, shall file with the receiver or the clerk of this court its consent to payment of the sum allowed.

It is further ordered, adjudged and decreed, that the termination of said receivership and the surrender of possession of the mortgaged premises to said Toledo, St. Louis & West-

ern Railroad Company, as assignee of the purchaser herein, shall be without prejudice to the valid obligations of the receiver, which are assumed by the purchaser, and without prejudice to the rights of any creditor of the receivership, who has heretofore filed or who may hereafter, within such time as may be fixed by the court, file intervening petitions herein upon claims which have been or shall be adjudged to be prior in right to the lien of the first mortgage bonds; the court reserving the right to retake and resell the mortgaged premises for the payment of such valid and adjudged prior obligations of the receivership, in the manner provided in the decree of foreclosure and sale heretofore entered herein.

(1) This order was made in the case of Continental Trust Co. v. Toledo, St. Louis & Kansas City Ry., pending in the circuit (now district) court of the United States for the northern district of Ohio.

No. 716.

**Decree Confirming Master's Sale and Ordering Conveyance
and Possession of a Railroad Property.(1)**

District Court of the United States, Western District of
Tennessee, Western Division.

| | |
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| The Farmers' Loan & Trust Company | } In Equity. |
| <i>vs.</i> | |
| The Memphis & Charleston Railroad | |
| Company, The Central Trust | |
| Company of New York, and Samuel Thomas. | |

Now on this 26th day of February, 1898, come again the parties by their respective solicitors, and comes the Southern

Railway Company, and come also the purchasers, and their petition that the report of Louis B. McFarland, Esq., the Special Master, heretofore filed herein on February 26, 1898, should be approved, and that the sale to the said purchasers, pursuant to the decree of foreclosure, heretofore entered herein on March 2, 1897, and to the decree supplemental thereto, entered herein on November 24, 1897, pursuant to the mandate of the Circuit Court of Appeals for the Sixth Circuit, of the railroad, property, rights, assets and franchises of the Memphis & Charleston Railroad Company, briefly described in said decree of foreclosure and sale, and in the notice of sale, should be confirmed and made absolute, came on to be heard;

And it appearing by the report of said Special Master, so filed as aforesaid, that he has fully complied with the directions in said decree of foreclosure, and in said supplemental decree, as to the sale of said railroad, property, rights, assets and franchises, and that such purchasers have fully complied with the directions of said decree of foreclosure, and of said supplemental decree, as to the sale of the said property; and that such purchasers were the highest, best, and accepted bidders for such railroad, property, rights, assets and franchises, sold as an entirety as provided in said decree, and in said supplemental decree, and that the same were struck off to the said purchasers for the sum of two million five hundred thousand dollars (\$2,500,000), subject, however, as recited in said decree of foreclosure, and in said supplemental decree, to a certain statutory lien in favor of the state of Tennessee and to two certain mortgages, as set forth in said decree of foreclosure, and said supplemental decree, and upon the condition that, to the extent that the assets, or the proceeds of assets, in the receivers' hands should be insufficient, such purchasers, or their successors or assigns, should pay, satisfy and discharge (a) any unpaid compensation which should be allowed by the court to the receivers; (b) any unpaid indebtedness

and obligations or liabilities which were duly contracted or incurred by the receivers before delivery of possession of the property sold; and (c) also any unpaid indebtedness or liability contracted or incurred by said the Memphis & Charleston Railroad Company in the operation of its railroad, which is prior in lien or superior in equity to the consolidated first mortgage of August 20, 1877, except such as has been paid and satisfied out of the income of the property in the hands of the receivers, or out of such other assets upon the court adjudging the same to be prior in lien or superior in equity to said mortgage, and directing the payment thereof, no obligation, nevertheless, being imposed upon, or being required to be assumed by, the said purchasers, their successors or assigns, to pay or discharge either the said statutory lien, or the said first mortgage bonds, or the said second mortgage bonds, of the Memphis & Charleston Railroad Company, hereinbefore referred to, and subject to which the property was sold, and subject also to all and singular the terms, conditions, reservations and obligations in said decree of foreclosure, and in said supplemental decree, set forth; and it also appearing that the said purchasers have made the payments thus far obligatory upon them;

And it further appearing to the court by the said petition, that besides the cash payment made by the said purchasers, they, being the lawful holders of 2,257 of the consolidated first mortgage bonds of said the Memphis & Charleston Railroad Company, for the principal sum of \$1,000 each, with all unpaid coupons thereon, out of a total issue of 2,264, of such consolidated first mortgage bonds, have deposited with said Special Master the certificate of the Guaranty Trust Company of New York, that it holds the said 2,257 of such consolidated first mortgage bonds, subject to the order of the Special Master, and entitling him or his successor, on surrender thereof, to receive the same, to be canceled or credited, as provided in the said original decree of foreclosure and sale,

and in said supplemental decree, heretofore entered herein, for and on account of the said bid for the said property, rights, assets and franchises, mentioned in the said decree, and in said supplemental decree, and sold thereunder as aforesaid;

And it being shown to the satisfaction of the court that the recitals in the said report of the Special Master, and in said petition of the purchasers, are true, and no sufficient cause being shown against the report of the said Special Master, or the granting of the petition of the said purchasers.

Now, on motion of Messrs. Estes & Fentress, solicitors for the complainant, the Farmers' Loan & Trust Company, and of Francis L. Stetson, Esq., of counsel for the purchasers, the Central Trust Company of New York, appearing by Adrian H. Joline, Esq., as its counsel, Samuel Thomas, by W. A. Henderson, Esq., as his counsel, and the Southern Railway Company, by Francis L. Stetson, as its counsel, and all consenting that the said motion for the confirmation of said sale and of the said report of said Special Master made thereon, may be now heard and determined, and all questions thereunder adjudicated, it is hereby

Ordered, adjudged and decreed as follows, to wit:

That the said report of the Special Master be spread at large upon the record, and in all things be approved, and that the sale made by said Special Master to the said purchasers, as joint tenants and not as tenants in common, of all and singular the railroad, equipments, property, rights, assets and franchises of the Memphis & Charleston Railroad Company, as described in and by the said decree of foreclosure, entered in this cause on March 2, 1897, and in and by the said supplemental decree, entered herein on November 24, 1897, at and for the sum of two million five hundred thousand dollars (\$2,500,000) by them bid, be, and the same hereby is, in all things ratified, approved, confirmed and made absolute, subject, however, to all the terms and conditions of said decree,

and of said supplemental decree; and subject, also, to all and singular the conditions of purchase, as recited in said decree of foreclosure, and in said supplemental decree; and the purchasers agreeing to take the property, so sold as aforesaid, subject to the performance by them, or by their successors or assigns, of all pending contracts in respect thereof, theretofore, lawfully made by the receivers; the said purchasers, and their successors or assigns, having, nevertheless, the right, within ninety days after the completion of the sale and delivery of the deed, as hereinafter provided, to elect whether or not to assume or adopt any lease or contract sold with the railroad and other property and franchises, neither they, nor their successors nor assigns, to be held to have assumed or adopted any of said contracts, or leases, which they shall so elect not to assume or adopt. And this court expressly reserves, for future adjudication, with power thereby to bind the property sold, all liens, claims and equities specified in and reserved by the said final decree of foreclosure, and said supplemental decree, so as aforesaid entered on March 2, 1897, and on November 24, 1897, respectively.

And it further appearing to the court that the purchase of said railroad, property, rights, assets and franchises by said purchasers, was for the purpose and with the intent of having the title of all the said railroad, property, rights, assets and franchises vested in, and held by, the Southern Railway Company, a corporation created and existing under the laws of the state of Virginia, by an Act of Assembly, approved February 20, 1894, as to all said railroad, real estate and franchises, within the states of Tennessee and Alabama, and also as to all equipment, chattels and choses in action sold, wherever situate, said corporation having complied with all conditions of law precedent to the transaction of business within the said states; and vested in and held by the Memphis & Charleston Railway Company, a corporation to be organized by that name in the state of Mississippi, as to all of the rail-

road, real estate and franchises, within the state of Mississippi.

And it further appearing that the said purchasers have declared that such purchase was made by them for the use, benefit and behoof of the Southern Railway Company, its successors and assigns, as to all such railroad, real estate and franchises, within the states of Tennessee and Alabama, and also as to all said equipment, chattels and choses in action, wheresoever situate; and for the use, benefit and behoof of a corporation, its successors and assigns, to be organized under the laws of the state of Mississippi under the name of Memphis & Charleston Railway Company, as to all of said railroad, real estate and franchises, within the state of Mississippi; and that said purchasers have requested that all such railroad, real estate and franchises, within the states of Tennessee and Alabama, and all said equipment, chattels and choses in action, wherever situate, may be conveyed and assigned to, and vested in, said Southern Railway Company, its successors and assigns; and that all such railroad, real estate and franchises within the state of Mississippi may be conveyed and assigned to, and vested in, themselves or their successor, the Memphis & Charleston Railway Company, its successors and assigns; so that, upon the execution and delivery of such conveyance, said Southern Railway Company, its successors and assigns, and said purchasers or their successor, the Memphis & Charleston Railway Company, its successors and assigns, severally and respectively, shall have, possess and be invested with, all the estate, right, title and interest in and to such railroad and all other property, with their appurtenances, and all the franchises, rights and privileges, described in and sold under the said final decree of foreclosure and sale, and said supplemental decree, of this court, as stated in said report of sale; and that this court will accept said Southern Railway Company as the purchaser, in its corporate name and behalf, of all the said railroad, real estate and franchises, within the states of Tennessee and Alabama, and also of all equipment,

chattels and choses in action sold under said decrees, wherever situate; and that it will accept said Memphis & Charleston Railway Company, when organized, its successors and assigns, as the purchaser, in its corporate name and behalf, of all of the railroad, real estate and franchises, within the state of Mississippi, so sold under said decree and said supplemental decree; and that such corporations, severally and respectively, shall be obliged to complete the said bid and pay for all such property the balance remaining of such accepted bid, and in all other respects to comply with the orders or decrees now, or to be hereafter, entered obligatory on such purchasers; and it is further

Ordered, adjudged and decreed that the said sale, so reported by said Special Master, and the purchase of the railroad, property, rights, assets and franchises by said purchasers, shall be, and the same hereby is confirmed.

And the court further reserves full power from time to time to enter orders binding upon the said Southern Railway Company, as purchaser, requiring it and its successors or assigns, to pay, satisfy and discharge (a) any unpaid compensation which shall be allowed by the court to the receivers; (b) any unpaid indebtedness and obligations or liabilities which shall have been duly contracted or incurred by the receivers before delivery of possession of the property sold; and (c) also any unpaid indebtedness or liabilities contracted or incurred by said the Memphis & Charleston Railroad Company in the operation of its railroad, which is prior in lien or superior in equity to such consolidated first mortgage of August 20, 1877, except such as shall be paid and satisfied out of the income of the property in the hands of the receivers or out of such other assets, upon the court adjudging the same to be prior in lien or superior in equity to said mortgage, and directing the payment thereof; all payments for any such purpose, made by the purchasers, or their successors or assigns, in advance of the final accounting and discharge of the

receivers, to be treated as advances, and subject to final adjustment upon such accounting; and to pay into the registry of this court all such sums as have been ordered or may be ordered by this court for the payment of said claims and liabilities, which are entitled to preference in payment out of the proceeds of sale prior to the bonds secured by said consolidated first mortgage of the Memphis & Charleston Railroad Company; provided, however, that upon publication by the Special Master, when ordered by the court, as provided in said decree, of a notice, requiring holders of any claims to present the same for allowance, any such claims, which shall not be so presented or filed within the period of six months after the first publication of such notice, shall not be enforceable against the property sold, or against the purchasers, or their successors or assigns, and also to pay such sums in cash as may be required in order to pay all costs and expenses of the sale, the compensations of the Special Master, and all charges, compensations, allowances and disbursements, payable out of the purchase price bid for the premises, as the same shall be fixed and allowed by the court, and also such sums of cash, as shall be payable out of the net proceeds of sale in respect of each of the seven outstanding consolidated first mortgage bonds, with all unpaid coupons thereon, if and when payment thereof shall hereafter be adjudged by the court.

But no obligation, however, is imposed upon, or required to be assumed by, the purchasers, or by their successors or assigns, to pay or discharge either the said statutory lien, or the said first mortgage bonds, or the said second mortgage bonds, of the Memphis & Charleston Railroad Company, hereinbefore referred to, and subject to which the property was sold; and it is further

Ordered, adjudged and decreed that the said Special Master be, and hereby is, authorized and directed, on or after the 26th day of February, 1898, to sign, seal, execute, acknowledge and deliver a deed or deeds of conveyance to the South-

ern Railway Company, conveying to it, its successors or assigns, forever, subject to the terms and conditions of said decrees, and of this decree, all and singular the said railroad, real estate and franchises, within the states of Tennessee and Alabama, and also all estate, equipment, personal property and choses in action wherever situate; including also all income, proceeds of income, bills and accounts receivable, cash and other property, received by the said receivers, and all causes of action, and judgments, by them acquired or obtained in the management or operation of the said mortgaged premises, to be embraced in the conveyance thereof or pertaining thereto; and also any and all property of the said Railroad Company, appurtenant to the premises and required for use in connection with or for the purpose of said railroad or the business of said railroad company and vested in or standing in the name of the said receivers, or to which the said receivers in any manner have acquired title; and a deed or deeds of conveyance to the purchasers, or to their successor, the Memphis & Charleston Railway Company, conveying to them, or to it, their or its successors or assigns, forever, subject to the same conditions, all and singular the railroad, real estate and franchises, within the state of Mississippi, so as aforesaid sold under the said decree, and said supplemental decree, of this court, free from any and all equity of redemption of the said the Memphis & Charleston Railroad Company, or any one claiming by, under or through it except the said statutory lien, and the said two prior mortgages, recited in such decree, and supplemental decree; together with all the corporate estate, equity of redemption, rights, privileges, immunities and franchises of said the Memphis & Charleston Railroad Company, and all the tolls, fares, freights, rents, income, issues and profits of the said railroads, and all interest and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, at any time owned or acquired by, and now in the posses-

sion of, said the Memphis & Charleston Railroad Company, or the receivers thereof; the form of said conveyance being now submitted to and approved by this court, and filed herewith.

In order to facilitate the recording thereof, several counterparts of such deed, or deeds, may be executed, acknowledged and delivered by the Special Master, all or any one or more of which may be recorded, and any one or more of such counterparts, when executed, acknowledged and delivered, severally or collectively, shall be deemed to be an original, and for all intents and purposes constitute a single instrument.

On March 1, 1898, or as soon thereafter as practicable, on exhibition of any such deed, or deeds, executed and delivered by the Special Master, as herein ordered, and upon the request of the grantees thereunder, or upon the several requests of the said Southern Railway Company, or of the purchasers, or of said Memphis & Charleston Railway Company, when organized, the receivers of this court are authorized, directed and required to let the said Southern Railway Company and the said purchasers, or the said Memphis & Charleston Railway Company, severally and respectively, its or their successors or assigns, into the possession of the premises therein conveyed; and the receivers, or any party in the cause having possession thereof, shall deliver over to the said Southern Railway Company, and to the said purchasers, or to their successor, the Memphis & Charleston Railway Company, severally and respectively, their or its successors or assigns, the possession of all and singular the railroad and property, described in and conveyed to them, respectively, by such deed or deeds, and sold as aforesaid, and to the Southern Railway Company all income, proceeds of income, bills and accounts receivable, cash and other property received by the receivers, and all causes of action, and judgments, by them acquired or obtained in the management or operation of the mortgaged premises, to be embraced in such conveyance thereof or per-

taining thereto; and also any and all property of the said railroad company, appurtenant to the premises and required for use in connection with or for the purposes of said railroad or the business of said railroad company, invested in or standing in the name of the said receivers, or to which the said receivers in any manner shall have acquired title; and it is further

Ordered, adjudged and decreed that by way of further assurance and confirmation of title to such Southern Railway and to such Memphis & Charleston Railway Company, severally and respectively, the receivers of this court, and also the Memphis & Charleston Railroad Company, by its proper officers and under its corporate seal, and the Farmers' Loan & Trust Company, trustee, shall, under the direction of the Special Master, upon request of said Southern Railway Company, and of the said purchasers, or of their successor, the said Memphis & Charleston Railway Company, severally and respectively, sign, seal, execute, acknowledge and deliver to said two corporations, severally and respectively, all proper deeds of conveyance, transfer, release and further assurance, of all and singular the mortgaged property and premises, and every part and parcel thereof, of every kind and description and wherever situate, so as aforesaid sold under the said decree, and said supplemental decree, of this court, and embraced in the deed of the Special Master, so as fully and completely to transfer to, and to vest, severally and respectively, in the Southern Railway Company and in the Memphis & Charleston Railway Company, when organized, and their successors and assigns, the full legal and equitable title, as above provided, to such railroad, property, rights, assets and franchises, sold or intended to be sold under the decree and supplemental decree of this court.

The Special Master shall keep on deposit to his order with the Guaranty Trust Company of New York all of the said 2,257 consolidated first mortgage bonds, with all unpaid cou-

pons thereon, so that the same may be stamped with the credit or the payment on account thereof upon the bid of such purchasers, after the amount thereof shall be adjudged by this court; such bonds and coupons thereafter to be returned to the said purchasers, their successors or assigns.

The court reserves full power, notwithstanding such conveyance and delivery of possession, to retake and resell the property this day confirmed, if the purchasers, or their successors or assigns, shall fail or neglect fully to complete such purchase and to comply with the orders of the court in respect to full payment and performance of said bid, or to pay into court, in accordance with such decree, of sale and supplemental decree, all such sums of money hereafter ordered by the court to be paid into its registry to discharge any and all such debts, liens or claims, as it may adjudge and decree should be paid out of the proceeds of sale in preference to the bonds secured by the mortgage of the Memphis & Charleston Railroad Company herein foreclosed. All payments for any such purpose made by the purchasers, or their successors or assigns, in advance of the final accounting and discharge of the receivers, shall be treated as advances, and subject to final adjustment upon such accounting.

The Spezial Master shall deposit, subject to the order of this court, any cash paid to him by the purchasers, their successors or assigns, in the registry of this court at Memphis, Tennessee, to abide the further order of the court herein, and shall deposit all bonds and attached coupons, received by him or paid over to him by the purchasers, their successors or assigns, with the Guaranty Trust Company of New York, so that the same may be stamped with the credit or payment on account thereof upon such bid, after the amount thereof shall be adjudged by the court, such bonds and coupons thereafter to be returned to the said purchasers, their successors or assigns; and it is further

Ordered, adjudged and decreed by the court that all of the

right, title and interest of the Memphis & Charleston Railroad Company, and of all the other parties to this cause, in and to the property reported as sold by the special master to the said purchasers, be, and the same hereby is, divested out of the Memphis & Charleston Railroad Company, and out of all of the other parties to this cause, excepting the Southern Railway Company; and that all of the railroad, real estate and franchises within the states of Tennessee and Alabama, and also all of the equipment, chattels and choses in action, so sold as aforesaid, wherever situate, be, and hereby the same are, vested in the Southern Railway Company, its successors and assigns; and that all of the railroad, real estate and franchises within the state of Mississippi be, and hereby the same is, vested in the said purchasers and in their successor, the Memphis & Charleston Railway Company, a corporation of Mississippi, when organized, its successors and assigns; and upon the application of the Southern Railway Company, its successors or assigns, and of the purchasers, or of the said Memphis & Charleston Railway Company, or its successors or assigns, or of any of them, the clerk of this court will furnish to the applicant certified copies of this decree, for registration as a muniment of title.

(1) This decree was entered in the case of *The Farmers' Loan & Trust Co. v. Memphis & Charleston R. Co.*, in the circuit (now district) court of the United States for the western district of Tennessee.

Decree of confirmation may be made in vacation. *Central Trust Co. v. Sheffield, etc., Ry. Co.*, 60 Fed. 9.

No. 717.

Decree Quieting Title.

*[Caption.]*¹

This cause came on for hearing this 6th day of April, 1899, before the Honorable C. D., judge, presiding, and was heard upon the bill, answers, exhibits, agreements of parties.

proof in the cause and arguments of counsel, and it appearing that the bill was filed to remove a cloud upon plaintiff's title to the west one-half (1-2) of the south one-half (1-2) of lot No. fifty-two (52), and the west one-half (1-2) of the north forty-five (45) feet of lot No. fifty-four (54) on Chestnut street, in the city of —, — county, —, which cloud was caused by the recovery by defendants of a judgment against A. J. and G. W., the former owners of said real estate, in the Chancery Court of —, —, issuance of an execution upon said judgment, the levy of same by the sheriff of — county, —, upon the aforesaid real estate, a sale of the same by the sheriff, at which sale defendants, J. M. and R. M., became the purchasers, and on the — day of —, a deed was executed to them by the sheriff of — county, —, and is of record in the register's office of — county, —, in Book "N," Volume "6," page 428, *et seq.*, and because it appears to the court that at no time since the recovery of defendants' said judgment, have the said A. J. and G. W., been seized with a beneficial interest in said real estate, but that the same is now the property of plaintiffs, who are entitled to the relief prayed for in their bill, it is therefore ordered, adjudged and decreed that plaintiffs are entitled to have the cloud caused by the execution and registration of the deed aforesaid removed from their title and the said defendants and their privies in estate or blood are hereby perpetually enjoined from setting up title to said real estate by reason and sale by the sheriff of said — county, and the purchase at said sale by defendants, J. M. and R. M.; or by reason of the execution to them by the sheriff of — county of the said deed of July 25, 1898, and registration of same; the court being of the opinion and so decrees that said defendants took nothing by said deed, but that said sale was invalid and void.

The plaintiffs will be entitled to a copy of this decree as a

muniment of title upon the payment by them to the clerk of his fees for a certified copy.

The defendants will pay all the costs of the cause for which an execution will issue.

No. 718.

**Decree Subjecting Absent Defendant's Property to
Payment of Judgment.**

[*Caption.*]

This cause came on to be heard on the — day of —, 1894, on the bill of complaint and testimony, [*or as may be*] the said defendants being represented by counsel. Upon the hearing of the case the court thereupon finds that all of the defendants have been duly notified of the pendency and prayer of the bill, and have failed to answer the same; and the court further finds from the testimony that the defendant, E. F., has in his possession and belonging to C. D. a large sum of money; that the said plaintiff is entitled to have sufficient of the said money applied to the payment of the judgment and costs fully described in his bill in this cause, subject to any claim which may have been set in any suit in other courts prior to the filing of the bill in this cause; and that there is now due to the said plaintiff, on the said judgment and costs, the sum of — dollars, which, with interest — dollars, and clerk's additional costs in said cause, to wit, — dollars, makes a total of — dollars due the said plaintiff.

It is therefore ordered, adjudged, and decreed that the said defendant, E. F., pay into the registry of this court the said sum of — dollars, and in addition thereto the costs in this cause, taxed at — dollars, the sum so paid to be credited on any sum which may be found due from him to the said C. D., or to the defendant, G. H., and that the said C. D. and G. H. be forever enjoined from collecting the amount so paid by said E. F. from said E. F., or from re-

fusing to credit the said sum upon any amount which may be found due from the said E. F. to the said C. D., as aforesaid, provided, however, that this decree shall not interfere with the payment to any other creditor of the said C. D., who has brought suit to subject the same, prior to the filing of the bill in this cause.

No. 719.

Order of Distribution.

[*Caption.*]

On motion of R. X., counsel for the plaintiff, and it appearing to the court that in accordance with a decree heretofore entered, the defendant, E. F., has paid into the registry of this court the sum of — dollars in obedience thereto, and the court proceeding to distribute the same, orders and directs that after the payment of the following sums, to-wit [*set forth the items*], that the sum of — dollars shall be paid to the plaintiff, A. B.

And it is further ordered that the sum of — dollars be duly credited on the judgment and costs in the case of A. B. vs. C. D., No. —, in the district court of the United States for the — district of —, in full satisfaction of the same.

No. 720.

Decree Awarding Perpetual Injunction Restraining Municipality from Interfering with Telephone Company.

[*Caption.*]

This cause came on to be heard on this — day of —, A. D. —, before the Hon. D. C., holding the district court of the United States for the — district of —, — division, upon the pleadings and proof on file, including all ex-

hibits to the pleadings and depositions, and all stipulations and argument of counsel therein.

From the consideration of all of which the court is of the opinion, and doth adjudge and decree, as follows:

First. That the matter in dispute in this cause, exclusive of interest and costs, exceeds the sum or value of \$2,-
000.00.

Second. That the complainant, A. B. Telephone Company, is vested with the right of maintaining and operating a telephone system or telephone exchange on or over the streets, avenues, alleys and squares of the city of —, and has the right to go upon and use said streets, avenues, alleys and squares not only for the purpose of maintaining its long distance toll line, but also for the purpose of constructing, maintaining and using a local telephone exchange, and is entitled to the injunctive relief prayed for in the bill.

Third. That the preliminary injunction granted on May —, be made perpetual, and the defendant board of mayor and aldermen of the town of —, their agents, marshals, police, servants and attorneys, and each of them be, and they hereby are, perpetually enjoined and restrained from interfering with complainant, its officers, agents or employes in erecting poles, stringing wires or cables, or placing telephone instruments, either for the purpose of repairs, or to make connections with new subscribers, within the corporate limits of said city of —, or from interfering with complainant in the construction, maintenance or operation of its toll lines or telephone exchange in the said city of —.

Fourth. That the defendant, board of mayor and aldermen of the city of —, pay all the costs of this cause, for which execution will issue.

No. 721.**Decree Confirming Sale Ordering Deed and Writ of Possession.**

[*Caption.*]

This cause came on to be heard on the report of the Special Master of sale, made pursuant to order of —— day of ——, and said report of sale being unexcepted to, is in all things confirmed.

It is therefore ordered, adjudged and decreed by the court that all the right, title, interest and claim of the complainants and the defendant in and to the real estate, personal property, rights, privileges and franchises sold by the Special Master, be and the same is divested out of the complainants and defendants, and each of them, and that the same be vested in the purchaser, W. W., trustee, his heirs and assigns, forever, in fee simple.

And it appearing to the court that the purchaser has paid the purchase price and the cost of the cause and expenses of the sale, the Special Master is directed to make the purchaser a deed in accordance with this decree, and if necessary, writ of possession will issue to put the purchaser in possession.

STIPULATIONS.**Miscellaneous.****No. 722.****Stipulation Concerning Facts, Procedure, Costs, etc.****[Caption.]**

Mr. Gordon, for the plaintiff, introduced the following agreement:

"In this cause, for the purpose of this suit, the parties hereto agree upon the following facts, evidence of which, except this agreement, need not be made further upon the trial:

"1. Complainant and defendant are citizens of different states, and are corporations, as shown and alleged in the complaint.

"2. A written instrument in words and figures as set out in subdivision II of the complaint was executed in duplicate by the parties to this suit, one copy being in possession at the present time of each of the parties, and the copy of said instrument as set out in said subdivision of said complaint is a true and correct copy thereof.

"3. The land mentioned and described in said contract consists of the land described in said subdivision III of the complaint, and any other land or leases of complainant in the Vinton oil field in Louisiana.

"4. The letters copied in subdivision IV of the complaint were written and received by the respective parties on the day of their dates.

"5. It was the intention and effect of the Sun Company's letter, above referred to, to exercise its option to extend the purchase contract for the additional two years' period; and it was the intention and effect of the Vinton Petroleum Company's letter to recognize and confirm such extension. This is without prejudice to either party's contention as to price.

"6. During the ten days succeeding immediately December 24, 1914, there was in existence an oil purchase contract between the Sun Company, as purchaser, and the Gum Cove Oil Company, as seller, said contract having been entered into December 5, 1913, and extending for a period of two years, and provided a maximum daily purchase of eight hundred barrels, the price provided in said contract being one dollar per barrel. No payments under said contract were made by the Sun Company during the ten days immediately succeeding December 24, 1914; such payments, however, were made on dates prior and on dates subsequent to said ten days; the oil being taken by the Sun Company during said ten days under this contract was oil produced by the seller from its holdings in the Vinton oil field and of similar character and kind to that produced by the Vinton Petroleum Company, and said contract and the contract price evidenced thereby was made in good faith by the parties.

"7. It is agreed that this suit shall, so far as a money judgment is concerned, involve only the oil produced by the Vinton Petroleum Company under said extended contract, during the period beginning December 25, 1914, and ending March 31, 1915, and the parties shall make such amendment of pleading as may be necessary to carry this provision into effect. The amount of oil belonging to the Vinton Petroleum Company and so produced and tendered by it and received by the Sun Company under said extension of said contract during said period, December 25, 1914, to March 31, 1915, both inclusive, is 134,919.91 barrels. The amount of money advanced by the Sun Company to the Vinton Petroleum Company, in the same period by reason of said oil, is sixty-five thousand, eight hundred and twenty-three and $21/100$ (\$65,823.21) dollars. Should the court find from its decision as to the correct contract price that the said Sun Company is due for said oil an amount in excess of the amount of money above named, the Vinton Petroleum Company shall be entitled to a judgment for said ex-

cess. On the other hand, should the amount the Sun Company should pay for said oil be found by the court to be less than the amount advanced, as above stated, judgment shall be for the Sun Company for the amount of the excess advanced by it. It is agreed that the amount of said advancement, as above stated, was agreed upon without any reference whatever to the question as to what the correct contract price should be, and shall not be construed as evidence of having any bearing upon the question of the correct contract price.

"8. It is further agreed that the cost of the trial court in this cause shall be borne equally by the two parties regardless of the judgment.

"9. It is agreed that either party may, subject to the rulings of the court, present testimony orally upon the hearing of this cause.

"10. This agreement, subject to all legal objections as to admissibility, materiality and relevance, etc., may be introduced in evidence as a whole or by paragraphs by either party, and its introduction shall relieve both parties of the necessity of making further proof upon any of the matters herein agreed to and so introduced; said agreement being made for the purpose of expediting the trial of the cause and confining the issues as much as possible to the good faith matters in dispute between the parties.

"Executed in duplicate April 10, 1915."

(Signed by Attorneys for Parties.)

No. 723.

Stipulation Concerning Facts but Limiting Their Use.

[Caption.]

For the purposes of the trial of this action, but not for any accounting ordered thereon, it is hereby stipulated that the defendant may offer in evidence the following statements of fact subject to the same objections which the plain-

tiff might have urged if proof of said facts had been offered in the ordinary manner; that if the defendant shall offer in evidence any part of this stipulation on the trial of this action, plaintiff shall be at liberty to offer in evidence any other part subject to the like objections on the part of the defendant.

It being expressly understood, however, that the plaintiff is not entitled to offer in evidence the stipulation or any part thereof on the trial of this action until and unless the defendant shall have offered in evidence the whole or any part thereof. Either party may offer other and further evidence with respect to any of the matters, but not in contradiction thereof.

The making of this stipulation is without prejudice to any of the motion or objections made by either party in the action, and the mentioning of the endorsements on plaintiff's exhibit 1 is not and shall not be construed to be an admission on the part of defendant that any securities set forth in such endorsement come within the pleadings herein or the scope of this suit or that same are relevant, competent or admissible.

No. 724.

Stipulation Concerning Facts and Exhibits in Unfair Competition Case.

[Caption.]

1. It is stipulated by and between counsel for plaintiff and for defendant that the plaintiff, the Eisenstadt Manufacturing Company, is a corporation duly organized and existing under the laws of the state of Missouri, and having its principal place of business at the city of St. Louis in the said state; that the business of said corporation is the manufacture and sale of articles of jewelry.

2. It is further stipulated and agreed that the defendant, prior to the beginning of this action, and on or about May 1, 1915, first sold to wholesale dealers (jobbers) in various

localities in the United States links identical in size, construction and appearance with the sample link below attached, marked "Plaintiffs' Exhibit, Defendant Link," and the defendant so continued to sell links in all respects like the said sample from May 1, 1915, to the time of filing of the bill of complaint herein.

3. It is further stipulated and agreed that true photographic or lithographic copies of drawings, cuts and engravings or paper exhibits may be offered and used in evidence with the same force and effect as the originals, provided, however, that the proposed copies shall be first exhibited to the opposing counsel and approved by him as being true copies subject to all objections available against the said originals.

4. It is further stipulated and agreed that the ordinary printed patent office copies of specifications and drawings of the United States letters patent may be offered and used in evidence in this case by either party with the same force and effect as the originals of said letters patent, or duly certified copies thereof.

5. Subject to objection on the part of complainant that the same is irrelevant and immaterial to any issue in this cause, it is stipulated and agreed that the following is a true copy of a letter sent May 11, 1915, to defendant by John E. Stryker and received by defendant in due course, and that said Stryker was at that time acting for H. B. Pratt, referred to in the bill of complaint: [*Here follows letter.*]

And it is stipulated and agreed that the following is a true copy of a letter from A. and B., being then attorneys for defendant, in reply to said letter dated May 11, 1915, the letter having been received by said John E. Stryker in due course: [*Here follows letter.*]

6. Subject to objection on the part of complainant that the same is irrelevant and immaterial to any issue in this cause, it is stipulated and agreed that the following is a true copy of a letter sent June 10, 1915, to the defendant by F.

and H., and received by the defendant in due course, and that said F. and H. were at that time acting for complainant: [*Here follows letter.*]

And it is stipulated and agreed that the following is a true copy of a letter sent by defendant in reply to said letter of F. and H., and received by the latter in due course: [*Here follows letter.*]

7. Subject to objection on the part of complainant that the same is irrelevant and immaterial to any issue in this cause, it is stipulated and agreed that the annexed circular marked "Defendant's Exhibit B" is a true copy of circulars sent out by complainant by permission and under the authority of H. B. Pratt.

M. N.,

Solicitor and Counsel for Plaintiff.

O. P.,

Solicitor and Counsel for Defendant.

No. 725.

Stipulation for Continuance of Case.

[*Caption.*]

It is hereby stipulated and agreed by and between the complainant and Nellie M. Joyce, the only defendant who answered in the above entitled case, that said case be, and the same hereby is, continued from the July, 1914, term of the above entitled court to and until the January, 1915, term of said court.

A. B.,

Attorney for Complainant.

C. D.,

Attorney for Defendant, Nellie N. Joyce.

No. 726.

Stipulation for Change of Venue, Waiving Issuance of Subpoena, for Procedure, etc.

[*Caption.*]

Whereas, the parties have heretofore agreed and settled the form of the pleadings in the above entitled matter, but

at the time of such agreement it was intended that the venue of such cause should be laid in the United States district court for the fourth division of the district of Minnesota, and said pleadings were entered accordingly; and,

Whereas, it has been agreed that the venue of said cause shall be changed to the fifth division of said district;

Now, therefore, for the purposes last indicated and other purposes incident to the trial of said cause, it has been and hereby is mutually stipulated and agreed between the parties as follows:

First. That the venue of said cause in the pleadings heretofore prepared and agreed to as aforesaid shall be changed from the fourth to the fifth division of the district of Minnesota, and as so changed such pleadings shall be immediately filed in the last-named court.

Second. That on filing of the complainant's bill herein, defendant will forthwith cause its general appearance to be duly entered in said cause and court and its answer to said bill to be immediately filed therein, issuance of chancery subpoena to compel the appearance of the defendant being hereby expressly waived.

Third. That said cause shall be immediately assigned by the clerk of said court to the calendar of causes for trial and that the same shall be noted and set for hearing and trial on the 19th day of March, 1914, at 10 o'clock a. m. of that day, or as soon thereafter as counsel can be heard, at the government building in the city of Duluth, Minnesota.

Fourth. That the evidence in said cause shall be taken orally by the court in accordance with the provisions of rule 46 of the new equity rules of the supreme court of the United States for 1912, and the hearing and conduct of said cause shall be in all respects as provided by said rules for the hearing and trial of causes in equity generally regularly placed on the equity trial calendar for hearing.

Fifth. That the inventory of the property, the value whereof is in dispute in said cause, heretofore agreed upon, shall be, before the trial of said cause, identified by the sig-

natures of the respective parties or their solicitors and the same, so identified, filed with the record of said cause. That said inventory shall, for all purposes of the trial thereof, be held to embrace and include all of the property in dispute between the parties and that no claim shall be made on behalf of the complainant of any liability upon the part of the defendant herein to account for or pay the value of any property other than that inventoried as aforesaid.

Sixth. That the final decree rendered herein shall ascertain the amount in which the defendant shall account to and pay the complainant herein and that the complainant is entitled to a lien therefor on the premises described in the pleadings. That said decree may further provide, in the event the defendant shall fail to satisfy the same and account for and pay to complainant the amount therein adjudged and determined within the time to be fixed by said decree, that said lien may be foreclosed in the ordinary manner agreeably to the rules, practices and procedure of equity in similar cases.

(Signatures of Parties by Attorneys.)

No. 727.

Stipulation Amending Bill.

[Caption.]

It is hereby stipulated between the undersigned that paragraph 12 of the bill is hereby amended by changing the period at the end of the paragraph, on line 22, page 15, into a comma, and adding the following:

“such fare being less than a reasonable rate and less than the value of the service rendered.”

A. B.,

Solicitor for Plaintiff.

C. D.,

Solicitor for Defendant.

PROCEEDINGS BEFORE A MASTER.(1)

No. 728.

Motion for Appointment of Master to Report on Evidence.

[Caption.]

Now comes the plaintiff and moves the court to appoint a master in said cause to examine the testimony taken and to be taken therein, and to make therefrom a special finding of facts upon the issues joined between the parties, and to report the same and his conclusions of law thereon to the court, the ground of said motion being that said testimony is very voluminous, requiring much time for its consideration.

W. W., its Attorney.

(1) Equity Rules 59 to 68 relate to masters. The spirit of the new rules is made clear in the opening sentence of Rule 59, from which it appears that masters will no longer feature a case in equity.

No. 729.

Motion to Refer Intervention to Special Master.

[Caption.]

Now comes B. F., intervener, by counsel, and moves the honorable court that his petition of intervention filed in the papers of this cause be referred in all things to J. N., Esq., master in chancery, for his examination and report; and intervener with respect so prays.

D. H.,

Attorney for B. F.

No. 730.

Order Appointing Master to Report on Evidence.(1)

[Caption.]

On motion of the plaintiff for the appointment of a master in said cause, it is ordered that B. R., because of his experience in matters of accounting, be and he is hereby appointed special master in said cause to examine the record

and the evidence now on file or hereafter taken therein, and to make a special finding of fact on the issues joined between the parties and to report the same to the court and his conclusions of law thereon.

Done at chambers at the city of —, this — day of —, E. S., Judge.

(1) Clerks of district courts can not be appointed masters except for special cause named in the order. Act of March 3, 1879, 20 Stat. at 410, brought forward in Judicial Code, Sec. 68. See *Fischer v. Hayes*, 22 Fed. 92; *Briggs v. Neal*, 120 Fed. 224; *Quinton v. Neville*, 154 Fed. 432.

If the order does not assign special reason his acts are valid. *Northwestern Mut. Life Ins. Co. v. Seaman*, 80 Fed. 357; a. c. on appeal, 86 Fed. 493.

No. 731.

Order Appointing Special Master to Report on Strike.(1)

[Caption.]

In this cause it is ordered that B. R. be appointed Special Master to hear proof and report whether:

First. The strike complained of in the bill is over; and

Second. Whether there has been any settlement of this suit or the disputed matter involved so that the bill should now be dismissed, and if so, at whose costs.

(1) Note the language of Equity Rule 59, as to the appointment of masters.

No. 732.

Order Appointing Master to Determine Amount Due.

[Caption.]

This cause came on this day for orders, whereupon it was adjudged and decreed that it be referred to J. B. as Special Master, who will ascertain from the proof now on file and any that may be submitted:

First. The amount now due complainant by the defendants or either of them.

Second. The amount that the defendants have paid the complainant association and on what account.

Third. The amount of fee proper to be paid the complainants for services herein.

No. 733.

Stipulation as to Special Master.

[Caption.]

In this cause, counsel for both parties hereby agree and request that a special master be appointed immediately, to take the testimony and report the findings of fact and conclusions of law to the court; they further agree that an exceptional condition has arisen calling for the the appointment of such master; namely, that the District Judge is about to enter upon a term of jury trials, and cannot give personal attention to the hearing of testimony at this time.

(Date.)

A. B.,

Attorney for Complainant.

C. D.,

Attorney for Defendant.

No. 734.

Order Appointing Special Master.

[Caption.]

This cause coming on to be heard, upon motion of counsel for complainant—counsel for both parties having agreed thereto—it is hereby ordered that John F. A. Merrill, Esq., of Portland, within said District be, and he hereby is, appointed special master in this cause to take the testimony and report the findings of fact and conclusions of law to the Court, with all convenient speed, subject to exceptions according to the usual course of Chancery Practice.

This order is made upon a showing that an exceptional condition requires such order; namely, the cause is shown

to the court to require the immediate taking of testimony and prompt proceeding with the cause; and the District Judge is just entering upon a term of jury trials, and cannot give personal attention to the hearing of testimony at this time.

BY THE COURT,
JAMES A. HENLEY, Clerk.

No. 735.

**Order Appointing Special Master to Hear and Report on
Certain Claims.**

[Caption.]

Now on this day comes the St. Joseph Gas Company and files a claim against the Kaw Gas Company, Kansas Natural Gas Company and the receivers of the Kansas Natural Gas Company for damages for breach of contract.

It is ordered by the court that the said claim be and the same is referred to Mr. Wash Adams of Kansas City, Missouri, as special master to take the testimony, to make findings of fact, adopt conclusions of law, and report a proposed decree with reference thereto, which he will do with all deliberate speed, calling to his aid, if he deems advisable, a stenographer to the end that the testimony may be taken and transcribed and filed in lieu of depositions taken with all statutory formality.

And any and all other claims filed against the receivers herein will be, if filed within that prescribed time, without further order referred to him, the said Mr. Wash Adams, under like terms and conditions as hereinbefore set forth, the said special master to fix the time and place of hearing the same by notice through the United States mail to the parties or their attorneys having an interest in the said subject matter.

It is further ordered that the said St. Joseph Gas Company pay to the receivers of this court the balance of

\$2,565.03; that the same be paid forthwith to the receivers of this court, and that they, the said receivers, will deposit the same in one of the banks to be selected by them heretofore designated and said amount retained in said bank and in no event, until ordered by this court, transferred to the said receivers of Montgomery county, Kansas.

It is further ordered that the sum of \$19,414.87 paid by the said St. Joseph Gas Company to the receivers herein this January 30, 1914, be by the said receivers of this court retained by them in the First National Bank of Kansas City, Missouri, and be not transferred to the receivers of the state court of Montgomery county, Kansas.

R. X.,
Judge.

No. 736.

Order Appointing Master in Chancery Pro Hac Vice.

[Caption.]

Solicitors for the Complainant and the Defendant and Intervener in the above entitled cause, agreeing thereto, it is

Ordered, that Ben. H. Stone, Esquire, be, and he is hereby appointed Master in Chancery pro hac vice. Said Master is directed to proceed in conformity with the equity rules of the United States Supreme Court having relation thereto, to hear evidence and seasonably make his report thereon.

E. R. M.,
United States District Judge.

No. 737.

Oath of Special Master.

[Caption.]

I, C. G., having heretofore been appointed Special Master in the above-entitled cause, do solemnly swear that I will faithfully and impartially perform my duties as such mas-

ter, agreeable to the order of the court, to the best of my ability and understanding. So help me God. C. G.

Sworn to before me and signed in my presence this — day of —, 1894. B. R.,

Clerk of District Court of the United States
[Seal.] for the — district of —.

No. 738.

General Notice for Proceedings before Master.

To X. Y.,
Counsel for Plaintiff [*or, Defendant*].
[Caption.]

By virtue of an order of reference in the above-stated case I do hereby appoint to consider the matters thereby to me referred Saturday, the — day of —, at 10 o'clock a. m., at my office in the — building, —, at which time and place all parties concerned are to attend.

Dated, — day of —, 1894. C. G.,
Special Master.

No. 739.

Master's Warrant or Summons.(1)

District Court of the United States for the — District
of —.

A. B., Plaintiff, }
vs. } In Equity.
C. D., Defendant. }

To A. B. and C. D.:

In pursuance of the authority contained in a decretal order made in this cause by the Hon. J. W., District Judge, at a stated term of this court held at the United States Court House in the city of —, on the — day of —. A. D. —, I. B. R., one of the Masters of said court, do hereby summon you, A. B., complainant, and C. D., defend

ant, to appear before me, the said B. R., at my office at No. — Broadway, in the city of —, in the — District of —, on the — day of —, A. D. —, at 2 o'clock in the afternoon, to attend a hearing before me, the said Master, of the matters in reference in the said cause to be had by virtue of the decretal order aforesaid. And hereof fail not at your peril. B. R., Master.

Dated the — day of —.

Underwriting: To take the account in the suit.

B. R., Master.

(1) See Equity Rule 60.

No. 740.

Order to Master to Report Testimony.

[Caption.]

On motion of complainant, it is ordered that the Master heretofore appointed in said case do report the testimony taken on which his said report was made, and that this order take effect as of the date of the order appointing said Master. And the action of Master in heretofore filing said evidence is hereby affirmed.

No. 741.

Motion before Master for Order Requiring Defendant to Submit a Report in Accounting.

[Caption.]

Now come the complainants by their counsel, Mr. John W. Hill, and move the Master for an order requiring the defendant herein to prepare and file its report under the order of the court directing an accounting in said case, which report shall show in the form of debtor and creditor the following:

1. The accounts by months, beginning August 21, 1902, and continuing to February 18, 1913, setting forth the quantity of material in infringement of the Grant patent sued on, directly and indirectly manufactured and sold by the de-

fendant for domestic use only and the price received, clearly separating in the account the rubber, the channel and the wire, and as a debit against the same, all of the monthly expenses, including cost of material, the direct cost of manufacture and the overhead expense, itemizing or classifying the said overhead expense, showing in what class or for what purpose said expense was made, and extending balance of such monthly account for aid in totalling the same, and finally casting up the grand total of such monthly balances.

2. In the same manner an account showing the sales within the territory of the Northern District of Illinois alone.

3. In the same manner an account showing the sales to those, or in the territory of those, whom the defendant claims were licensees of the complainant, such, for example, as James D. Hurd, The Munford Rubber Tire Company, and all others whom the defendant claims were licensees, separating the account as to each of said licensees, that the master may consider them in making up his account.

4. In like manner an account of the manufacture and sales for export, that is, in foreign trade.

5. An account showing the total poundage and the amount received for the Grant tire for domestic use during the year beginning August 28, 1903, and ending August 27, 1904, during which time the defendant claims to have had a license from the complainants under said patent.

6. A similar report showing the total poundage and amount received for foreign trade.

7. Also a statement showing by semi-annual periods of January 1st and July 1st, the total volume of business done by the defendant, and the ratio of the business in the Grant tire therewith, and

8. The total overhead expense for the entire business of the defendant by semi-annual periods, as in No. 7, and showing how the overhead expense and the various amounts going to make up the same is apportioned to the business in the Grant tire.

No. 741a.**Order of the Master Thereon.**

[*Caption.*]

Paragraph 1 of the motion is overruled. It asks that the domestic and foreign business be separated and that monthly balances be furnished. As I understand it, it is not necessary for complainants in making out their case to segregate the foreign from the domestic business; that if such a segregation should necessarily be made, that the burden of doing so rests on the defendant. It appears from the record that the balances called for are not kept monthly on the books, and I am of the opinion that defendant should not be required to furnish balances monthly as it would entail a heavy expense and I am not able to say that it will be of material service to the complainants. Counsel for the complainants also states that he will be satisfied with semi-annual balances as they are kept on the books and waives that part of his motion which asks for monthly balances.

The Master orders that in lieu of the information asked in paragraph 1 of this motion that the defendant furnish as a part of its accounting an account in semi-annual periods corresponding with the books, beginning August 21, 1902, and continuing to February 18, 1913, setting forth the quantity of material in infringement of the Grant patent sued on, directly and indirectly manufactured and sold by the defendant, and the price received, clearly separating in the account the rubber, the channel and the wire, and as a debit against the same, all of the semi-annual expenses, including cost of material, the direct cost of manufacture and the overhead expenses, itemizing or classifying the said overhead expenses as they are itemized and classified on the books of the defendant, and showing in what class or for what purpose said expenses were made, and extending the balances of each semi-annual period for aid in totalling the same, and finally casting up the grand total of such semi-annual balances.

To which ruling of the Master in overruling paragraph 1 counsel for the complainants excepts.

To the order as above named counsel for defendant excepts.

Paragraph 2 will be overruled. The Master is of the opinion that if the profits are to be limited to those arising out of the business transacted wholly within the Northern District of Illinois, the burden is upon the defendant to establish that position and that it is not necessary that the complainants do so in making out their prima facie case on this accounting.

To which ruling of the Master counsel for the complainants excepts.

Paragraph 3 will be overruled. The Master is of the opinion that if anything should properly be deducted from the gross profits of the business on account of licenses or business with licensees, the defendant must assume the burden on this question and that it is not necessary for the complainants in their prima facie case to do so.

To which ruling of the Master counsel for the complainants excepts.

Paragraph 4 is overruled for reasons stated in reference to paragraph 1.

To which ruling of the Master counsel for the complainants excepts.

Paragraph 5 is overruled for the same reasons as paragraph 4.

To which ruling of the Master counsel for the complainants excepts.

Paragraph 6 is overruled for the same reasons as paragraph 4.

To which ruling of the Master counsel for the complainants excepts.

The Master sustains the motion as to paragraphs 7 and 8.

To which ruling counsel for the defendant excepts.

Further proceedings adjourned to October 29, 1913.

No. 742.**Affidavit of Defendant Showing Progress of Compiling Report
in Accounting before Master.****[Caption and Venue.]**

Guy E. Norwood, being duly sworn, deposes and says that he is Assistant Treasurer of The B. F. Goodrich Company, and pursuant to an order of the Master, dated Chicago, September 29, 1913, he undertook, on behalf of The B. F. Goodrich Company, immediately upon receiving a copy of said order, to prepare the information called for by the order. This work has since been continuously and diligently prosecuted, and as large a number of men have been employed upon this work as is consistent with the form and number of the records. The several departments dealing with said records have been called upon to lend their assistance in the preparation of this report, with the result that an average of four or five men have been working on it daily during the business hours since the order was received.

Deponent has also devoted a large part of his personal time to said work. The nature as well as the period covered by these records necessitate the employment of experienced men, familiar with those particular records.

Notwithstanding that the work has been prosecuted as above, the report is not yet in shape to present, nor is the deponent able, at this time, to present any part of the report. Deponent further states that this condition is entirely beyond his control and that he knows of no way of arriving at the final result other than by the method he is pursuing.

GUY E. NORWOOD.

Sworn to and subscribed this 24th day of Oct. A. D. 1913, before me, a Notary Public in and for said County and State.

EUGENE C. BARD,
Notary Public.

No. 743.**Stipulation for Taking Depositions in other Jurisdictions for
Use before Master in Accounting.**

[Caption.]

It is stipulated and agreed, by and between the parties hereto, the depositions may be taken and proofs put in, by either side, at Akron, Ohio, and New York, N. Y., before the Master, C. B. Morrison, Esq., with the same power, force and effect as though taken and offered in the Northern District of Illinois and all rulings, orders and directions of said Master, made in the taking of depositions and proofs at said Akron and New York, shall have the same force and effect as though made in the said Northern District of Illinois.

Further stipulated that in addition to the Master's compensation he shall also be paid the extra expenses incurred by him by reason of the taking of testimony in Akron and New York rather than at his office in Chicago, and such extra expenses shall be added to the compensation allowed to the Master and be treated in the taxing costs and otherwise as a part of the compensation of the Master.

No. 744.**Notice during Proceedings before Master of Motion in District Court for Order Requiring Witness before Master to Testify.**

Mr. Stapleton: Counsel for plaintiffs now give notice that they will appear before the United States District Judge at Cleveland in this District tomorrow morning at 10 o'clock and there request an order directing the witness to answer, and in default that he be punished for contempt of court; and this application will be made on affidavits disclosing the condition of affairs and the refusals of the witness to answer. In the meantime, we ask an adjournment until such time as we can get a ruling from the court.

The Master: I will adjourn until 2 o'clock tomorrow and if the court has not passed upon it by that time, I will then make a further adjournment.

No. 745.

Notice during Proceedings before Master of Motion in District Court for Order Requiring Production of Books before a Master.

Mr. Stapleton: We give notice on the record that we will bring this question of the refusal to produce the books in accordance with the order of the master before the District Judge of the Northern District of Ohio at his office in the postoffice building in the City of Cleveland, Ohio, on Monday, the 9th day of March, 1914, at the opening of the court on that day or as soon thereafter as counsel can be heard and ask for an order directing the production of the books and records called for and that in default of their production that defendant and its officers be punished for contempt of court.

No. 746.

Notice of Motion to Take Surrebuttal Testimony before Master in Accounting, and Objections to Motion.

Mr. Hibben: Counsel for defendant now gives notice on the record that promptly after the stenographic notes of this session are written out he will make a motion before the Master for leave to take surrebuttal proofs in answer to certain testimony of the witnesses Wechsler, Esquerre, Dennis and Seaman, and to the Exhibit Wechsler Statement, which testimony will be specially specified in the motion papers.

No. 747.**Motion to Take Surrebuttal Testimony before Master in Accounting.**

[Caption.]

Now comes the defendant by S. E. Hibben, its solicitor, and offers to prove, and moves the Master for leave to take surrebuttal proofs to prove, the following: (Enumerate.)

THE B. F. GOODRICH COMPANY,
By S. E. HIBBEN, its Solicitor.

No. 748.**Objections to the Above Motion.**

[Caption.]

Plaintiffs object to the granting of defendant's motion and protest against its being granted permission to take surrebuttal proofs as proposed in its motion upon the following grounds:—

1. That defendant has already closed its proofs and that the motion, if allowed, amounts to permitting defendant to reopen its case and would thus be unfair to plaintiffs.
2. That no grounds are stated as a basis for the motion or for permitting surrebuttal proofs.
3. That it does not appear that defendant cannot safely proceed to argument without the proofs proposed.
4. That there is no foundation laid and no reason given for the granting of the motion or for the introduction of the proposed proofs.
5. That the proposed surrebuttal proofs would not assist the master or the court in fathoming the intricacies, theories, or speculations involved in the third account, nor explain the contradictions between said third account and the first and second account, nor explain defendant's contradictory testimony respecting the correctness of all three accounts.

Plaintiffs protest against and object to the granting of the motion and to the introduction of the proofs proposed should the same be granted, specifically as follows: (Enumerate.)

CHARLES W. STAPLETON,
Solicitor for Plaintiffs.

No. 749.

**Interrogatories(1) for Examination of Witnesses before a
Master.**

[*Caption.*]

Interrogatories to be exhibited on the part of the said plaintiff for the examination of witnesses to be produced, sworn, and examined before C. G., one of the masters of said district court, pursuant to a decretal order made and entered in this cause on the — day of —, 1894.

First Int. State if you know the parties, plaintiff and defendant, in the above-entitled cause, or either (or any), and which of them, and how long have you known them respectively, or such of them as you do know; declare the truth and your utmost knowledge, remembrance, and belief herein.

[*Continue with other interrogatories, and for the last one say:*]

— *Int.* Do you know, or can you set forth, any other matter, or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them; or that may be material to the subject of this your examination, or the matters in question in this cause? If so, please state the same fully and at large in your answer.

(1) See Equity Rules 62 and 65.

No. 750.**Interrogatories(1) in Accordance with Equity Rule 58.**

[Caption.]

Interrogatories propounded by plaintiff, and to be answered by each of the defendants, Fred Hamilton, Bushrod J. Milton, and James S. Cruse.

Interrogatory No. 1. How many head of cattle were purchased by the defendants in this action, at the Union Stock Yards, Kansas City, Missouri, on the 28th day of December, 1914?

Interrogatory No. 2. If you shall say in answer to the foregoing interrogatory that defendants purchased 176 head of cattle, or any other number of head of cattle, at the time and place mentioned in Interrogatory No. 1 state the name of the person from whom defendants made purchase.

Interrogatory No. 3. Were all of the cattle so purchased, transported from Kansas City, Missouri, to Owensboro, Kentucky, and received by the defendants in said action, at Owensboro, Kentucky?

If you shall say in answer to this interrogatory that all of the cattle purchased by the defendants in this action, at Kansas City, Missouri, on December 28, 1914, were not received in Owensboro, Kentucky, then say how many were received.

Interrogatory No. 4. State on what date the cattle that were purchased on December 28, 1914, in Kansas City, Missouri, arrived in Owensboro, Kentucky.

Interrogatory No. 5. How many of the cattle so purchased by the defendants, in Kansas City, Missouri, on the 28th day of December, 1914, are now in the possession of the defendants?

And if you shall state that the cattle so purchased by the defendants in this action, in Kansas City, Missouri, on the 28th day of December, 1914, are now in the possession

of the defendants, state in what particular and specific place these cattle may be found.

Interrogatory No. 6. Were the cattle so purchased by the defendants in this action, in Kansas City, Missouri, on December 28, 1914, in the possession of the defendants on January 7, 1915?

Interrogatory No. 7. If you say that said cattle were in the possession of the defendants on January 7, 1915, state in what particular place in or near Owensboro, Kentucky, they were. If you shall say in answer to the last interrogatory that the cattle so purchased in Kansas City, Missouri, on the 28th day of December, 1914, were in the possession of the defendants on the 7th day of January, 1915, in the cattle stables or cattle barns or barn on the property of the Green River Distilling Company, then say in which part of the barn or stables these cattle were located.

Interrogatory No. 8. State whether or not the defendants in this action owned or had any cattle in their possession prior to the 28th day of December, 1914.

If you shall say that they had cattle in their possession, state how many, and where these cattle were located.

Interrogatory No. 9. State whether or not any of the cattle purchased by the defendants in this action, in Kansas City, Missouri, on December 28, 1914, were ever intermingled or mixed with any other cattle owned by the defendants.

Interrogatory No. 10. If you shall say that you have not got in your possession now all of the cattle purchased by the defendants in this action, in Kansas City, Missouri, on December 28, 1914, then say what became of those cattle which you have not now in your possession.

E. B. ANDERSON,

and

C. M. FINN,

Attorneys for Plaintiff.

NOTE: Each of the defendants, Fred Hamilton, Bushrod J. Milton, and James S. Cruse, will answer the foregoing interrogatories.

(1) See Federal Equity Rule 58; Simkins, *A Federal Suit in Equity*, pp. 292-294; Hopkins' *Federal Equity Rules*, 2d ed., pp. 222, et seq.; Foster's *Fed. Prac.*, 5th ed., Sec. 348.

In *Luten v. Camp*, 221 Fed. 424, it was held that under new Rule 58 the interrogatories are not a part of the pleadings as they were under the former practice, and that hence a waiver of answer under oath does not now relieve from the duty of answering interrogatories.

At page 427 the court says: "It is apparent that, in furtherance of the purpose of simplifying the pleadings and of expediting the ascertainment of the facts and final hearing, the purpose of Rule 58 was to provide for a simple practice equally open to either party for interrogating the other without such interrogatories becoming part of the pleadings."

In *J. H. Day Co. v. Mountain City Mill Co.*, 225 Fed. 622, the court says at page 623: "After careful consideration I think it clear that the 58th Equity Rule was intended merely to change the procedure in reference to obtaining discovery and to extend this right to a defendant as well as to a plaintiff, and was not intended to change the long-established rule in reference to the subject-matter of such discovery or to extend such right in favor of either party beyond the matters relating to his own ground of action or defense, respectively, and enable him to obtain discovery in reference to matters relating solely to the ground of action or defense of the other party. In other words, under this rule the plaintiff's right of discovery extends only to facts resting in the knowledge of the defendant or documents in his possession material to the support of the plaintiff's case; and the defendant's correlative right of discovery, only to facts and matters material to his defense; and neither is entitled to discovery of an inquisitional character as to the ground of action or defense of the other. Further, any disclosure may be limited to material facts, and does not extend to evidence or facts merely tending to prove the material facts."

Upheld in *F. Speidel Co. v. N. Barstow Co.*, 232 Fed. 617, in which the court says at page 618, that the purpose of the rule is to enable a party to establish his own case rather than to seek information as to the evidence or witnesses of the other party. The same rulings are found in *Wolcott v. Natl. Electric Signaling Co.*, 235 Fed. 224.

In *Batdorf v. Sattley Coin Handling Machine Co.*, 241 Fed. 925, the court says at page 926: "Equity Rule 58 does not warrant the court in requiring answers which would give no more than an opinion, or

no more than the evidence intended to be relied on in the support or defense of the cause; but if the answer would disclose a material fact or document, an interrogatory should not be denied simply because it would, in disclosing the material fact or document, require an expression of opinion, the disclosure of some of the evidence on which the party interrogated would rely at the trial, or the giving of other information which, standing alone could not be required."

At page 928 the court lists the cases in which Rule 58 has been considered and says: "But these decisions are not entirely in harmony. I am in favor of applying the rule in such a manner as to simplify as far as possible, not only the issues of the cause, but also the testimony either in behalf or in defense of the cause."

In *Pressed Steel Car Co. v. U. P. Ry. Co.*, 241 Fed. 964, at page 966, the court says "As a result (of Rule 58 and Rule 29) the proper practice in a bill of discovery is now as follows: The plaintiff will plead those facts which entitle him to a discovery from the defendant, and will annex such interrogatories as he wishes the defendant to answer. If the defendant does not dispute the plaintiff's right to some discovery, but objects to some or all of the actual interrogatories annexed to the bill, he will make those objections under Rule 58, and bring them on for hearing before the judge. He is not subject to the rule that by answering one he must answer all. If, on the other hand, he disputes the plaintiff's right to any discovery, he will plead in an answer such facts as he deems apposite, and obtain from the court, under Rule 58, an enlargement of his time to answer the interrogatories until the plaintiff's right to discovery is established." And at page 967, "the plaintiff will have leave to frame and keep reframing interrogatories until it has extracted from the defendant all the information which it possesses. Much the most convenient way would be for the parties to agree upon a master and allow the plaintiff an oral examination. This, however, I can not compel; but the same result may probably be obtained, though it must be confessed with the maximum of expense in time and labor, by allowing interrogatories to be renewed as often as justice requires."

In *Marquette Mfg. Co. v. Oglesby Coal Co.*, 247 Fed. 351, the court reviews the cases dealing with phases of Rule 58, and finds that discovery may not be had of the evidence, or of such matters as tend to criminate, or of a trade secret, or which would be against public policy or professional privilege; also that it was not the purpose to compel discovery, by plaintiff, of the particulars of his own cause of action, where such particulars do not relate to any pleaded defense, or to compel the defendant to disclose facts material only to his defense.

No. 751.**Report of Special Master.(1)**

[*Caption.*]

To the Honorable Judges of said Court:

The undersigned, this day appointed Special Master in the above stated cause to report to the court whether or not the strike of May 20, 1901, referred to in the bill of complaint herein, is ended, and whether the questions in controversy which brought about said strike have been adjusted, respectfully submits the following report:

I have taken the testimony of several witnesses, including the defendant, C. D., and of the manager of said complainant company and report the following:

First. That all, except two or three of the men who went out from the factory of complainant on the 20th day of May, 1901, have returned to work, and are now at work in said factory; that said return to work was voluntary on the part of said employees and without any inducement offered by complainant's officers, or agents, except the statement that they were at liberty to return to work, and that said strike of May 20, 1901, is over.

Second. I find that there has been no adjustment, or settlement of the controversy which was the immediate cause of said strike, but that said strikers returned to work and are now at work upon the same terms as to hours and wages as prevailed before the strike.

The testimony taken upon the reference is filed in cause No. —.

Respectfully submitted,

A. B.,

Special Master.

Dated —.

(1) See Equity Rule 61.

No. 752.**Master's Report.(1)**

[Caption.]

To the Honorable Judges, etc.:

In pursuance of a decretal order made and entered in this cause, and bearing date of the — day of —, 1894, at a stated term of this court, held at [*place of holding court*], in the city of —, in the said district, by which it was referred to C. G., of —, one of the masters of this court, to take and state an account of [*according to the decretal order*].

I, C. G., a master in said court, do respectfully report that I have proceeded to investigate the matters so referred to me, and that pursuant to a summons duly issued, I have been attended by the parties, plaintiff and defendant, and their respective counsel in the above cause [*or as the fact may be*], and that, after taking due proofs, I find and report that [*here set forth the findings of the master*].

I do, therefore, respectfully report that the said defendant should be decreed to pay the said plaintiff the sum of — dollars, besides costs to be taxed.

I respectfully refer to schedules A, B, C, hereto annexed, as making a part of my report.

All of which is respectfully submitted.

Dated —.

C. G.,
Master.

(1) See Equity Rule 61.

No. 753.**Report of Master—Introduction.**
(Another Form.)

[Caption.]

To the Honorable Judge of the United States District Court for the District of Maine:

The undersigned, J. A. M., who was appointed Master in the above entitled cause September 12, 1913, to hear and

report to the Honorable Court his findings of fact and conclusions of law in the above entitled cause, respectfully reports that on the 24th of September, 1913, and on the two following days, he heard the evidence introduced by the parties hereto and also the arguments for the complainant and for the respondent, and he respectfully submits the following report containing the findings of fact and the conclusions of law found by him, which he respectively presents as his report as Master in the above entitled cause. In addition the said Master also files with his said report a report on the evidence taken out before him and also the argument of counsel.

Respectfully submitted,

J. A. M.,
Master.

February 3, 1914.

No. 754.

Notice Accompanying Draft of Master's Report.

[*Caption.*]

Messrs. X. & X.,
Solicitors for Plaintiff,
and
Messrs. Y. & Y.,
Solicitors for Defendant.

Sirs: You are hereby notified that I have prepared the draft of my report upon the matters referred to me as master, by the interlocutory decree herein, dated the — day of —, and that a copy of such draft report accompanies and is annexed to this notice, and is herewith served upon you; you are also hereby notified that I shall sign and file said draft report as my report herein, unless alterations are made by me therein, upon suggestions of counsel for either party hereto, and that I appoint the — day of —, at my office, No. — street, in the city of —, at 11 o'clock in the forenoon of said day, for counsel for either

party hereto to present to me any suggestions of amendments to or alterations of said draft report, and to file with me written objections or exceptions thereto, if any they have to the same.

Yours, etc.,

C. G.,
Master.

Dated at ———.

No. 755.

Exceptions to Master's Report.(1)

[Caption.]

Exceptions taken by the plaintiff [*or*, defendant] to the report made herein by C. G., one of the masters of this court, to whom this cause was referred by an order of this court made and entered on the ——— day of ———, 1894.

First Exception: For that the said master, in his said report, etc. [*state the objection*], whereas the said master should have, etc. [*state what it is claimed ought to have been reported*].

Second Exception: For that, etc.

R. X.,
Solicitor for, etc.

(1) See Equity Rule 66; *Decker v. Smith*, 225 Fed. 776; *Shel. & Bir. Ry. Co. v. Gordon*, 151 U. S. 285, 38 L. Ed. 164.

No. 756.

Exceptions to Report of Special Master.

[Caption.]

For defendants it is urged, for exception to the said report of Special Master:

First. That it assumes that there is anything due complainant on the obligations of defendants, because those obligations show on their face a reservation of usurious interest. This usury is condemned both by the laws of Tennessee and Alabama, and in Tennessee avoids the contract and forfeits the principal. The evidence shows that the obligations are Tennessee contracts.

Second. The evidence shows that the interest allowed by the Special Master is usurious, and binds neither of the defendants.

Third. C. D. had no power to make any contract as to the stock in company of complainants, and her property cannot be charged for the same, she being a married woman when this contract was made.

Fourth. The Special Master, if he is permitted to allow interest at all on the principal, cannot allow beyond 6 per cent. per annum, and without rests. He has allowed interest at the rates claimed by complainant, and this is error.

Fifth. Defendants prove that on the loan one thousand dollars were paid. He has not yielded to this proof, and has not allowed that credit.

Sixth. C. D. cannot be charged with interest, premiums, fines or dues on the stock. There is no evidence that she ever applied for stock in complainant, and if she did it was a contract she was incapable of making, and is not bound by it.

Seventh. The Master cannot charge either of defendants with taxes paid by the complainant on the property or with what they paid M. N., yet he has done so.

Eighth. C. D. cannot be charged with attorney's fees. It was a contract she had no power to make.

R. Y., for Defendants.

No. 757.

Exceptions to Master's Report and Motion for Allowance (Another Form).

[Caption]

Now comes the petitioner in the above entitled cause and prays that it may be allowed exceptions on the following findings of fact and conclusions of law of J. A. M., Master in the above entitled cause:

First. That the Master finds as a matter of law that the numerals 1-0-8 as used by your petitioner are not the subject of a trade-mark.

Your petitioner prays that he may be allowed an exception to this finding and states that as a matter of law numerals as used by your petitioner are the subject of a trade-mark.

Second. That the Master finds that the petitioner is not entitled to an injunction on account of an infringement of the defendant on the alleged trade-mark, and your petitioner prays that he may be allowed an exception on this finding.

Third. That the Master finds that the petitioner has not established his case of unfair competition on the part of the defendant as will entitle him to an injunction as prayed for, and your petitioner prays that he may be allowed an exception to this finding.

Fourth. That the Master finds that the petitioner is not entitled to an accounting for damages, and your petitioner prays that he may be allowed an exception to this finding.

That he may be allowed a general exception to the report of the Master in that it is against the law, against evidence and against the weight of evidence.

GOLDSMITH SILVER COMPANY,

By its Attorney, M. E. R.

No. 758.

Receiver's Exceptions to Master's Report Because of His Lack of Authority.

[*Caption.*]

To the Honorable E. R. M., Judge:

Now comes G. W. F., Receiver, and says to the Court that the findings of fact and conclusions of law made by Ben H. Stone, Master in Chancery pro hac vice, filed herein on the 8th day of February, 1917, should not be considered as findings, but that said report should only be considered as a report of the evidence taken by him, for the reason that the order of Court appointing said Master in Chancery

does not authorize or require said Master to make or report any findings of fact or conclusions of law, but simply and only directs and empowers the said Master in Chancery to hear evidence and to seasonably report thereon. And, therefore, said Receiver excepts to the Court's considering such findings of fact or conclusions of law so made by said Master. Wherefore, said Receiver prays the Court to strike out and not consider any of the findings of fact or conclusions of law contained in said report, but to wholly disregard the same and to accept said report only as showing what evidence was taken and returned by the Master.

Subject to the foregoing motion and exception, without waiving the same, but insisting thereon, yet solely for the purpose of protecting this Receiver's rights and in compliance with the rules of equity, in the event the Court shall overrule said foregoing motion and shall consider such findings of fact and conclusions of law, then this Receiver presents for the consideration of the Court the following exceptions to certain findings and conclusions, to wit:

* * * * *

Wherefore, Receiver prays that its motion set forth in paragraph 1 hereof to reject the findings and conclusions of the Master be granted, and that said findings be disregarded; but if said motion shall be overruled, then Receiver, reserving all exceptions and objections to the action of the Court which he may be entitled thereby, prays the Court to reject the findings and conclusions of said Master set forth in the foregoing exceptions, and to make findings in accordance with the truth and justice of the record and in accordance with the foregoing exceptions; and for any and all such other orders, judgments and decrees as said Receiver may be entitled to in the premises he will every pray.

A. B. and C. D.,
Attorneys for Receiver.

No. 759.

The Plaintiff's Exceptions to the Report of the Master on Accounting.

[Caption.]

Exceptions taken by the plaintiff to the report made herein by Charles B. Morrison, Esq., one of the Masters of this Court, to this cause, on accounting by an order of this court herein duly made and entered:

First Exception: For that the Master does not find and hold that plaintiffs are entitled to recover on the basis of an established royalty.

Second Exception: For that the Master does not find and hold that the plaintiffs are entitled to recover in this action for the rubber tires and rubber sections made by it and sent to foreign countries.

Third Exception: For that the Master does not find and hold that the plaintiffs are entitled to recover out of the general profits made by defendant during the infringing period pro rata, as the sales of infringing tires bear to the total sales of defendant during the infringing period.

Fourth Exception: For that the Master does not award interest to plaintiffs from the time when royalties should have been paid, had the defendants been operating under a license, and in accordance with the licenses which were issued by the plaintiffs.

Fifth Exception: For that the amount found by the Master as due from the defendant to the plaintiff is too small, considering the nature of the invention and the utility and advantages of the monopoly granted by the patent sued on.

Respectfully submitted,

JOHN W. HILL,
Solicitor for Complainants.

No. 760.**Exceptions to Report of Special Master (Another Form).**

District Court of the United States, — District of —,
— Division.

| | |
|--|------------|
| The A. B. Trust Company of —, | } No. 887. |
| Trustee, Complainant, | |
| vs. | |
| The C. & D. Railroad Company <i>et al.</i> | |

S. M., receiver of the C. & D. Railroad, excepts to so much of said report as finds:

First. That the Second National Bank of — has a first lien or charge, or any other lien or charge, upon the real estate mentioned in said report superior to the lien of the mortgage of the C. & D. Railroad Company to the E. F. Trust Company of —, trustee, dated November 9, 1895, or to the lien of the mortgage of said railroad company to the A. B. Trust Company of —, trustee, dated —.

Second. That H. W. has a first lien or charge, or any lien or charge, upon the real estate mentioned in said report superior to the lien of the mortgage of the C. & D. Railroad Company to the E. F. Trust Company of —, trustee, dated —, or to the lien of the mortgage of said railroad company to the A. B. Trust Company of —, trustee, dated —.

Third. That L. P. has a first lien or charge, or any lien or charge, upon the real estate mentioned in said report superior to the lien of the mortgage of the C. & D. Railroad Company to the E. F. Trust Company of New York, trustee, dated —, or to the lien of the mortgage of said railroad company to the A. B. Trust Company of —, trustee, dated —.

R. X.,

Counsel for S. M., Receiver.

No. 761.**Order Granting Leave to Amend Exceptions to Master's Report.(1)****[Caption.]**

It is further ordered that leave be granted to complainant to amend its exceptions to the report of the Master heretofore filed in said cause for failure to report upon the facts as to the former adjudications mentioned in the bill of complaint and his conclusions of law thereon.

(1) Not specifically covered by any rule but falls within the general powers of a court of equity. See Equity Rule 66.

No. 762.**Plaintiff's Adoption of Exceptions by Receiver to Master's Report.****[Caption.]**

Now comes Emile K. Boisot, Trustee, plaintiff and for the purpose of avoiding a useless lengthening of the record herein, and in order that the rights of said plaintiff may be protected in this cause, hereby adopts as his own the exceptions to the report of the Master, filed herein on the 26th day of February, 1917, by Guy W. Faller, Receiver, in said cause, including the motion set forth in paragraph 1 of said exceptions to reject and not consider the findings of fact or conclusions of law contained in said report of said Master, as well also as adopting the prayer of said Receiver set forth in said exceptions, and in all other respects this plaintiff makes said instrument so filed by said Guy W. Faller, Receiver, his own, and prays the Court to act upon said exceptions and motion on behalf of the plaintiff, and this plaintiff also reserves unto himself all such other exceptions and objections to the action of said Master and to the ruling of the Court on said report,

to which this plaintiff may be entitled, the same as though he had written out in full the exceptions and motion so filed by said Guy W. Faller, Receiver.

No. 763.

Master's Report in Accounting in Suit for Infringement of Patent.

[Caption.]

To the Honorable Judge of said Court:

The undersigned, Charles B. Morrison, Master in Chancery of said Court, respectfully represents unto your Honors that on the 8th day of February, 1913, the above entitled suit was referred to him with directions that he ascertain the gains and profits made by the defendant and the amount of damages sustained by the complainants by reason of the infringement by the defendant of Letters Patent No. 554,675, and report his conclusions of fact and of law to the Court.

Pursuant to the order of reference, the parties by their respective attorneys appeared before the undersigned on the 13th day of February, 1913, and on divers days thereafter, until the 13th day of September, 1915, at which last mentioned time the taking of testimony and the making of oral arguments were concluded. That on said divers days the parties introduced certain oral and documentary evidence and certain physical exhibits and took other necessary steps and proceedings, all of which will more fully and at large appear by the transcript of the testimony and proceedings had and taken before the undersigned and herewith returned into court.

By agreement of the parties testimony was taken before the undersigned at Akron, Ohio, on four separate occasions, at New York City on three separate occasions, and in the city of Chicago on different occasions, as shown by the transcript. [*Here follow findings of fact and of law.*]

No. 764.**Statement by Master of Objections to His Report (In the Report).**

The undersigned master further reports that on the 12th day of February, 1916, he caused a notice in writing, together with a copy of his draft report, to be served upon counsel representing both sides of the case, notifying them that objections thereto might be filed on or before ten o'clock in the forenoon of Friday, February 25, 1916, and that all objections filed within said time would come on to be heard before him.

That within said time counsel for complainants filed objections numbered 1 to 4, inclusive, and counsel for defendant filed objections numbered 1 to 54, inclusive. Counsel on both sides stated to the master that they did not desire to argue the objections before him.

After duly considering the objections and his report, the master overruled each and all of said objections and stands by his report.

No. 765.**Return of Master in Accounting for Infringement of Patent (At End of the Report).**

I herewith return into court a true and correct transcript of the testimony and proceedings had and taken before me consisting of 2,008 pages of testimony, numbered from 1 to 2,008, together with 10 pages of index, making a total of 2,018 pages.

I also return into court complainant's documentary exhibits: [*Here follows the list.*]

The above are all the exhibits introduced before the master that were left in his custody. The following exhibits were delivered to counsel for complainants for use in other cases involving the same patent and are still in his custody and may be filed hereafter: [*Here follows the list.*]

Many exhibits other than those mentioned above were introduced in evidence and bound or written into the trans-

script at the places where introduced and may be found by reference to the index to the transcript.

I also return the objections filed by complainants and the objections filed by defendant.

Respectfully submitted,

C. B. MORRISON,

Master in Chancery, United States District Court,
Northern District of Illinois.

No. 766.

Notice of Hearing on Objections to Master's Report.

[*Caption.*]

Please take notice that on the pleadings, proofs, testimony and exhibits, the report of the master, Charles B. Morrison, filed herein on or about March 3, 1916, and all other papers and documents in this case, this court will be moved at a term thereof to be held for the hearing of motions at the court-house (general post-office building) in the city of Chicago, Ill., on Wednesday, September 27, 1916, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard:

1. That the exceptions to said report of said master filed by the defendant herein, and each and all of them, be overruled.

2. That the exceptions to said report of said master filed by plaintiffs herein, and each and all of them, be allowed.

3. That the damages found and stated by the master in his said report be increased to not exceeding three times the amount found by said master.

4. That damages be awarded plaintiffs for the tires made by defendant and shipped to foreign countries.

5. That interest be allowed plaintiffs on the sales made by defendant, from the time when such sales were made.

6. That said report as so changed or amended be confirmed.

7. For final judgment herein with costs and disbursements against the defendant and for such other and further

order, judgment and relief as to the court may seem just and equitable. Yours, etc.,

JOHN W. HILL,
Of Counsel for Plaintiffs.
CHAS. W. STAPLETON,
Of Counsel.

No. 767.

**Decree on Master's Report, Where Suit for Infringement
of Patent.**

[Caption.]

This cause coming on to be heard upon the report of the master, Chas. B. Morrison, Esq., to whom it was referred to ascertain the amount of gains and profits and the amount of damages sustained by plaintiffs in accordance with the interlocutory decree herein, and also upon the exceptions taken to said report on the part of plaintiffs and defendant, and said cause having been argued by counsel for the respective parties and due deliberation had thereon, it is

Ordered, adjudged and decreed as follows:

1. That each and all of the exceptions taken to said master's report by either of the parties are overruled.

2. That letters patent of the United States, No. 554,675, dated February 18, 1896, and issued to Arthur W. Grant for improvements in rubber-tired wheels, are good and valid letters patent.

3. That said Arthur W. Grant was the first true and original inventor of the improvements described and claimed in said letters patent.

4. That the plaintiffs herein are the lawful owners of said letters patent and are entitled to recover the gains, profits, savings and advantages made and derived by defendant from the use thereof and to recover damages from said defendant for the infringement thereof.

5. That the defendant herein has infringed upon the said letters patent and upon the rights of the plaintiffs thereunder and of each of the claims thereof.

6. That the plaintiffs recover of the defendant, B. F. Goodrich Company, for the damages sustained by plaintiffs by reason of such infringement, the sum of two hundred sixty-two thousand, two hundred ninety-eight dollars and ninety-five cents (\$262,298.95), together with ten thousand, three hundred twelve dollars and twenty-eight cents (\$10,312.28), being five (5%) per cent. interest thereon since March 22, 1916; and also plaintiff's costs and disbursements herein, to be taxed and noted at the foot of this decree, and that plaintiffs have execution therefor. Execution to be stayed for sixty days from date hereof.

7. That this decree carries interest on the amount thereof until the same is paid at five (5%) per cent. per annum.

Dated January 3, 1917.

A. L. SANBORN,
Judge.

No. 768.

Final Decree on Master's Report.

[Caption.]

This cause came on for final hearing on the master's report, the exceptions thereto and the evidence and proofs in the case, and the court being fully advised in the premises, doth order and decree that the exceptions of the plaintiff to the report of the master be and the same are hereby overruled, and the exception of the respondent to the master's conclusion of law from the facts relating to the increase of the valuation of the shares of complainant by the state board of equalization for banks is sustained, and on the report of said master and the evidence in the case.

It is ordered, adjudged and decreed that the said bill of complainant herein be and the same is hereby dismissed with costs to the defendnat to be taxed.

No. 769.

Final Decree on Master's Report.

[Caption.]

This cause having come on to be heard upon the report of C. G., Esq., one of the masters of this court, to whom it

was referred to ascertain and report [*as in the decretal order*], which report bears the date of the — day of —, 1894 [*and also upon exceptions taken to the said report on the part of said plaintiff, and also on the part of said defendant, and upon the equity reserved*], and the said cause having been argued by counsel, and due deliberation had thereon,

It is ordered, adjudged and decreed, and this court, by virtue of the power an authority therein vested, does order, adjudge and decree that [*the decision of the court*].

And it is further ordered, adjudged and decreed, and this court, by virtue of the power and authority therein vested, does order, adjudge and decree, that the said defendant pay to the said plaintiff the sum of — dollars.

And it is further ordered, adjudged and decreed that the said defendant pay to the said plaintiff his costs in this suit to be taxed, and that the said plaintiff have execution for such costs, and for the sum above decreed to be paid to said plaintiff as aforesaid.

No. 770.

Reference to a Master in Special Cases.(1)

For master's reports in particular cases see under titles "Patents" and "Proceedings Relating to Receivers," etc.

(1) On masters generally. See Foster's Fed. Prac., 5th ed., Secs. 278, 377, 384, 386, 388, 391, 393.

A special master has no power, under Equity Rule 62, to order an injunction, nor in the absence of special statute can a court give him such authority. *In re Gordon*, 250 Fed. 798.

In an accounting before a master, under Equity Rule 63, exceptions to an account filed with the master need not be made formally; the master has discretionary powers in that matter. *Coffield Motor Washer Co. v. Wayne Mfg. Co.*, 255 Fed. 558.

No. 771.

Contempt Proceedings.

See hereinafter under the heading "Contempt of Court."

RECEIVERS.***No. 772.****Bill by Judgment Creditor Praying the Appointment of a Receiver.(1)**

For form of bill by judgment creditor for the appointment of a receiver, see form of bill in equity No. —.

(1) It is now well settled law that simple contract creditors can not come into a court of equity to obtain the seizure of the property of their debtor and its application to the satisfaction of their claims. Judgment creditors only can maintain such suits for the appointment of a receiver. *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 378.

No. 773.**Bill for the Foreclosure of a Railway and Appointment of Receiver.**

For form of bill in equity for the foreclosure of a railway, see form of bill No. —.

No. 774.**Prayer for Receiver of Irrigation System.**

That a receiver be appointed according to the law and the usage of this court, and that such receiver be authorized, directed and empowered to take immediate possession of the irrigation system in this complaint referred to and to receive and collect all sums due from all water contract-holders in said irrigation system entitled to receive water

* What are commonly known as receivership suits are usually begun by a judgment creditor's bill against an insolvent person or corporation or by a bill to foreclose a mortgage against a railroad or manufacturing corporation. Receivers may be appointed in many other classes of suits. See Beach's Mod. Eq. Prac., chap. 22; Bates' Fed. Eq., Secs. 580 et seq.; Thompson on Corporations, title 17; Foster's Fed. Prac., 5th ed., Secs. 301 to 325; *Penn. Steel Co. v. N. Y. City Ry. Co.*, 198 Fed. 721; *Re Metropolitan Ry. Receivership*, 208 U. S. 90, 52 L. Ed. 403; *Hollins v. Briarfield C. & I. Co.*, 150 U. S. 371, 37 L. Ed. 1113.

therefrom under the order of this court, including interest, and to hold, use and dispose of the same as directed by this court for the purposes in this complaint set out, and that each and all of the complainants and all water contract holders in said irrigation system who are to receive water therefrom under the order of this court be authorized and directed to pay any and all sums due on said contracts to said receiver, and that the said defendant, Twin Falls Salmon River Land and Water Company, and the defendant, Salmon River Canal Company, Limited, and each of them, and their and each of their agents, officers, attorneys, servants, employes and assigns, be restrained and enjoined from collecting, or attempting to collect, any such sums of money so due from any settlers or water contract holders in said irrigation system, or their assigns.

That the said receiver be empowered and directed to secure additional supply of water for such segregation, if the same be found feasible; or, in lieu thereof, this court direct the manner and method of reducing the said segregation to a point within the water supply, so that the land remaining shall have appurtenant thereto an ample supply of water and not less than the amount claimed by these plaintiffs, as stated in this complaint, and that the water rights and water contracts for all land beyond and outside of said area so established as aforesaid be annulled, cancelled and held for naught, and the defendant, Salmon River Canal Company, Limited, be authorized and directed to cancel the corporate stock therefor, and be restrained and enjoined from recognizing such land as entitled to water, or from delivering or furnishing water to or for said lands.

That it be adjudged, decreed and determined that in the event such segregation be reduced as aforesaid, the owner or holder of the land and appurtenant water right be entitled to receive from the said trust fund under the direction of this court, any and all sums of money paid on account of the purchase of said water right, with legal interest thereon, together with all other legal damage to be determined by

this court, resulting to such owner or holder by reason of the cancellation of his said water right.

That this court decree, determine and fix all priorities existing, if any, by reason of a settlement and improvement, and that pending a final determination of this action, the defendants, Salmon River Canal Company, Limited, and Twin Falls Salmon River Land and Water Company, be enjoined and restrained from delivering or furnishing any water to any land not actually in cultivation at the time of the filing of this complaint.

That the said receiver be authorized and directed to take immediate possession and control of said irrigation system described in this complaint and to deliver and furnish water as covenanted to be furnished on the terms and conditions of the settlers' contract and state contract herein to the lands entitled thereto, and that the said receiver take possession of all moneys due or collected for maintenance for the year 1914, and for the subsequent years if the receiver be in charge of said irrigation system, or until further order of this court, and use and expend the same in the operation and repair of said irrigation system, and that the defendant, Twin Falls Salmon River Land and Water Company, and the defendant, Salmon River Canal Company, Limited, their agents, servants, officers and employes, be directed to turn over the money collected by them, if any, for the maintenance charges during the year 1914 to said receiver.

That the said receiver be authorized and directed to maintain the expenses incurred by these plaintiffs in this action, and to pay the costs, attorneys' fees, witness fees and other proper items of expense as may be directed by the court.

That the said receiver be authorized and directed to issue receiver's certificates from time to time as may be ordered by this court for the purpose of said receivership.

That the defendant, Twin Falls Salmon River Land and Water Company, be compelled to account to this court for any and all sums converted and used by it from the maintenance charges collected by the defendant, Salmon River

Canal Company, Limited, and misappropriated by said Twin Falls Salmon River Land and Water Company as in this bill of complaint set out.

That these plaintiffs and all water contract holders in said irrigation system hereinbefore described have such other or further relief in the premises as may be just and equitable, together with the costs and disbursements of this action.

A. B. and C. D.,
Solicitors for Plaintiffs.

[*Verification.*]

No. 775.

Allegations Showing Equity Jurisdiction and Asking for a Receiver,(1) by a Holder of Corporation Notes.

Your complainant is informed and believes and therefore upon information and belief avers that it is inevitable that the defendant will, immediately after August 31, 1916, be faced with over thirteen millions of dollars of its overdue notes, which it can not pay; that undoubtedly large numbers of the holders of said notes, of whom there are now about 372, will immediately bring suits against the defendant to recover the same.

Upon information and belief the complainant further avers that on August 31, 1916, payment of over \$2,300,000 of said notes of the Vermont Valley Railroad, endorsed by the defendant as aforesaid, will be demanded of the defendant, and for non-payment thereof suits to recover the amount thereof will be brought against the defendant; that suits will invariably be accompanied by attachment of its available property; that such suits will be brought in many different courts in different states, and wherever any property of the defendant can be found; that there will result a multiplicity of suits and a race of diligence to secure such attachments in order that those who act most speedily may get payment in full of their notes, while other creditors less diligent may

be thereby required to suffer great loss; that strenuous attempts will be made by individual creditors to secure early judgments and priorities; that, in the rush for security, attachments and levies will be made upon the engines, cars and rolling stock of the defendant, and upon its fuel, material and supplies indispensable to the operation of the system; that attachments will also be placed upon all the funds of the defendant and upon all available revenues; that the defendant will be without means of dissolving such attachments and will be unable to use in carrying on its business the property attached; and that if this race of diligence is allowed to go on, great loss and injustice will be inflicted upon the bondholders of the defendant company, whose obligations are not yet due and will not fall due for a considerable time, and who will be unable to protect themselves except through the relief here sought.

And your complainant is further informed and believes and therefore upon information and belief alleges that as the result of such suits, attachments and levies the defendant will be seriously hindered in the operation of its trains, and will be unable to perform its duties as a common carrier and as a carrier of the United States mail, or to discharge its duties to the public; that in the proper transaction of its business it is necessary for the defendant to interchange freight with other railroads and to pay promptly all traffic balances that may from time to time become due such other railroads, and its inability to do so because of attachments of its revenues will render it impossible for it to continue such interchange, resulting in great loss of business and income; that the leases and contracts under which defendant is operating its system of railroads as above set forth call for the prompt payment by the defendant of the rentals and other charges provided for therein, and most, if not all, of them are subject to forfeiture for non-payment, so that the inability of defendant to meet such payments because of the loss of its income and the tying up of its revenues by such attachments will subject the defendants to such forfeitures

and will inevitably lead to the disintegration of the system and to a chaotic condition of the whole transportation service of the defendant, which will be ruinous financially to the defendant and many of its subsidiary companies, and will occasion great inconvenience and loss to all the communities which depend upon them for service; that, if permitted to go on without interference of this court, such suits, attachments and levies will result in forced sales of much of defendant's property at prices far below the real value, to the great loss of the defendant and all its creditors except those upon whose judgments such sales are made; and that great waste and loss can be avoided, and the property be preserved for equitable distribution among those entitled to it, only by the intervention of a court of equity, and the granting of equitable relief, including the appointment of a receiver.

Wherefore, for the equal protection of the rights not only of your complainant and other holders of the promissory notes of the defendant, but of all its creditors, including holders of bonds that will not fall due for a long time to come, as well as for the protection of the stockholders of the defendant whose property is in imminent danger of being wasted, and of the public which is vitally interested in the continuous and interrupted operation of this great transportation system, the intervention of a court of equity is imperatively required, especially for the timely appointment of a receiver to take charge of and preserve the property of the defendant, and to collect and receive and properly appropriate the income thereof, until the final decree of the court in the premises.

This suit is of a civil nature, in equity, between citizens of different states, wherein the matter in controversy as aforesaid exceeds, exclusive of interest and costs, the sum or value of \$3,000.

Inasmuch, therefore, as your complainant has no adequate remedy at law for the aforesaid grievances and can have relief only in equity, your complainant files this bill of complaint and prays for equitable relief as follows:

1. That the rights of your complainant and of all other creditors of the defendant may be ascertained and decreed, and that the court fully administer the property and funds in which the defendant is interested, constituting the entire railroad system and other assets of the defendant, and ascertain the several and respective liens and priorities existing upon each and every part of said system, and enforce and decree the rights, liens and equities of the creditors of the defendant as the same may be finally ascertained by the court.

2. That the court forthwith appoint a receiver of all and singular the property and assets operated, held, owned or controlled by the defendant, including its entire railroad system and all the lands, tracks, terminal facilities, rolling stock, franchises, rights, materials, machinery, supplies, book accounts, choses in action, shares of stock, bonds and other property, real and personal, of every description and wherever situated, belonging to the defendant or in which it has an interest, with full power and authority to demand, sue for, collect, receive and take into possession the goods, chattels, rights, credits, moneys, effects, lands, tenements, books, papers and property of every description belonging to the defendant, and with all the incidental powers ordinarily vested in receivers in like cases; and also with full power and authority to run and operate all the railroads and property owned or controlled by the defendant, or in which the defendant has such right or interest, and to collect and receive all the rents, issues, earnings and profits thereof, and to apply the said income and receipts thereof, under the direction and order of the court, for such a period as the court shall order; to protect and preserve the corporate franchises, privileges and property and to preserve the corporate existence of the defendant; to protect and preserve the said railroads and property, real and personal, from being sacrificed under any proceedings which can or may be taken, likely to sacrifice and prejudice the same; to appoint such agents and attorneys as may be necessary for the proper handling of

such property and business; to do any and all other acts which may be necessary to preserve the valuable rights, property and franchises of the defendant; and to exercise such further powers as the court may from time to time grant, including the power to borrow money, on receiver's certificates, or otherwise, as may be necessary in connection with its administration of the property and assets of the defendant.

3. That because of the imminence of the danger pending the appointment of a permanent receiver, this court appoint a temporary receiver to exercise for the time being the powers and authority above specified, so far as they may be appropriate.

4. That all creditors and stockholders and other persons be enjoined from instituting or prosecuting, or continuing the prosecution of, any actions, suits or proceedings at law or in equity or under any statute against the defendant in any court, wherever situated, and from levying any attachments, executions or other processes upon or against any property of the defendant, or from taking or attempting to take into their possession the property of the defendant or any part thereof, or any property of which the defendant has the right of possession until the further order of the court.

5. That the defendant, its officers, agents and employes, and all persons claiming and acting by, through and under it, and all other persons, be enjoined and restrained from interfering with the said receivers in taking possession of and managing the said property and business.

6. That at such time or times as may be found just and proper the property and franchises of the defendant may be ordered to be sold as an entirety, to be held, exercised and enjoyed by the purchaser, or in such parcels and in such places and in such manner and upon such terms and conditions as this court shall deem just and equitable, and the proceeds of any such sale or sales distributed among those entitled thereto, or that the property of the defendant, after

satisfaction of the claims of the creditors, may be returned to it.

7. That your complainant may have such other and further relief in the premises as the nature of the case may require and as to the court may seem proper.

8. That the defendant be required, pursuant to the rules and practice of the court, to answer all and singular the matters hereinbefore stated, but not under oath, an answer under oath being hereby expressly waived, and further to perform and abide by such order, direction and decree herein as to the court shall seem meet.

May it please the court to grant unto your complainant a writ of subpoena to be issued out of and under the seal of this court and directed to the defendant, requiring it to appear on a certain day before the court and make answer as aforesaid.

And may it please the court to grant unto your complainant a writ of injunction to be issued out of and under the seal of the court, and to be directed to the defendant and to its officers and agents and all persons claiming and acting by, through or under the defendant, and to all other persons, enjoining and restraining them from interfering with the said receivers in taking possession of or in managing the said property and business.

INTERCONTINENTAL RUBBER COMPANY,

Date ———.

By B. B. J., its Solicitor.

[*Verification.*]

(1) In *re Brown, et al.*, 155 C. C. A. 228 (242 Fed. 452), an original petition was addressed to the circuit court of appeals praying the disapproval of an order of the district court appointing a receiver, on the ground of fraud and misrepresentation made to the district court, and the proceeding was predicated upon Sec. 56 of the Judicial Code. It was held that this section does not authorize the disapproval of the appointment, but only the assumption of jurisdiction and control of property outside of the district in which he is appointed. The remedy of disapproval of an order appointing a receiver is by appeal therefrom under Sec. 129 of the Judicial Code.

The petition in this case was, upon motion, dismissed.

For receivers generally see *Foster's Fed. Prac.*, 5th ed., Secs. 301 to 325.

No. 776.**Bill for an Account of Partnership Dealings and Dissolution,
and for a Receiver.**

For form of bill, see No. —.

No. 777.**Affidavit of Insolvency in Support of Bill.(1)**

State of —, County of —, ss.

G. L., of lawful age, being duly sworn, on oath says that he resides in the city of —, state of —, and is the treasurer of the C. D. Co., a New Jersey corporation, defendant in the foregoing bill of complaint; that he has heard the foregoing bill of complaint read and is familiar with the facts therein stated. That all said facts with reference to the formation of said corporation, its purposes, the amount of its stock, and its business and property, are true to his own knowledge. That a debt of — dollars due on call by said corporation to the — National Bank of the city of — was demanded on call, and became due and payable on the — day of —, 1893, and payment thereof was refused and default made therein, because of lack of sufficient funds of said corporation to pay the same. Further debts of said corporation matured on the — day of —, 1893, amounting to not less than — dollars, and default was made in the payment thereof, because of lack of funds to pay the same. On the — day of —, 1893, further debts of said corporation matured, amounting to not less than — dollars, and default was made in the payment thereof for lack of funds. Daily thereafter during the month of — debts will mature.

The total amount of which said indebtedness maturing from the — day of — to the — day of —, 1893,

is more than — dollars. The corporation is also indebted in amounts which will mature from day to day during the months of —, — and —, in 1893, exceeding — dollars.

The corporation is without funds to meet the said indebtedness, or any considerable part thereof, and has no assets which are readily convertible into money, and has no reasonable prospect of being able to meet its obligations after this date. The assets of said corporation consist of several [*cordage*] mills, owned or operated at least in the several cities mentioned in the bill of complaint, and all the [*cordage and twine*] manufactured, and in manufacture, and in process of manufacture, the value of all which it is impossible at this time to estimate, or to even approximate.

That the corporation also has certain assets, consisting of open accounts receivable and bills receivable, the greater part of which mature in —, — and —, 1893, and a very small part of which is available for the raising of money at this time. The securities of said company which are available for the raising of said money are already pledged and hypothecated for debts due by the corporation. The corporation can not pay its maturing obligations, and has no means of raising money to pay the same, and is in fact unable to pay its debts, and is insolvent.

Subscribed and sworn to before me this — day of —, 1893.

[*Seal.*]

J. N.,
[*Official Title.*]

(1) See Beach's Modern Eq. Prac., Sec. 729.

No. 778.

Order Taking Jurisdiction and Fixing Day for Hearing.

[*Caption.*]

Now, on this — day of —, comes the complainant, by its counsel, R. X., and having filed its bill of complaint

and exhibits moves thereon, and upon the affidavits of [*name affiants*] for the appointment of a receiver of the railway and property of the C. & D. Railway Company; and thereupon the defendant, the C. & D. Railway Company, appearing by its counsel, L. B., and asking a postponement of the application:

It is ordered that the complainant's application be and is sustained, and the further hearing stand over to the — day of —, A. D. —, at —, 10 a. m., with the right to all parties to be then heard on the merits of said application, without any prejudice by reason of this order, and that in the meantime the defendants be restrained from making any change in the present status of said C. & D. Railway other than may be necessary in the proper operation of said railway as heretofore.

No. 779.

Notice of Application for the Appointment of a Receiver.(1)

To R. X.,

Attorney for —:

Notice is hereby given, pursuant to the terms of an order in this cause, dated the — day of —, that the further hearing of the application for the appointment of a receiver herein will be had before the Hon. J. B., the district judge of this circuit, at —, on —, the — day of —, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated —.

Yours, etc.,

X. & X.,

Solicitors for Complainant.

(1) This notice should be given each party interested or his counsel.

No. 780.**Motion for the Appointment of Receiver to Take Charge of
Mortgaged Property, Collect Rents, etc.**

The District Court of the United States, — District of
—.

A. B., Complainant,

vs.

C. D., Defendant,

Now comes A. B., complainant in this case, and moves the court for the appointment of a receiver herein to take charge of the mortgaged property described in the bill, to collect the rents thereof, and further to act in the premises as this court, after hearing, may direct, and with such further orders and instructions as this court may deem proper to give.

R. X.,

Attorney for Complainant.

No. 781.**Order Concerning Application for Receiver and Extending
Time to Answer, etc.**

The District Court of the United States for the — Dis-
trict of —.

The A. B. Trust Company, Complainant,

vs.

The C. & D. Railway Company and the
E. & F. Railway Company, Defendants.

And now, on this — day of —, A. D. —; in pursuance of the stipulation of the parties hereto, it is now by the court here ordered that the further hearing of the application for the appointment of a receiver in this case shall stand over until such date as may be fixed in a written notice

to be served by the complainants, at least twenty days before the date so fixed, or such shorter time as may be allowed as notice. In event of an application by any other person for the appointment of a receiver of said property, and until the further order of the court, and notwithstanding the filing of the bill of complaint or any order heretofore made, or this order, the E. & F. Railway Company may continue to operate, under the existing lease thereof, the railroad and property of the C. & D. Railway Company, and shall have and enjoy all rights and privileges under said lease as fully and completely as if the bill of complaint herein had not been filed, or the order of June 9 or this order been made.

And it is further ordered that until further order of the court the management, operation and control by the Northern Railroad Company of its railroad and property, and the disposition and control of its revenues by the said Northern Railroad Company, shall so be and remain the same as if said bill of complaint had not been filed, or any order heretofore or this order been made.

And it is further ordered that the time within which defendants may file answers in this case be and the same is hereby extended for the period of sixty days from the date of this order.

No. 782.

Entry of Appearance and Answer.

[*Caption.*]

And now comes the C. D. Co., defendant in the above entitled cause, and waives the issuing and service of subpoena, and enters its appearance herein, and admits that the several statements and charges of said bill of complaint are true.

Y. & Y.,

Attorneys for the C. D. Co.

No. 783.**Petition for the Appointment of a Receiver and for an Order of Court Directing the Production of Oil & Gas from the Real Property Involved in this Suit.****[Caption.]**

Come now the complainant herein, the United States of America, and the above-named defendants, Bessie Wildcat, a minor; Santa Watson, as guardian of Bessie Wildcat, a minor; Cinda Lowe, Louisa Fife, Annie Wildcat and Emma West, Martha Jackson, a minor; Saber Jackson, as guardian and next friend of Martha Jackson, a minor; J. Coody Johnson and Black Panther Oil & Gas Company, a corporation, and H. B. Beeler, being all the parties to this action who have asserted herein an interest in the land which forms the subject-matter hereof, to-wit:

Northwest quarter of section 9, township 18 north, range 7 east, in Creek county, Oklahoma,
and represent to the court that the said land is of the proper value of many thousands of dollars, and that its value consists mainly of the deposits of oil and gas which lie thereunder; that when these deposits of oil and gas are extracted the value of the land will be almost wholly destroyed; that on the premises adjacent to and surrounding the said land to-wit, principally the [northwest] quarter of section 8, township 18 north, range 7 east, there is a large daily production of oil and gas, the daily production of oil consisting of several hundred barrels; that on the said adjacent quarter of section 8, township 18 north, range 7 east, there are at this time at least three producing oil wells which are located within three hundred feet of the boundary line of the west side of the above described land involved in this section; that from these three wells there is a present daily production of several hundred barrels of oil; that there are other producing wells on the same adjacent quarter of section 8, township 18 north, range 7 east, and there are other produc-

ing wells on other lands adjacent to the said land in suit; that the production of oil and gas from the said producing wells on adjacent lands is causing a large drainage of the oil and gas from underneath the land in suit, and is daily and materially diminishing the value of the land in suit to the very great and irreparable injury to the parties to this action; that if the production of oil and gas from adjacent lands be not offset by the immediate production of oil and gas from the land in suit, the value of the land in suit will be materially diminished, if not practically destroyed; that the parties to this action are without adequate remedy at law to prevent the drainage of oil and gas from underneath the land in suit, [cause] by the production of oil and gas from the adjacent lands; that by reason of these conditions, it is of immediate and vital importance that the production of oil and gas from the land in suit be gone forward with under the direction and control of this court through a receiver to be appointed by it for that purpose, the proceeds of such production to be held by such receiver under the order of this court pending the termination of this action and the final adjudication of the ownership and right to possession of the said land, which is at issue among these petitioners, and also the defendant, H. B. Beeler.

The said petitioners and the said defendant, H. B. Beeler, are all agreed that it is to the best interest of all the parties to this action for the production of oil and gas from the land in suit to be gone forward with pending this action in manner and form as follows, to-wit:

That the production of oil and gas from said land be proceeded with by the said Black Panther Oil & Gas Company, a corporation, and that 25 per cent. of the gross amount of oil and gas so produced therefrom shall be delivered or paid by the said company to a receiver to be appointed by this court, or to such person or corporation as the said receiver may direct, the fund accruing from the said royalty portion of 25 per cent. to be held by the receiver under the direction of this court, to abide the result of this action, and to be

paid to the party or parties prevailing herein as [their] interests may then appear; that the claim and interest of the parties to this action in and to the oil and gas produced by the said Black Panther Oil & Gas Company from the said land released as to the portion thereof in excess of the said royalty portion of 25 per cent. of the gross production; that the Black Panther Oil & Gas Company drill in good faith at least three wells on the land in suit for the purpose of offsetting and to a sufficient depth and at proper places to offset the wells on adjacent lands, one of the said three wells to be commenced within ninety days from the date of an agreement to be entered into between the said Black Panther Oil & Gas Company and the said receiver as hereinafter provided for; another well to be commenced within six months from the said date, and the third well to be commenced within nine months from said date, each of said wells to be completed within a reasonable time after its commencement and to be drilled to such depth as may be necessary and sufficient to protect the above described tract of land from being drained by wells on adjoining lands, and as may properly develop the land in controversy to the fullest reasonable extent; that the said Black Panther Oil & Gas Company promptly execute to the said receiver and to his successor or successors in the receivership for the use and benefit of the parties in interest in this action, a good and sufficient bond in the sum of \$15,000, to be approved by the judge of this court, conditioned that the said Black Panther Oil & Gas Company faithfully carry out and perform all and singular the provisions of its agreement with the receiver, to be executed as hereinafter provided for; that the said Black Panther Oil & Gas Company shall not claim or be allowed any sum for the expense of any dry hole or holes drilled by it on said land and shall not claim or be allowed any sum for any expense of any kind incurred by it in carrying out its agreement to be made with the said receiver or in producing or attempting to produce oil and gas from the said land except its working interest of 75 per cent. of the oil and gas pro-

duced therefor; provided that at the final termination of this action the Black Panther Oil & Gas Company be allowed the reasonable cash value of its interest in the corporeal properties, such as derricks, machinery, piping, casing, tanks, etc., owned by it and then on the premises and necessary to the development of the production of oil and gas from the same; but the amount so to be allowed to the Black Panther Oil & Gas Company shall in no event exceed the amount of royalty that has accrued in the hands of the said receiver for the benefit of the prevailing party or parties to this suit; that the reasonable cash value of the said corporeal properties be determined according to their condition at the time of the termination of this action, and the said two persons shall meet to consider and appraise the reasonable cash value of the said physical properties, and whatever sum may be agreed upon by them shall be reported by them in writing to this court and shall be taken as such reasonable cash value; but if they be unable to agree thereon, the Black Panther Oil & Gas Company and the said prevailing party or parties shall report such disagreement to this court, who shall thereupon appoint some fit and disinterested person as a third appraiser, and the said three appraisers shall then meet and consider such reasonable cash value, and the concurring opinion of any two of the three of them, when reported in writing to this court, shall control and be conclusive as to such value between the said Black Panther Oil & Gas Company and the said prevailing party or parties, but any such determination of value shall always and in any event be subject to the approval of this court.

These petitioners respectfully represent in conclusion that the proposed agreement between the said Black Panther Oil & Gas Company and the said receiver for the production of oil and gas from the land in suit pending the final determination of this action is a fair and equitable plan conducive to the best interests of all the parties hereto, and the petitioner, Black Panther Oil & Gas Company, by signing this petition, signifies its acceptance of the proposed plan and its

willingness and readiness to enter into such an agreement with the said receiver as is proposed thereby, and to execute the bond in the sum and of the kind described to insure its faithful performance of the provisions of such agreement.

Premises considered, the said petitioners pray the court to appoint some fit person as receiver in this action who shall be empowered to take into his official charge and custody the above described tract of land involved in this suit and all improvements now thereon; that said receiver be required to enter into a good and sufficient bond of such kind and in such sum of may be directed and approved by this court, conditioned for the faithful performance of any order of the court with respect to the disposition or disbursement of the funds in his hands or under his control as such receiver; that he be authorized and directed by order of this court to enter into a formal agreement with the said Black Panther Oil & Gas Company for the development of the land in suit and the production of oil and gas therefrom by the said Black Panther Oil & Gas Company during the pendency of this action, in the manner and form above outlined and provided for; that he be authorized and directed to require and take from the said Black Panther Oil & Gas Company to run to himself and his successor or successors in the receivership for the use and benefit of the parties in interest in this action a good and sufficient bond in the sum of \$15,000, to be approved by the judge of this court, conditioned that the said Black Panther Oil & Gas Company will faithfully carry out and perform all and singular the provisions of its agreement with him; that the said receiver be authorized to receive and collect and be charged with the duty of receiving and collecting from the said Black Panther Oil & Gas Company a full 25 per cent. of gross amount of all the oil and gas produced by the said company or any person acting for it from the said land, and that he be further authorized and directed to make such examinations of the books and records of the said Black Panther Oil & Gas Company as he may

deem necessary to enable him to perform properly his duty as such receiver, and that he be further authorized and directed to report promptly any failure on the part of the said Black Panther Oil & Gas Company to deliver to him or under his order a full 25 per cent. of the gross amount of all the oil and gas produced from the said land, or the proceeds thereof, or any other failure of the said company to perform its several undertakings to and agreements with him; that he be further authorized and directed to release the said Black Panther Oil & Gas Company, and its assigns, if and so long as the provisions of the agreement to be entered into between himself and the said Black Panther Oil & Gas Company are faithfully and punctually performed by the said company, the working interest in the oil and gas produced by the said company from the land in suit; that is to say, all of the oil and gas so produced in excess of the royalty portion of one-fourth of the gross amount of production; that the said receiver be further required and directed to hold and safely keep in whatever manner this court may deem proper the fund accruing in his hands as such receiver, subject to be disbursed only under an order of this court regularly made.

The joining of these petitioners in this petition shall not be taken or construed as a recognition by any one of them of the interest or any other one of them in the land in suit, being solely for the purpose of bringing about the conservation of the value of the property in suit and the deposits of all oil and gas thereunder.

THE UNITED STATES OF AMERICA,

Complainant,

By C. C. H., Assistant United States Attorney, Its
Solicitor of Record.

_____, Defendants,
By R. and T., Solicitors.

No. 784.**Order Appointing Temporary Receiver.****[Caption.]**

This cause came on to be heard this 29th day of August, 1916, and was argued by counsel, and upon consideration, the court being fully advised in the premises, it is ordered, adjudged and decreed:

1. That James H. Hustis, a resident of Winchester, Massachusetts, be and he hereby is appointed temporary receiver of all the railroads, lands, property, assets, rights and franchises of the Boston and Maine Railroad as incorporated under the laws of Massachusetts and as incorporated under the laws of New Hampshire and as incorporated under the laws of Maine, including all railroads and other property, assets, real, personal and mixed, of whatever kind or description and wherever situated, owned, leased or operated by said Boston and Maine Railroad, with all tracks, terminal facilities, warehouses, offices, stations, shops and all other buildings in the premises of whatever kind, and all locomotives, cars and other rolling stock and equipment of whatever kind or description, and all tools, machinery, furniture, fixtures, coal, materials and supplies and all books of account, records and other books, papers, cash in bank, and all other moneys, all debts, things in action, credits, stocks, bonds, securities, debts, leases, contracts, bills receivable, rents, issues, profits and income accruing and to accrue, as well as all leasehold interest, operating and all other contracts and all rights, interests, easements, privileges and franchises of said Boston and Maine Railroad, and all other assets of every kind and description.

2. That said receiver be and he hereby is directed immediately to take possession of all said railroad's rolling stock, franchises, property and premises, and to run, manage, maintain and operate said railroad and property wherever situated and found, whether in this commonwealth, judicial circuit

or elsewhere, including such railroads and property as the said Boston and Maine Railroad holds, controls or operates under lease or otherwise, and to use, manage and conduct said business in such manner as in his judgment will produce the best results, and to this end to exercise the authority and franchises of said Boston and Maine Railroad, and to discharge all the public duties obligatory upon it and to preserve said railroad's property in proper condition and repair and to manage and operate said railroad's property according to the requirements of the valid laws of the several states in which the same are situated, and to employ, discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employes; and to keep such property insured to such an extent as the receiver may deem advisable; to continue and carry on such pension systems in respect to officers and employes of the said Boston and Maine Railroad as the receiver may deem advisable; to collect and receive the income and bills of said property and to collect all outstanding or accruing accounts, things in action and credits due or owing to the said Boston and Maine Railroad, and to hold and retain the net revenues thereof in such manner and to the end that the same may be applied under this order and such orders as this court may hereafter make.

3. That all persons, firms and corporations having in their possession any of said property and premises of which a receiver is hereby appointed shall deliver such property and premises to said receiver, and each and every of the officers, directors, agents and employes of said Boston and Maine Railroad be and they are hereby required and commanded forthwith to deliver and turn over to said receiver or his duly constituted representative any and all books of account, vouchers and papers, debts, leases and contracts, bills, notes, accounts, moneys, or other property in their hands or under their control belonging to or in the possession of said Boston and Maine Railroad to which it is or may become entitled, and each of said officers, directors, agents and employes is hereby commanded and directed to abide by and conform to

such orders as may be given from time to time by said receiver or his duly constituted representative in conducting the operation of said property and in the discharge of his duties as receiver.

4. That the said Boston and Maine Railroad and the officers, directors, agents, attorneys and employes of said corporation and all other persons claiming under and by virtue of said railroad company, and all other persons, firms and corporations whatsoever and wheresoever situated, located or domiciled, are hereby restrained and enjoined from interfering with, attaching, levying upon, or in any manner whatsoever disturbing any operation of, the property or premises of which a receiver is hereby appointed or in taking possession thereof, or in any way interfering with the same or any part thereof or in interfering in any manner to prevent the discharge by said receiver of his duties, and this order shall apply not only to property on possession of said Boston and Maine Railroad, but to all the reversions and remainders thereof.

5. The receiver shall within ten days from the date of this order file herein a bond for \$100,000, with a surety or sureties approved by a judge or a clerk of this court, conditioned that he will fulfill and perform his duties herein, and in any ancillary proceedings wherein he may be appointed, well and truly to account for all money and property coming into his hands as such receiver and perform all things which he is herein or may hereafter directed to perform in this cause, or in any ancillary proceeding wherein he is ancillary receiver.

6. The said receiver shall within ninety days file with the court an inventory of the property coming into his possession as such receiver. The said receiver shall forthwith open books of account and cause to be kept therein due and proper account of the earnings and expenses, receipts and disbursements of the railroad property of which he is appointed receiver, and shall preserve proper vouchers for all payments made by him on account thereof, and shall deposit the

moneys coming into his hands in some bank or banks, reporting to the court the bank or banks so selected, and shall make to the court at least once in six months a report of all receipts and expenses. Such accounts may in the discretion of the receiver be kept in such manner as to show the receipts from each of the railroad properties under direct lease to the defendant and the expenditures on account of each said property.

7. That the receiver is hereby authorized at his discretion from time to time out of the funds coming into his hands to pay all taxes due or becoming due from the said Boston and Maine Railroad upon the property above described, or any of it, any expense of printing or sending out customary reports on the road, and to pay the expenses of operating said properties and executing the trust, and to pay the wages and salaries of all officers, attorneys, managers and superintendents, agents or employes employed or retained by the said receiver, and any pay-rolls, salaries, vouchers, supply accounts, operating or other current charges heretofore incurred within six months last past and now unpaid, and also to make any payments which he may deem necessary or advisable under any contract heretofore entered into for the maintenance and equipment of any railroad owned or operated by said Boston and Maine Railroad, and also to make such payments of interest on any bonds issued or assumed by the said railroad as may in his judgment be necessary to prevent the prior maturing of the principal of said bonds.

8. The said receiver is authorized until the further order of this court to make from income accrued or hereafter accruing such payments and to do and perform such other acts and things as he may deem necessary or expedient to preserve, or prevent the forfeiture of, and lease, leasehold estate, contract or contract right now vested in or belonging to the said Boston and Maine Railroad; but no such payment or act on the part of such receiver shall operate as an election on his part to assume the obligation of any such lease or contract, or accept or become vested with any such

leasehold estate or contract right, nor shall any such payment or act on the part of the receiver operate to charge the obligation of any such lease or contract upon the interest which any party to this suit may have in the estate in the hands of said receiver. The court reserves the right hereafter to direct said receiver to surrender and reject, or to adopt and assume any lease, leasehold estate, contract or contract rights now vesting in or belonging to the said Boston and Maine Railroad, and no such lease, leasehold estate, contract or contract rights shall be taken as adopted by said receiver or as chargeable upon him or upon the interest of any party herein to the estate in his hands except as hereafter expressly ordered by the court.

9. That said receiver be and he hereby is authorized to institute and prosecute within this commonwealth and elsewhere and in his name as receiver, or in the name of the said Boston and Maine Railroad, all such suits as may be advised by counsel for the proper protection of said property and the discharge of the trust, and to prosecute to final judgment or to compromise as may be in his judgment advisable all pending suits brought by or in behalf of said Boston and Maine Railroad, and likewise to defend, compromise or settle all actions pending or instituted against the said Boston and Maine Railroad, but no payment shall be made by said receiver in respect to any of such suits other than suits relating to wages of employes, personal injuries or damages to property in transit, or damages caused by fire in the operation of said railroad, without the order or direction of the judge, and no action taken in defense of any such action or suit against said Boston and Maine Railroad shall have the effect of establishing any claims upon the right in the property or funds in the possession of the receiver or to alter or change the existing equities or legal rights of the parties.

10. That said receiver shall retain possession and continue to discharge the duties or trusts aforesaid until the further order of this court and shall from time to time

make report of his doings in the premises and from time to time may apply to this court for such other and further orders and directions as he may deem requisite to the due administration of his trust.

11. The complainant herein is authorized to apply to any other court to obtain jurisdiction for such order or orders in the premises as the complainant may deem necessary to carry out any of the orders issued by this court. The right is reserved to the parties hereto to apply to the court for any other or further instructions to said receiver, and this court reserves the right to make such further orders as may be proper and to modify this order and in all respects to regulate and control the conduct of said receiver.

W. L. PUTNAM,
Circuit Judge.

(Date of entry.)

No. 785.

Order Appointing Receiver for a Railway.(1)

[*Caption.*]

Upon reading and considering the verified bill in this cause, together with the evidence adduced, on motion of counsel for the plaintiff, the defendant having been duly notified to appear by its counsel, it is ordered by the court that S. M. be and is hereby appointed receiver of this court of all and singular the property, assets, rights, and franchises of the C. & D. Railway Company described in the bill of complaint herein, wherever situated, including all the railroad tracks, terminal facilities, real estate, warehouses, offices, stations, and all other buildings and property of every kind owned, held, possessed, or controlled by said company, together with all other property in connection therewith, and all moneys, choses in action, credits, bonds, stocks, leasehold interests, operating contracts, and other assets of every kind, and all other property, real, personal, and mixed, held or possessed by it, to have and to hold the same as

the officer of and under the orders and directions of the court.

The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found, and to continue the operation of the railroad of said company, and to conduct systematically, in the same manner as at present, the business and occupation of carrying passengers and freight, and the discharge of all the duties obligatory upon said company.

And said C. & D. Railway Company, and each and every of its officers, directors, agents, and employes are hereby required and commanded forthwith to turn over and deliver to such receiver or his duly constituted representative any and all books of accounts, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, money, or other property in his or their hands or under his or their control, and they are hereby commanded and required to obey and conform to such orders as may be given them from time to time by the said receiver or his duly constituted representative in conducting the said railway and business, and in discharging his duty as such receiver; and they and each of them are hereby enjoined from interfering in any way whatever with the possession or management of any part of the business or property over which said receiver is so appointed, or from in any way preventing or seeking to prevent the discharge of his duties as such receiver. Said receiver is hereby fully authorized to continue the business and operate the railway of said company, and manage all its property at his discretion in such manner as will, in his judgment, produce the most satisfactory results consistent with the discharge of the public duties imposed on said company, and to collect and receive all income therefrom and all debts due said company of every kind, and for such purpose he is hereby invested with full power at his discretion to employ and discharge and fix the compensation of all such officers, coun-

sel, managers, agents, and employees as may be required for the proper discharge of the duties of his trust.

And said receiver is directed to deposit the moneys coming into his hands in some bank or banks in the city of —, —, and to report his selection to the court.

Said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary, in his judgment, to the proper protection of the property and trust hereby vested in him, and likewise defend all actions instituted against him as receiver, and also to appear in and conduct the prosecution or defense of any and all suits or proceedings now pending in any court against said company, the prosecution or defense of which will, in the judgment of said receiver, be necessary and proper for the protection of the property and rights placed in his charge, and for the interest of the creditors and stockholders of said company (2).

Said receiver is hereby required to give bond in the sum of \$100,000.00, with security satisfactory to this court, for the faithful discharge of his duties, and is also required to make and file full reports in this court quarterly.

And the court reserves the right by orders hereinafter to be made, to direct and control the payment of all supplies, materials, and other claims, and to in all respects regulate and control the conduct of said receiver.

J. S.,

District Judge.

And thereupon came in open court said S. M., and accepted such appointment, and was thereupon duly sworn according to law, and tendered his bond as required by said order, with W. P. and C. J. as sureties therein, which bond is hereby approved and accepted.

(1) This order may be and is frequently made by a judge in chambers. *Walters v. Trust Co.*, 50 Fed. 316; *Wood v. Oregon Devel Co.*, 55 Fed. 901, after suit pending but not before bill is filed. *Greene v. Star Cash and Package Car Co.*, 99 Fed. 656; *In re Brant*, 96 Fed. 257.

As to what the order should contain. See *Bates' Fed. Eq.*, Sec. 594.

(2) As to the rights of a receiver to sue. See *Beach's Modern Eq. Prac.*, Secs. 742 and 743.

No. 786.**Order Appointing a Receiver for a Railroad (Another Form).**

The District Court of the United States for the — District of —.

The A. B. Trust Company, Trustee,
Complainant,

vs.

The C. & D. Railway Company, and
the E. & F. Railway Company,
Defendants.

} In Equity.

In this cause an order was duly made on the — day of —, that the complainant's application for a receiver be and is sustained, and that the further hearing of such application stand over until the — day of —, and that the rights of all parties be then heard on the merits of said application, as will more fully appear by reference to said order; and on the — day of —, under stipulations of the parties, the court ordered that the further hearing of the application for the appointment of a receiver in said cause shall stand over until such date as should be fixed by written notice as particularly specified in such order; and pursuant thereto notice has been duly given, fixing this the — day of —, for such hearing.

Now on this — day of —, comes the A. B. Trust Company, trustee, complainant, by X. & X., its solicitors; and also come the defendants, the C. & D. Railway Company, by Y. & Y., its counsel; the E. & F. Railway Company, by B. P., its solicitor.

And thereupon came on for hearing upon the bill of complaint, answer, exhibits and affidavits the said application of the said A. B. Trust Company for the appointment of a receiver, which application is not resisted by the E. & F. Railway Company, but is resisted by the C. & D. Railway Company, and the same having been argued by counsel and

considered by the court, it is now hereby ordered, adjudged and decreed that S. M. and H. C. be and they are hereby appointed receivers of the property of the C. & D. Railway Company covered by the mortgages made by the said company which are sought to be foreclosed in the bill of the A. B. Trust Company, complainant, with the following powers and instructions, to wit:

First. Said receivers are hereby directed to take, on the — day of —, possession of all of the said mortgaged property, and to operate and cause to be operated the said railroads mortgaged as aforesaid, as herein provided, and to preserve and protect all of the said mortgaged property, acting in all things under the order of this court, or of such other courts as may entertain jurisdiction of parts of the said mortgaged property as ancillary to the jurisdiction of this court.

Second. The said receivers also, in like manner, shall, until otherwise ordered, pay all rentals accrued, or which may hereafter accrue, upon all leased lines of the C. & D. Railway, and for the use of all terminals or track facilities, and all such rentals or installments as may fall due from the said company for the use of any portion of the road or roads or terminal facilities of any other company or companies, and also all sums of money due or to become due for rolling stock or for steel, iron, ties, or other materials, for the maintenance of way or construction, sold or contracted to be sold to or for the benefit of the C. & D. Railway Company. And it appearing to the court that the C. & D. Railway Company has commenced or promoted the construction of a branch railroad from —, in the state of —, to or towards —, in said state, and has expended a very considerable sum of money thereon, and that the company constructing said road is under a statutory obligation to complete and equip at least ten miles of the same prior to the — day of —; and upon such completion the said C. & D. Railway Company will be en-

titled to certain stocks and bonds, and upon failure so to complete will forfeit all of the corporate franchises and rights belonging to said branch railroad; wherefore, the receivers are authorized, if in their judgment it shall be to the best interests of all parties concerned, to build and equip the said ten miles of said road, and in all respects to comply with the statutory requirements of the state of — in relation thereto.

Third. And the said receivers are also authorized to defend any actions pending or which may be brought seeking to establish claims, liens or demands against the said company or its property, and to prosecute or continue any action already brought against any corporation or party for the recovery of any money or property due to the said C. & D. Railway Company.

Fourth. Said receivers shall also pay, out of any income or revenues which may come into their hands, all just claims and accounts for labor, supplies, professional services, salaries of officers and employees remaining unpaid, and that have been earned or have matured within three months prior to the said — day of —.

Fifth. The matter of the payment of balances due or to become due to other railroads or transportation companies, growing out of the exchange of traffic, is reserved for further orders.

Sixth. The said receivers are further ordered and directed to pay all taxes on the said mortgaged property as the same shall mature, and also all the current expenses in the operation and maintenance of the said road, and to collect all the revenues thereof.

Seventh. The said receivers are further ordered and directed to keep, or cause to be kept, such accounts as may be necessary to show the sources from which all the income and revenues shall be derived, with reference to the interest of all the parties to each of the mortgages mentioned in the complainant's bill.

Eighth. The receivers shall report to this court from time to time, at least once in three months, their doings under this order, and they may apply to this court for instructions whenever necessary.

Ninth. The said receivers, before entering on their duties, shall each take and subscribe an oath to perform them faithfully, and with one or more sureties, approved by this court or any judge thereof, shall execute an undertaking to the clerk of said court, for the benefit of whom it may concern, in the penal sum of two hundred thousand (\$200,000) dollars, conditioned to the effect that he will faithfully discharge the duties of receiver herein, and obey the court.

Tenth. It is further ordered that all parties having in their possession any of the said mortgaged property shall, upon written demand of said receivers, yield up and deliver said property to them, and the complainant and defendants are and each of them is authorized to apply to any other Circuit Court of the United States of competent jurisdiction for such other order or orders in aid of the primary jurisdiction vested in this court, in said cause, as may have ancillary jurisdiction herein.

Eleventh. And it appearing to the court that certain bonds and stocks claimed to be the property of the said defendant, the C. & D. Railway Company, are now in the possession of the A. B. Trust Company, the complainant herein, it is ordered that said A. B. Trust Company retain the possession of said property until the further order of this court, unless the surrender thereof shall be duly ordered by some court of competent jurisdiction.

To all of which orders and appointments the C. & D. Railway Company, defendant, objects and excepts.

(1) This order was entered in the case *Mercantile Trust Co. v. Missouri, Kansas & Texas Ry. Co.*, pending in the circuit court of the United States for the district of Kansas.

No. 787.**Order Appointing Receivers of Kansas Natural Gas Company.**

[Caption.]

And now, October 9, 1912, this cause came on for further hearing upon the bill of complaint filed and upon the answer of the respondent, under its corporate seal and sworn to by its President and Secretary, admitting and confessing the truth of all statements, averments and charges in the bill contained, and also the right of the complainant to the relief prayed for, and joining in the prayer of the complainant for the appointment of a Receiver, and waiving all notice of the application therefor; the complainant appearing by his solicitor, Charles Blood Smith, Esq., of Topeka, Kansas, and the respondent by its solicitor, John J. Jones, of Chanute, Kansas. And the Court being fully advised of the premises,

It is now ordered, adjudged and decreed:

First. That Conway F. Holmes, George F. Sharitt, and Eugene Mackey be and they are now and hereby appointed Receivers of all and singular the assets, lands, tenements and hereditaments of the respondent, the Kansas Natural Gas Company, and all of its property, real, personal and mixed, of every nature and kind, wheresoever situate in this Eighth Judicial Circuit, including all pipe lines, compressor stations, pumps, machinery, appliances, fittings and equipment belonging to or connected therewith; and all oil and gas mining lands, leases and leaseholds and the wells, derricks, drain pipe, casing, tubing, machinery, appliances and equipment thereon connected therewith or belonging thereto and all leases, contracts, stocks, bonds, obligations, choses in action, accounts and rights, owned by, belonging to, or due to the defendant company; and all rights, franchises, income and profits granted to, acquired by or belonging to the defendant company.

Second. That each of the Receivers shall, before entering upon his duties hereunder, give and file with the Court a bond in the penal sum of \$25,000.00 with surety or sureties approved by this Court or the Clerk thereof, and conditioned that he will faithfully perform his duty as Receiver herein and in any ancillary proceedings wherein he may be appointed and well and truly account for any and all moneys or property coming into his hands as such Receiver, and abide and perform all things, which he is herein or may hereafter be directed to perform in this cause or in any ancillary proceedings wherein he is ancillary Receiver.

Third. That upon the filing and approval of the said bonds, the said Receivers (or each of them as fast as his respective bond is filed and approved) be and they are hereby authorized, empowered and directed to take immediate possession of all and singular the pipe lines, compressor stations, leases and other property above described or referred to, wherever the same may be situate or be found, and, until the further order of this Court, to continue the operation of the present pipe line system and natural gas business of the defendant company and every part or portion thereof, and to run, manage, conduct and operate such pipe lines and property as the defendant company holds, controls or operates under leases, contracts arrangements or otherwise. All of which is to be done, until the further order of the Court, as heretofore done, run or operated by the defendant Company; but

The Court expressly reserves to itself the right to pass upon, approve, disapprove, disavow and cancel any and all leases, arrangements and contracts of every nature, kind and description, under or by virtue of which, the defendant company has been or is now operating any of its leased lines and property; or selling or furnishing any of its gas for distribution and sale; or buying and acquiring any gas for use and transportation through its operated lines; and

no such lease, arrangement or contract shall be regarded as binding or taken by the Receivers, until expressly ordered by this Court in these proceedings; and nothing herein contained shall be considered or taken as in any way accepting, approving, satisfying or adopting any such lease, arrangement or contract.

The Receivers shall exercise all such powers as are usually exercised by Receivers and all such as are necessary or convenient to the proper conduct by them of the business of the [defendant] corporation and they shall discharge all such duties as are within the line, scope or purpose of their appointment.

Fourth. That the defendant corporation and each and every of its officers, directors, agents and employes and all other persons, associations and corporations are now and hereby ordered, commanded and directed to turn over and deliver to such Receivers or their duly constituted representatives any and all of the pipe lines, compressor stations, books of account, records, vouchers, deeds, leases, contracts, agreements, notes, accounts, moneys, stock, bonds, obligations and property of every nature and kind, real, personal and mixed, now in or which may hereafter come into his or their hands, control or possession; and

That the defendant corporation and each and every of its said officers, directors, agents and employes and all other persons, associates and corporations are now and hereby ordered, commanded and directed to obey and conform to such orders as may be given to them from time to time by such Receivers (or their duly constituted representatives), in conducting the operations of the said business, and in discharging their labors and duties as such Receivers; and

That the defendant corporation and each and every of its said officers, directors, agents and employes and all other persons, associations and corporations be and they are now and hereby restrained and enjoined during the pendency of this cause and the administration of the said Receivers,

from transferring, selling, disposing of or [interferring] with any of the said pipe lines, compressor stations, and property of the defendant corporation; and from taking possession of or in any way interfering with the same or any part thereof; and from disturbing, preventing or in any way interfering with the Receivers in their possession, control, operation or management of the property, or any part thereof, of the defendant company over which the said Receivers are hereby appointed as such; and from disturbing, preventing or in any way interfering with the Receivers in the discharge of their duties hereunder.

Fifth. The Receivers, in operating, conducting and managing the pipe line system and business of the defendant company are (until the further order of this Court) hereby authorized and empowered:

(a) To manage and operate the said lines and business of the company in such manner as will, in their judgment, produce the most satisfactory results.

(b) To collect and [receiver] all income from the property and business and all debts, accounts, choses in action and revenue, due the defendant company or its business.

(c) To employ and discharge and fix the compensation of all such officers, counsel, attorneys, accountants, managers, superintendents, auditors and employes as are in the judgment of the Receivers deemed necessary to aid in the discharge of their duties.

(d) To institute and prosecute such suits as may be necessary, in the judgment of the Receivers, to protect the property and trusts hereby vested in them and to likewise defend all such suits and actions as may be instituted against them as such Receivers and also to assume and take the prosecution or defense of any and all suits now pending against the defendant company, the prosecution or defense of which will, in the judgment of the said Receivers, be necessary for the proper protection of the property placed in their charge.

(e) To keep the property of the defendant company, hereby placed in their possession and control, insured in the same manner and to the same extent as it was insured by the company itself or in the judgment of the Receivers may deem fit and proper.

(f) To preserve the trust property in good order and condition, making all needed repairs thereon.

(g) To vote or cause to be voted any and all stock owned by the company in any underlying or subsidiary corporation.

(h) To have the record herein printed, at the expense of the trust, * * * copies of the bill, answer and this decree to be for distribution among bondholders and stockholders of the defendant company.

Sixth. That, until further order of this Court, the Receivers shall out of and from the income and revenue coming into their hands, pay and discharge:

(a) All the expenses of the receivership and of the operation and maintenance of the pipe lines, leases and properties, including all taxes and charges in the nature thereof lawfully imposed upon the property.

(b) All debts lawfully contracted by the defendant company for current operating expenses, material and supplies, since September 1, 1912, including the wages, salaries and expenses of officers, attorneys, managers, superintendents, agents, servants and employes.

Seventh. That the Receivers prosecute and complete the laying and construction of all pipe lines of the company now under way; the removal and re-construction of all pipe lines and compressor stations now under way; the drilling of all oil and gas [well-] now being drilled; the taking and securing of oil and gas mining leases, now being negotiated for; the making of contracts for the purchase of natural gas from producers thereof, to the end that as full a supply of gas, as possible, may be secured for the coming winter; but no contract for the purchase of gas shall be finally en-

tered into and signed by the Receivers, until first presented to and approved by this Court. Out of and from the income and revenue coming into their hands, the Receivers shall pay all cost and expenses of such betterments and improvements, including therein any balances due contractors, laborers, workmen, employes and materialmen falling due before or after the appointment of the Receivers.

Eighth. That the Receivers take and acquire such new oil and gas mining leases and drill such new wells and enter into such new contracts for the purchase of gas as in their judgment they may deem best and proper, but before any such contracts for the purchase of gas shall become effective, they shall be first submitted to and be approved by this Court.

Ninth. That the Receivers acquaint themselves at once with the extent and condition of the company's affairs, suits and property and within two weeks from the date hereof make and file with this court a full and detailed report, in triplicate, giving:

(a) The size, number, length, character, cost and condition of the company's owned and leased lines.

(b) The number, area, character and location of the company's oil and gas mining leases.

(c) The conditions under which the company secures its supply of gas and the cost thereof.

(d) The prices which it realizes for the gas it sells and copies of the contracts with the distributing companies.

(e) The terms and conditions under which [its] operates its leased lines and property and copies of the operating leases.

(f) Any and all other information, which the Court should have for a full understanding of the company's affairs and business.

(g) A list of the Company's officers, managers, superintendents, auditors and major [employess], showing the services and duties of each and the salaries received.

(h) The supply of gas which is available to the company from all sources.

(i) A review of the Kansas and Oklahoma gas fields, showing their extent, size, condition and worth.

(j) The Receivers' suggestions as to the value of the company's leases and contracts, both for operating lines and furnishing gas to the local distributing companies in the several cities reached by the operated lines of the defendant company and the advisability of disapproving and disavowing any or all of them.

(k) The nature, extent and cost of the betterments now being carried on by the company and the probable ability of the Receivers to pay for the same out of the receipts from the sale of gas and the suggestions of the Receivers as to the advisability of issuing receivers' certificates to complete the said work.

Tenth. That a person selected by the Receiver be and he is hereby appointed the attorney and counsel for the Receivers, at such salary as may be hereafter allowed him by the Court.

Eleventh. That the Receivers on January 1, 1913, and quarterly thereafter until the further order of this court, file itemized reports showing their receipts and disbursements.

Twelfth. That any bondholder or creditor of the defendant company, now or hereafter represented by complainant's counsel, may be hereafter filing herein a pleading so to do, become a party complainant herein, with the same force and effect as if he had joined in the original bill.

Thirteenth. Full right and power are hereby expressly reserved by the Court to make such other and further orders herein as it may hereafter from time to time deem necessary or proper.

Fourteenth. The bill herein having been filed for and on behalf of all bondholders of the company, and these proceed-

ings being instituted for the benefit of all creditors of the company, the costs of this proceeding, including the bill of the solicitor for the complainant, shall be paid by the receivers out of the trust funds. The bill of the said solicitor to be first approved and allowed by this court.

Fifteenth. That a copy of the bill of complaint filed herein be by the parties to this suit exhibited to and filed with each and every trustee in any trust deed or mortgage now existing on any property of defendant and file proof of same in this case, also file herein a certified copy of any and all such trust deeds and mortgages within seven days from this date.

Done this 9th day of October, 1912, at Kansas City, Kansas.

JOHN C. POLLOCK,
RALPH E. CAMPBELL,
Judges.

No. 788.

Order Appointing Receiver with Power to Collect Rents.

[Caption.]

This cause came on this, the — day of —, for orders, upon the application of complainant for the appointment of a receiver of the property involved herein, whereupon it was ordered and decreed by the court that M. L. be and is hereby appointed receiver of said property, being premises lot No. 5, Stephenson subdivision of county lot 512, north side of Alabama street, 45½ by 242 feet, and occupied by S. P. and J. P. He will take possession of said property and rent it out from month to month. The clerk of the court will issue to him a copy of this order, as evidence of his authority, and if possession is refused him under this order, the clerk will issue a writ of possession to the marshal, commanding him to put said receiver in full and peaceable possession of said premises. Said M. L. will execute a receiver's bond in the penalty of \$—, with one surety, conditioned to account for any rents coming into his hands as

such receiver, and to discharge the duties of such faithfully. It is further ordered that said receiver will not take possession of the premises aforesaid until the expiration of ten days from this date, and in the meantime, if the said defendants, S. P. and J. P., shall pay all taxes and costs and charges for the collection thereof, against said premises, and remove all adverse claims imperiling the title of said property as a security to the Southern Building & Loan Association, this order appointing M. L. receiver will be vacated upon the application of said S. P. and J. P.

No. 789.

Order Extending the Receivership.

The District Court of the United States for the ——— District of ———.

The A. B. Trust Company, Trustee, Complainant,

vs.

The C. & D. Railway Company and the E. & F.
Railway Company, Defendants.

An order was heretofore made in this suit, bearing date the ——— day of ———, A. D. ———, and entered on the ——— day of ———, A. D. ———, in which and whereby it was ordered, adjudged and decreed that S. M. and H. C. be appointed receivers of the property of the C. & D. Railway Company, covered by mortgages made by the said company, which are sought to be foreclosed in the bill of complainant herein, with the powers and instructions stated in the said order.

Now, on this ——— day of ———, A. D. ———, there comes before me, the C. & D. Railway Company, one of the above-named defendants, by R. T., its counsel, and the said the E. & F. Railway Company, the other defendant, by R. Y., its counsel, who appears in opposition to the present application, and claims that the court has no jurisdiction to make

the order as prayed for, or any order in the premises; and the said S. M. and H. C., receivers, by H. S., their counsel.

And it also appearing that the A. B. Trust Company, trustee and complainant, has received due notice of this application, and has signified that it does not oppose the granting of the relief prayed for by the C. & D. Railway Company.

And thereupon came on for hearing the said application of the defendant, the C. & D. Railway Company, and on its said petition, and on the affidavit of W. B. on the bill of complaint, and all the proceedings in this cause, and it further appearing to my satisfaction that the relief prayed for is necessary for a full and complete protection of the property covered by the said mortgage, and referred to and described in the bill of complaint, and that by reason of the allegations contained in the petition of the defendant, the C. & D. Railway Company, it is entitled to the relief therein prayed for:

It is now hereby ordered, adjudged and decreed that the receivership of the said S. M. and H. C. be, and the same is, hereby extended to cover all interest and estate of the C. & D. Railway Company in the property and assets described in said petition, to-wit: [*Naming the property, as, ninety-seven thousand two hundred and eighty-four shares of the capital stock of the International & Great Northern Railroad Company; one thousand shares of the capital stock of the Galveston, Houston & Henderson Railroad Company; nine thousand nine hundred and sixty-eight shares of the capital stock of the Boonville Bridge Company; one thousand and sixty-five one-thousand-dollar bonds of the General Consolidated Mortgage, and four hundred one-thousand bonds of the Galveston, Houston & Henderson Railway Company of 1882*]; provided, however, that this order shall not affect or impair any rights, legal or equitable, in respect to said property, of either the parties to this suit, or of any other person whomsoever, existing at the time of the entry of this order, and

shall not affect the rights, legal or equitable, of any other person or corporation having in custody any of said property, or any part thereof heretofore existing, under any claim of right as against the C. & D. Railway Company or its receivers; and the parties now in possession of said property shall hold the same subject to any legal or equitable rights of the parties hereto, for the use and benefit of said receivers, subject to the further order of this court, or of any court having ancillary jurisdiction herein.

Nothing herein contained shall be construed as an admission by the said the C. & D. Railway Company, or the said receivers, of the validity of any of the said liens, or claims, or of the amount claimed to be due thereon.

Nothing herein contained is intended to affect in any manner the franchises of the said corporation, or its right to continue and maintain its organization.

The said receivers are further ordered and directed to keep such accounts as may be necessary to show any property or assets, the title to which may be vested in them under this order, to the end that the just rights of all parties having claims, rights, liens or demands against the said property or assets, or against the said company, may hereafter be adjudicated and determined by this court, or any other court having ancillary jurisdiction thereof, and the said property and assets applied in conformity with such adjudications.

The said receivers, before entering upon their duties, shall take and subscribe an oath to perform them faithfully, and with one or more sureties approved by this court, or any judge thereof, shall execute an undertaking to the clerk of said court for the benefit of whom it may concern in the penal sum of two hundred thousand dollars, conditioned to the effect that they will faithfully discharge the duties of receivers under this order and under the orders of this court.

The complainant and the defendant, the C. & D. Railway Company, are and each of them is authorized to apply to any other United States circuit of competent jurisdiction as may

have ancillary jurisdiction herein, for such order or orders in aid of the primary jurisdiction vested in this court as may be necessary.

To the above order the E. & F. Railway Company duly excepts.

No. 790.

Order to File Amendment and Extending Receivership.

[Caption.]

This cause came on to be heard this — day of —, upon the application of the plaintiff for leave to file its amendment to its bill of complaint filed herein heretofore in this cause:

Whereupon, the court being fully advised thereof, said application is hereby granted, and the clerk of the court is directed to file the same as of the date of this order. And upon application of the plaintiff it is further

Ordered and decreed that the receivership of S. M. and H. C., appointed under a decree heretofore made in this cause, be and the same is hereby extended to and over all the railway and property of the defendants [*name the railways under the control of the defendants over which the receivership is extended*]; and that the said S. M. and H. C. be and they are hereby appointed receivers of all said railways and the properties thereof, with all the powers and authorities mentioned in and subject to all the terms and conditions of said decree appointing them receivers in this suit.

And the said receivers are hereby authorized to defend any action pending, or which may be brought, seeking to establish claims, liens or demands against the C. D. Company and the above-named railway companies, or either of them, or the property of either of them, and to prosecute any action already brought against any corporation or person for the recovery of any moneys or property due said railway company or either of them.

A. P.,
District Judge.

No. 791.**Order Appointing Receiver for a Manufacturing Corporation.**

[Caption.]

Upon reading and filing the verified bill of complaint in this cause, together with the verified affidavits of J. W. and G. L., and the exhibits in support thereof, and on motion of the counsel for plaintiff, and counsel for defendant appearing and consenting thereto, it is ordered by the court that E. Y., of —, in the state of —, and C. L., of —, in the state of —, be and they are hereby appointed receivers of this court of all and singular the property of the N. C. Co. of every description, and all money, claims in actions, credits, bonds, stocks, leasehold interests or operating contracts, and other assets of every kind, and all other property, real, personal or mixed, held or possessed by said company, to have and to hold the same as officers of and under the orders and directions of this court.

The said receivers are hereby authorized and directed to take immediate possession of all and singular the property above described, and to continue the business of said company.

Each and every of the officers, directors, agents and employes of said N. C. Company are hereby required and commanded forthwith, upon demand of the said receivers, to turn over and deliver to such receivers any books, papers, moneys, or deeds, or property, or vouchers for the property, under their control.

The said N. C. Company and its officers are hereby directed immediately to execute and deliver to the said receivers deeds of all real estate now owned or possessed by said company, and transfers and assignments of all their property.

Said receivers are hereby fully authorized to institute and prosecute all such suits as they may deem necessary, and to defend all such actions instituted against them as such receivers, and also to appear in and conduct the prosecution or defense of any suits against the said N. C. Company.

The said receivers are hereby authorized and directed out of the moneys coming into their hands to pay and discharge all amounts due to employes upon the current pay-roll.

Each of the said receivers is required to file with the clerk of the court within ten days from date a proper bond, the sureties to be approved by the clerk of this court, in the penal sum of ——— dollars.

All creditors of said N. C. Company are hereby enjoined from in any way intermeddling with the property hereby directed to be turned over to said receivers; and all officers, directors and agents of said N. C. Company are hereby enjoined from interfering with or disposing of said property of said N. C. Company in any way, except to transfer, convey and turn over the same to said receivers.

J. S.,

District Judge.

[If the receivers appear in open court at the time the order is made, an entry like that appearing at the end of No. ——— should be made. When the receivers appear and accept the appointment later, an entry should be made stating such fact.]

No. 792.

Motion to Require Clerk of District Court Appointing a Receiver to File Certified Copy of Bill and Order in Other Districts.

[Caption.]

Now comes your complainant and respectfully represents as follows:

That on the 22d day of August, 1916, it filed in this court the above entitled bill of complaint against the defendant; that thereafter on the 29th day of August, 1916, the judge of this court entered an order therein appointing James H. Hustis, of Winchester, Massachusetts, temporary receiver of all property of the defendant, including property within the districts of Maine and New Hampshire in this circuit.

Wherefore, your complainant, acting under section 56 of the judicial code of the United States, respectfully prays that the clerk of this court be ordered to transmit to the clerk of the district court of the United States for the district of New Hampshire and to the clerk of the district court of the United States for the district of Maine, each, a certified copy of the bill of complaint in this cause and the order of the court thereon appointing James H. Hustis temporary receiver, to be duly filed and entered in each of said district courts; and further, that the clerk of this court be ordered to transmit to each of said clerks for filing in each of said courts certified copies of each and every order of this court in the above entitled cause hereafter made affecting the property of the defendant within the district of such court.

INTERCONTINENTAL RUBBER COMPANY,

By B. B. J., its Solicitor.

[*Clerk's Certificate.*]

No. 793.

Order Concerning Resignation of Receiver.

[*Caption.*]

Now comes Eugene Mackey, a receiver herein, and tenders his resignation in writing, which the court accepts. And on final account and the approval of his accounts he will be exonerated. And for such purposes, as to him, the said Mackey, the case is continued.

A certified copy of this order will be by the clerk of this court forthwith sent to the district court of the eastern district of Oklahoma. This court reserves the power and right to appoint such successor, one or more, as may seem to the court to be right.

It is now and here in open court ordered that all objections to finally exonerating said Mackey and his bondsmen from further responsibility or liability herein be filed in writing with the clerk of this court on or before five (5) days from

this date, and if not filed within said time all claims against him, the said Mackey, will be conclusively deemed as waived. And if objections thereto or claims against him, the said Mackey, are made, the same are to be heard as soon after the same are filed as the court can hear them.

Done in open court this January 21, 1914.

(Signed) A. B., Judge.

No. 794.

Order Accepting Resignation of One Co-Receiver, Making Other Sole Receiver, etc., Property Being in Three Judicial Districts.(1)

[Caption.]

Now at this time the cases above entitled come on for further consideration, and the court being advised accepts the verbal resignation of Conway F. Holmes, one of the receivers herein.

It is ordered that the said Conway F. Holmes and George F. Sharitt, the two receivers herein, file a report duly verified of all their doings and that the same be filed on or before March 23, 1914. It is further ordered that any and all objections to said report by any party in interest shall be filed within five days thereafter.

It is further ordered that the said report of said receivers and the said objections thereto, if any, are referred to Wash Adams, Esq., of Kansas City, Missouri, as master, to audit and pass upon the same and make his report to this court with all deliberate speed. And when the said report shall be approved, he, the said Conway F. Holmes, shall stand discharged from all further liabilities in said cases and the sureties on his bond be fully exonerated.

It is further ordered that, until the further order of this court, he, the said George F. Sharitt, shall be the sole receiver herein for the district of Kansas, for the western district of Missouri, and for the eastern district of Oklahoma,

under the orders of said United States district courts for said three districts.

It is further ordered that he, the said George F. Sharitt, shall prosecute his duties for said three districts with all diligence and properly conserve the property and interests heretofore, now and hereafter entrusted to him as the only and sole receiver.

It is further ordered that he, the said George F. Sharitt, sole receiver, shall collect for gas purchased by the St. Joseph Gas Company at the city of St. Joseph, Missouri; by the Kansas City Gas Company at Kansas City, Missouri; the Joplin Gas Company at Joplin, Missouri, and all other purchases and consumers within the state of Missouri. And the said concerns within the state of Missouri shall pay to him, the said George F. Sharitt, all sums for all gas purchased or consumed by them, or any of them, within the state of Missouri, which shall include all gas heretofore purchased or consumed, or that may be hereafter purchased or consumed, by any of said parties within the state of Missouri.

It is further ordered that the date of March 20, 1914, heretofore fixed for further hearing in these cases, be and the same is hereby vacated, and in lieu thereof it is hereby ordered that the said further hearing be fixed and is hereby fixed for Monday, March 23, 1914, at nine o'clock in the forenoon, at Kansas City.

It is further ordered that at said hearing above designated, March 23, 1914, the receivers of the district court of Montgomery county, Kansas, or any other party in interest, be and they are hereby granted permission to make application for an order or orders directing the receivers of this court to turn over moneys to them, the said receivers of the district court of Montgomery county, Kansas, or to any other parties in interest.

Done and ordered of record this March 12, 1914.

SMITH MCPHERSON, Judge.

(1) Judicial Code, Sec. 56, relates to a case where the property involved lies in several judicial districts. See *Pipe Line Co. v. Fidelity, etc., Co.*, 217 Fed. 187, 133 C. C. A. 181.

No. 795.**Order to Receivers Concerning Collection, Deposit and Checking Out Moneys.**

[Caption.]

It is further ordered that the Kansas City Gas Company, of Kansas City, Missouri, at once pay to the receivers of this court on account the sum of \$809,541.65.

It is further ordered that the Wyandotte County Gas Company pay on account to the receivers of this court the sum of \$199,463.54. The balances, if any due to the receivers herein, shall be subject to further adjustment.

Failing to pay such sums to the receivers at once, the receivers shall bring said company before the court obtaining jurisdiction over each and both said gas companies and all such moneys as well as all other moneys by said receivers hereafter received, shall by said receivers be forthwith deposited in equal sums approximately in the following banks and not elsewhere, namely: The First National Bank of Kansas City, Missouri; The Pioneer Trust Company of Kansas City, Missouri; The National Bank of the Republic of Kansas City, and the Merchants' National Bank of Topeka, Kansas; said receivers shall deposit such moneys and the whole thereof to their credit, subject to check, bearing interest at the highest rates attainable for such deposits. Said moneys and any part thereof, aside from current operating expenses, shall not be checked against nor paid out by the receivers except under orders of the court, on checks countersigned by the judge of this court.

Done in open court —.

SMITH MCPHERSON, Judge.

No. 796.**Order Allowing Claims Approved by Receiver.**

[Caption.]

This cause coming on to be heard upon the petition of Guy W. Mallon, receiver herein, for an order of allowance

of the claims of the creditors of the Superior Portland Cement Company, other than those that were allowed on November 7, 1914, which claims have been duly presented and verified to the satisfaction of said receiver, upon consideration thereof the court finds that the persons whose names are hereinafter set forth are creditors of the Superior Portland Cement Company in the amounts set opposite their respective names, and upon the recommendation of the receiver said claims are hereby found to be valid and correct in amount and the same are duly allowed, without prejudice to any claim for priority by any of said parties.

No. 797.

Order Making Allowances in Receivership.

[*Caption.*]

The court makes the following allowances, namely:

George F. Sharitt has heretofore been paid by orders of this court \$5,000, and he is allowed the further sum of \$10,500.

C. F. Holmes has heretofore been paid the sum of \$5,000 on account as receiver, and is now allowed the additional sum of \$10,500.

Eugene Mackey, a receiver, has heretofore been allowed the sum of \$5,000, and is hereby allowed the additional sum of \$5,000.

John F. Phillips has heretofore been allowed the sum of \$1,000, and he is now allowed the additional sum of \$5,000 as his compensation as solicitor for the receivers.

John J. Jones, as solicitor for receivers, has heretofore been allowed the sum of \$6,500, and he is hereby allowed the additional sum of \$9,000.

F. J. Fritch is allowed the sum of \$1,000 for legal services rendered to the receivers.

A. B. Macbeth is allowed on account of salary \$400.

Charles Blood Smith, solicitor for complainants, has heretofore been allowed the sum of \$4,500, and he is now allowed the additional sum of \$5,000.

Each and every of the foregoing allowances is made in open court, all parties in interest herein, including the state court receivers and their solicitors, being present, and all acquiescing in the said allowances in said amounts. And all of said allowances are made in full of all claims up to and including this day. The court finds that the management of the receivers of this court has been such as to enable them to pay all said sums aforesaid out of the reduction of salaries and the discharging of unnecessary employes and interest on moneys in their possession at current rates of two per cent. per annum.

The receivers of this court will this day by check pay to said state court receivers, Landon and Litchfield, the sum of fifty thousand dollars (\$50,000) on account, the same being necessary for operating expenses, which in open court is done.

The court reserves the right to make any and all other, further and different orders herein as it may deem equitable and just in the premises. For all of which and all other proper purposes this cause is continued.

Done in open court at Kansas City, Kansas, this January 24, 1914.

SMITH MCPHERSON, Judge.

No. 798.

Entry of Order Appointing Receiver for Manufacturing Company, Directing Transfer of Property to Him, Designating His Counsel, etc.

[Caption.]

This day this cause came on to be heard upon the amended bill of complaint of the plaintiff, upon the motion for the appointment of a receiver and the affidavits in support thereof, the objections to the appointment of a receiver filed on behalf

of the defendant and the affidavits in support of said objections, and the arguments of counsel, and it was argued by counsel, and submitted to the court.

Upon consideration whereof, the court, being fully advised in the premises, finds that the motion for the appointment of a receiver herein is well taken and should be sustained. It is therefore ordered, adjudged and decreed that A. B. be and he is hereby appointed receiver of the defendant, The Capital City Dairy Company, and of all its property, equitable interests, things in action, rights to property, effects and money, and all other property of whatever kind and description and wheresoever situated, belonging to the defendant, The Capital City Dairy Company, with full power and authority to collect and reduce to possession by appropriate legal proceedings, or otherwise, all of said property, equitable interests, things in action, rights to property, effects and money belonging to said The Capital City Dairy Company.

The defendant, The Capital City Dairy Company, its officers, directors, stockholders, employes and agents, and all other persons having any property or effects of said corporation in their possession or control, are hereby ordered and directed to turn over to the said A. B., as such receiver herein, all property, equitable interests, things in action, rights to property, effects, money, and all books, papers, documents or other evidences of indebtedness belonging to said corporation, in their possession or under their control.

It is further ordered that before entering upon his duties as receiver, the said A. B., as said receiver, give bond, with sureties, to the satisfaction of the clerk of this court, in the sum of five thousand dollars (\$5,000).

And thereupon the said A. B. appeared in open court and was duly sworn and qualified as such receiver, and executed a bond with sureties as herein required, as appears from the records of this court.

To said findings of the court and each thereof, and to said order, judgment and decree of the court, the defendant, The Capital City Dairy Company, excepts.

Thereupon the defendant gave notice of its intention to appeal from said findings and from said order, judgment and decree.

Whereupon the court fixes the appeal bond at the sum of five hundred dollars.

On account of the knowledge possessed by X. Y. and S. T. of the matters affecting the defendant, its officers and stockholders, they are hereby designated by the court as counsel for the receiver.

No. 799.

Judge's Fiat Appointing Receiver for Street Railway.

[Caption.]

The foregoing and annexed bill having been presented to me, and having been duly considered, and it appearing that the appointment of a receiver is necessary to properly care for and preserve the property pending the litigation, and that the defendant acquiesces in the prayer for a receiver, it is

Ordered that Guy W. Faller be and he is hereby appointed receiver of Amarillo Street Railway Company, with authority to bring and defend any and all such suits as may be necessary from time to time in order to accomplish the purposes of said appointment, and to do and perform all such acts as are usually incident and proper to be done as receiver, all of which acts and proceedings, however, to be subject to and under the control of the court.

This appointment to take effect and be in force only upon the filing of the bill in the district court of the United States for the northern district of Texas, at Amarillo, Texas, and upon the execution of a good and sufficient bond, to be approved by the clerk of said court or his deputy, in the sum of five thousand dollars, payable and conditioned as required by law and in conformity with the practice in equity and the laws of the state of Texas.

EDWARD R. MEEK,

U. S. District Judge.

No. 800.**Order Appointing Receiver of Indian Oil Lands, Defining His Powers and Duties and for Other Purposes.**

[*Caption.*]

On this the 17th day of April, 1914, this cause came on to be heard in open court at Muskogee, Oklahoma, on the petition of the complainant, the United States of America, represented by C. C. Herndon, assistant United States attorney, and the defendant, Bessie Wildcat, a minor; Santa Watson, as guardian of Bessie Wildcat, a minor; Cinda Lowe, Louisa Fife, Annie Wildcat and Emma West, represented by Ramsey & Thomas, their solicitors of record, and the defendants, Martha Jackson, a minor; Saber Jackson, as guardian and next friend of Martha Jackson, a minor; J. Coody Johnson and Black Panther Oil & Gas Company, a corporation, represented by J. G. Harley, their solicitor of record, and the defendant, H. B. Beeler, represented by Rosser & Cochran, his solicitors of record, for the appointment of a receiver in this cause, and for an order of court defining the powers and duties of the receiver. The defendants, Mattie Bruer (nee Phillips), Jennie Phillips, Billie Phillips, William McCombs, Jack Gouge, Ernest Gouge and D. L. Berryhill, by their solicitors, R. F. Turner and W. V. Thraves, being present and consenting to such appointment of receiver, and to such defining of his powers and duties, and it appearing to the court that the grounds for the appointment of a receiver, as set forth in the said petition, are sufficient, and that the receiver should be appointed in this cause, to take into his charge and custody, as receiver, the land which forms the principal subject-matter of this action, to-wit:

The northwest quarter of section 9, township 18 north, range 7 east, in Creek county, Oklahoma,

and to direct and cause the production of oil and gas from the said land during the pendency of this suit. It is hereby ordered, adjudged and decreed that J. F. Darby, of Muskogee, Oklahoma, be and he is hereby appointed receiver in the above

styled cause, and upon the execution by the said J. F. Darby of a good and sufficient bond in the sum of \$10,000, with solvent security, to be approved by the judge of this court, to be so conditioned as to require the said J. F. Darby as such receiver to comply punctually with each and all of the orders of the court herein, and to account faithfully, accurately and punctually for all moneys that may come into his hands as such receiver, and to disburse the same only as directed by the court, and upon his taking and subscribing an oath to be filed in court in this cause to perform faithfully, diligently and impartially his duties as receiver, and to keep safely and disburse only as directed by the court, the funds that may come into his custody or under his control; then he, the said J. F. Darby, shall be and is hereby authorized and directed to take into his official charge and custody the above described tract of land and all improvements now thereon and to receive and hold subject to the order of the court all funds that may be paid to or collected by him as such receiver under the provisions of this order.

The said J. F. Darby as receiver is hereby authorized and directed to enter into a formal agreement with the said Black Panther Oil & Gas Company, a corporation, for the development of the said land and the production of oil and gas therefrom by the said Black Panther Oil & Gas Company during the pendency of this action, the said agreement to embody substantially the following provisions, to-wit:

That the production of oil and gas from said land be proceeded with by the said Black Panther Oil & Gas Company, and that 25 per cent. of the gross amount of all oil and gas produced by the said company from the said land or the proceeds of 25 per cent. of the gross amount of oil and gas so produced therefrom shall be delivered or paid by the said company to the said J. F. Darby as receiver, or to such person or corporation as he may direct; that the said Black Panther Oil & Gas Company drill in good faith at least three wells on the said land for the purpose of offsetting, and to a sufficient depth and at proper places to offset the wells on adjacent lands,

one of said minimum number of three wells to be commenced within ninety days from the date of the agreement entered into between the said Black Panther Oil & Gas Company and the said receiver; another well to be commenced within six months from said date, and the third well to be commenced within nine months from said date, each of said wells to be completed within a reasonable time after its commencement, and the wells to be drilled on the said land by the said oil and gas company to be drilled in such number and to such depth and at such places as may be necessary and sufficient to protect the above described tract of land from being drained by wells on adjoining lands, and as may properly develop the above described land to the fullest reasonable extent; that the said Black Panther Oil & Gas Company do all things necessary for the full protection of the above described tract of land against drainage caused by the operation of oil or gas wells on adjacent lands; that the said Black Panther Oil & Gas Company promptly execute to the said J. F. Darby as receiver, or to his successor or successors in the receivership, for the use and benefit of the parties in interest in this action, a good and sufficient bond in the sum of \$25,000, to be approved by the said J. F. Darby as receiver, conditioned that the said Black Panther Oil & Gas Company faithfully carry out and perform all and singular the provisions of its said agreement with the receiver; that the said Black Panther Oil & Gas Company shall not claim or be allowed any sum for the expense of any dry hole or holes drilled by it on said land, and shall not claim or be allowed any sum for any expenses of any kind incurred by it in carrying out its said agreement with the said receiver, or in producing or attempting to produce oil and gas from the said land except its working interest of 75 per cent. of the oil and gas produced therefrom.

The said J. F. Darby as receiver is authorized and directed to require and take from said Black Panther Oil & Gas Company, to run to himself and his successor or successors in the receivership, for the use and benefit of the parties in interest

in this action, a good and sufficient bond in the sum of \$25,000, to be approved by himself, conditioned that the said Black Panther Oil & Gas Company faithfully carry out and perform all and singular the provisions of its agreement with him.

The said J. F. Darby as receiver is authorized and directed to receive and collect, and is hereby charged with the duty of receiving and collecting from the said Black Panther Oil & Gas Company a full 25 per cent. of the gross amount of all the oil and gas produced by the said company, or any person acting for it, from the said land, and he is further authorized and directed to make such examination of the books and records of the said Black Panther Oil & Gas Company as he may deem necessary to enable him to perform properly his duty as such receiver, and he is further authorized and directed to report promptly any failure on the part of the said Black Panther Oil & Gas Company to deliver to him or under his order a full 25 per cent. of the gross amount of all the oil and gas produced from the said land, or the proceeds thereof, and any other failure of the said company to perform its undertakings to and agreements with him, and he is further authorized and directed to release to the said Black Panther Oil & Gas Company and its assigns, free from any claim of any party to this action, if and so long as the provisions of the agreement to be entered into between himself and the said Black Panther Oil & Gas Company are faithfully and punctually performed by the said company, the working interest in the oil and gas produced by the said company from the above described land; that is to say, all the oil and gas so produced in excess of the royalty portion of one-fourth of the gross amount of production.

The said J. F. Darby as receiver is further directed to hold and safely keep the fund accruing from the said royalty portion of 25 per cent. of the oil and gas produced from the said land, subject to be disbursed by him only under an order of this court regularly made.

The said J. F. Darby as receiver is further ordered and directed to keep an accurate account of the production of oil

and gas from the said land, and of all his doings under this order of appointment, and of the funds that come into his custody, and of his disposition of the said funds, and shall file with the clerk of this court in this cause at least once in each successive period of sixty days a true and complete statement, under oath, of his accounts and doings under this order, and he shall receive as his compensation for all his services hereunder such sums as the court may from time to time allow therefor, and in addition thereto shall be allowed his actual and necessary expenses incurred in discharging his duty as receiver in this cause, including an allowance to cover the actual and necessary premium on his bond or bonds, and shall incorporate a statement of such expenses in the verified statements which he is hereby required to file with the clerk of this court, and he shall not reimburse himself for any expenses until such statement has first been approved by the judge of this court.

The said J. F. Darby as receiver is hereby ordered and empowered to take full custody and control of the above described tract of land, subject only to the possession thereof by the said Black Panther Oil & Gas Company for the production of oil and gas therefrom under this order, and its agreement with the said receiver, and he, the said receiver, is further empowered and authorized to go upon said tract of land at any time and make such inspections and investigations as will, in his judgment, enable him to perform properly his duties, power and authority under this order of appointment.

It is further ordered by the court that at the final termination of this action the said Black Panther Oil & Gas Company shall be allowed the reasonable cash value of its interest in the corporeal properties, such as derricks, machinery, piping, casing, tanks, etc., owned by it and then on the premises, and necessary in the development of and production of oil and gas from the same, but the amount so to be allowed to the said Black Panther Oil & Gas Company shall in no event exceed the amount of royalty that has accrued in the hands of the said receiver for the benefit of the prevailing party or parties

to this suit; that the reasonable cash value of the said corporeal properties be determined according to their condition at the time of the termination of this action and be ascertained in the following manner:

One person shall be appointed by the Black Panther Oil & Gas Company and one by the prevailing party or parties to this action, and the said two persons shall meet to consider and appraise the reasonable cash value of the said physical properties, and whatever sum may be agreed upon by them shall be reported by them in writing to this court and shall be taken as such reasonable cash value, but if they be unable to agree thereupon, the Black Panther Oil & Gas Company and the said prevailing party or parties shall report such disagreement to this court, and this court will thereupon appoint some fit and disinterested person as a third appraiser, and the three said appraisers shall then meet and consider such reasonable cash value, and the concurring opinion of any two of the three of them, when reported in writing to this court, shall control and be conclusive as to such value between the said Black Panther Oil & Gas Company and the said prevailing party or parties, but any such determination of value shall always and in any event be subject to approval by this court. This order is made subject to such notifications in any part hereof as the court may at any time hereafter upon due notice to counsel and a hearing deem necessary and proper for the better conduct of the matters involved.

R. E. C.,

Judge of the United States District Court.

No. 801.

**Order Amending Order Appointing Receiver, Continuing
Him, Prescribing Duties, etc.**

[Caption.]

The order of this Court made in chambers on the 21st day of August, 1916, appointing Guy W. Faller, Receiver,

of Amarillo Street Railway Company, in the above entitled cause, is hereby in all things ratified and confirmed, and on this the 2nd day of October, 1916, all parties to this cause being present by their attorneys, and the Court having considered said appointment, it is ordered that said original order of appointment be and the same is hereby amended, so that the order of this Court now entered is as follows:

Guy W. Faller is hereby continued as Receiver of said Amarillo Street Railway Company until the further orders of this Court, and it appearing to the Court from the report of said Receiver now on file that he has possession of all of the property of said Amarillo Street Railway Company; it is ordered by the Court that said Receiver continue in possession of said property, including all the assets, rights and franchises of said Amarillo Street Railway Company, wherever situated, including all the railway tracks, terminal facilities, real estate, offices, stations and all other buildings and property of every kind owned, held, possessed or controlled by said Company, together with all other property in connection therewith and all moneys, choses in action, credits, bonds, stocks, lease-hold interests, operating contracts and other assets of every kind and all other property, real, personal and mixed, held or possessed, by said Company, or now held or possessed by said Receiver for it, to have and to hold the same as the officer of and under the orders and directions of this Court.

Said Receiver is hereby authorized and directed and said Amarillo Street Railway Company and each and every of its officers, directors, agents and employees are hereby required and commanded to obey and conform to such orders as may be given them from time to time by the said Receiver, or his duly constituted representative, in conducting the said railway and business and in discharging his duty as such receiver, and they and each of them are hereby enjoined from interfering in any way whatever with

the possession or management of any part of the business or property over which said receiver is so appointed, or from in any way preventing or seeking to prevent the discharge of his duties as such Receiver.

Said Receiver is authorized to pay out of any income or revenues which may come into his hands all just claims and accounts for labor and operating expenses of said street Railway, professional services, salaries of officers and employees, as the same mature from time to time, but he shall make no purchase of ties, rails, cars, buildings or equipment, or of other material for the construction, improvement or betterment of the property of said Street Railway Company, except upon an order of this Court first obtained therefor.

Said Receiver is further ordered and directed to pay all taxes on the said mortgaged property as the same shall mature, and also all the current expenses in the operation and maintenance of said road, and to collect all the revenue thereof.

Said Receiver is further ordered and directed to keep or cause to be kept such accounts as may be necessary to show the sources from which all the income and revenues shall be derived, with reference to the interest of all the parties to each of the mortgages mentioned in the complainant's bill.

The Receiver shall report to this Court from time to time, as may be demanded by the Court, showing in detail his actions under this order, and he may apply to this Court for instructions whenever necessary.

Said Receiver is authorized to defend any actions pending or which may be brought, seeking to establish claims or liens against the said Company, or its property, and to prosecute or continue any action already brought against any corporation or party for the recovery of any money or property due to the said Amarillo Street Railway Company.

The bond of said Guy W. Faller as Receiver, heretofore presented by him and approved by the Clerk of this Court, and filed herein, is hereby in all things approved by the Court, and shall continue in full force and effect as the bond of said Receiver according to its terms and the order of the Court heretofore made in appointing said Receiver.

E. R. M.,
U. S. Judge.

No. 802.

Petition of Receiver to Bring in Parties, etc.

[Caption.]

Your petitioner, A. B., respectfully represents and shows to the court that he was heretofore appointed receiver by this court in the above entitled case, the general nature of which suit and the controversies herein, will appear from the bill and petition presented to this court with this application, which said bill and the record of this court in this case as made to this date, is referred to, without going further into detail, which is not deemed necessary for the purpose of this petition.

Your petitioner further is advised and informed that in order to save cost and expense of many suits and to better preserve the assets of the defendant corporation and to more adequately and effectually administer the trust and recover the property necessary for the satisfaction of the debts and obligations of the defendant corporation, and because actions at law will not provide an adequate remedy for the property sought to be recovered in the above entitled case and its application to the payment of the debts of said corporation, and in order to save the cost and expense of many suits, it is proper if it may be done, to bring in all the parties holding or claiming to hold any of the property described in the petition and all the parties indebted in any way to said defendant corporation, and com-

pletely adjust the rights in equity of all parties interested in said property by bill or petition in the above cause in one suit.

Wherefore, your petitioner prays for all and such orders and directions as will enable him to fully discharge his duty in the matter set forth in the bill and petition presented herewith as well as for such general instructions, if any, as this Honorable Court may see proper to give.

A. B.,

Petitioner.

X. Y. and S. F.,

Solicitors and Counsellors for Receiver.

No. 803.

Order Permitting Receiver to Sue.

[*Caption.*]

This day this cause came on to be heard upon the application and the petition of X. R., receiver herein, and the said receiver in this cause is ordered and directed to institute suit by proper bill or petition in the pending suit against all persons indebted to the defendant company or who may have any property of defendant company in their custody or control, and for all proper relief touching the matters and things set forth in the bill and petition of the receiver presented herewith; and upon application of said receiver he is hereby granted leave to file said bill in this cause.

No. 804.

Petition of Receivers for Authority to Accept Part Payment on Note and to Extend Payment on Balance, and Order of Court Thereon.

[*Caption.*]

Come now Conway F. Holmes, Geo. F. Sharitt and Eugene Mackey, Receivers appointed by this court in the

above entitled cause and show that on or about the 5th day of November, 1909, the Citizens Gas Company, of Nowata, Oklahoma, for good and valuable consideration made, executed and delivered its certain promissory note for the sum of Forty Thousand Dollars (\$40,000.00), due and payable within four years from the date thereof, and payable to the order of G. R. Hemminger. That thereafter for good and valuable consideration the said G. R. Hemminger duly sold, assigned and transferred said note to the Kansas Natural Gas Company and that said company is now the legal and equitable owner and holder thereof, and that said note will mature on the 5th day of November, 1913. Said Receivers further represent and show that the said the Citizens Gas Company is not capable of meeting this obligation, but is able and willing to pay Nine Thousand Ninety-Eight and 53/100 Dollars (\$9,098.53) and to enter into an extended agreement, as shown below, and your Receivers unqualifiedly recommend that said payment be made and accepted and that said extension be authorized and granted:

Wherefore, Your Receivers pray that they be authorized to enter into an extension agreement on said matter in the following form, to-wit:

**"An Agreement for the Extension of Time of
Payment of Mortgage Debt.**

This Agreement, Made this day of November, A. D. 1913, by and between Conway F. Holmes, Geo. F. Sharitt and Eugene Mackey, Receivers of the Kansas Natural Gas Company, the owner and holder of a certain promissory note for the sum of Forty Thousand Dollars (\$40,000.00), given by The Citizens Gas Company, of Nowata, Oklahoma, and secured by a certain mortgage deed upon certain property therein described, situated, lying and being in the County of Nowata, State of Oklahoma, which said mortgage is dated the 5th day of November, A. D. 1909, and filed for record on the 5th day of November, A. D. 1909, in the office of the Register of Deeds of Nowata County, Oklahoma, and duly recorded in Volume C. M.

Index at Page 116, N. 4261, of the records of said office, party of the First part, and The Citizens Gas Company, of Nowata, Oklahoma, the mortgagor, party of the second part.

Witnesseth: That the said parties for themselves, their heirs, successors and assigns, hereby mutually agree that the time for the payment of Thirty-Three Thousand Three Hundred and One Dollars and Forty-Seven cents (\$33,301.47) of the principal of said note and mortgage debt shall be and the same is hereby extended to be paid as follows, to-wit:

Eight Hundred Dollars (\$800.00) on or before the 15th day of February, A. D. 1914, and Eight Hundred Dollars (\$800.00) on or before the 15th day of March, A. D. 1914; and Five Hundred Dollars (\$500.00) on or before the 15th day of each succeeding April, May, June, July, August, and September, and Eight Hundred Dollars (\$800.00) on or before the 15th day of each succeeding October, November, December, January, February, and March, until the whole of said sum of Thirty-Three Thousand Three Hundred and One Dollars and Forty-Seven Cents (\$33,301.47) is paid, and that the principal sum remaining from time to time unpaid is to bear interest at the rate of 7%, payable annually on the 5th day of November each year until said principal and interest is fully paid, and until the same is fully paid, it will punctually pay interest now due or to become due thereon at the time and rate aforesaid, and the failure to punctually make said payments or any part thereof when due, shall at the option of the holder hereof make the whole of said principal and interest due and payable.

That the said The Citizens Gas Company will keep the mortgaged premises in good repair, and the taxes thereon duly paid, according to the provisions of said mortgage. That it will punctually pay all taxes and assessments levied or assessed on the mortgaged premises or any interest therein, whether in the nature of taxes or assessments now

in being or not, and that at the expiration of said extended term, it will pay said mortgage debt and all interest thereon, together with any money paid by the holders for taxes or other necessary charges on or in respect to the mortgaged premises, or the debt secured by said mortgage, and will in all respects faithfully comply with and perform all the covenants and terms of said mortgage deed.

It is expressly understood and agreed that nothing herein contained shall be construed to impair the security of said party of the first part, their successors or assigns, under said mortgage or other contract, or effect any rights or powers which it may have under said note and mortgage for the recovery of said mortgage debt with interest in case of non-fulfillment of this agreement, with interest, by said party of the second part.

Said party of the second part as a further security for said debt and as part consideration hereof, hereby sells, assigns and transfers all of its right, title and interest in and to a certain judgment obtained by it against the British-American Cement Company in the circuit court of Jackson County, Missouri. Said judgment, when collected, to be applied by the holders hereof to the extinguishment of the payments last maturing under this agreement.

Executed this day of November, A. D. 1913.

.....

Receivers, Kansas Natural Gas Company.

THE CITIZEN'S GAS COMPANY,

By.....

Its President.

'Attest:

.....

Its Secretary."

And for all proper orders in the premises.

JOHN J. JONES,

Attorney for said Receivers.

No. 805.**Petition to Discharge Receivers Appointed by Federal Court
and for Delivery of all Property in their Hands as such
Receivers to the Receivers Appointed by the State Court.**

[Caption.]

Come now John S. Dawson, Attorney General of the State of Kansas, and John M. Landon and R. S. Litchfield, citizens of Independence, Montgomery County, Kansas, and appearing for the purposes of this application and petition only, and not in subordination to or recognition of the propriety of this main proceeding, but as the duly authorized officers and representatives of the District Court of Montgomery County, Kansas, present this petition and show to this Honorable Court the following facts and matters, to the end of making plain the propriety of this request and prayer of the District Court of Montgomery County, Kansas, here and now presented through its said offices to yield to said last named court the physical control of the properties over which said last named court alone has legal dominion, but which is now in the possession of certain officers of this, the United States District Court for the District of Kansas.

(1). On January 5th, 1912, the State of Kansas by its Attorney General brought an action in the nature of quo warranto in the District Court of Montgomery County, Kansas, against the Independence Gas Company and the Consolidated Gas, Oil and Manufacturing Company, Kansas Corporations, and Kansas Natural Gas Company, a Delaware corporation authorized to do business in Kansas, charging said corporations with misuse, perversion and abuse of their corporate privileges, and with having contrived and engaged in an illegal combination in restraint of trade in violation of the anti-trust laws of the State of Kansas and in violation of the national anti-trust laws, which are a part of the civil jurisprudence of the State of Kansas, by which

unlawful combination the said Kansas Natural Gas Company had secured a monopoly of the sources of gas supply and a monopoly of the sale and distribution of gas to the people of Kansas, and by which unlawful combination the selling price of gas, a product of domestic raw material, an article of commerce, and an aid to commerce, had been advanced and controlled by the said Kansas Natural Gas Company. A true copy of the petition of the State of Kansas in said action is contained in an abstract filed herewith, but not physically attached hereto on account of its size and bulk, but which is marked "Kansas Petition Exhibit A", and made a part hereof.

(2). The said petition prayed for such relief as is sanctioned by the laws of the State of Kansas, and which is in part as follows: [omitted].

(3). Issues were joined by the filing of demurrers by the defendants on February 12th, 1912, and February 19th, 1912, which demurrers were overruled by the court on April 29th, 1912; and on May 21st, 1912, answers in the nature of general denials to all the allegations of the petition of the State of Kansas were filed by each of the defendants.

(4). Said demurrers and the rulings thereon and the answers of defendants appear in the abstract entitled "Kansas Petition Exhibit A", filed herewith.

(5). Evidence was taken and heard by the court in the said action in conformity with the laws of the State of Kansas and a trial had before the Montgomery County, Kansas, District Court, T. J. Flannelly, District Judge presiding, on September 30th, 1912, and October 1st, 1912, and on said October 1st, 1912, it was agreed in open court between counsel for the State of Kansas and for the defendants and with the approval of the court, that owing to the importance of the action its gravity and the public and property interests therein, and the voluminous record thereof, that time should be taken to abstract the record and

print such abstract and to submit printed briefs to aid the court in summarizing the facts and determining the law pertaining thereto, and the State of Kansas by its attorney general and counsel, set about with due diligence the preparation of such abstract and brief, a copy of which abstract is filed herewith, marked "Kansas Petition Exhibit A."

(6). Some time thereafter plaintiff's abstract and brief were duly filed and the brief of defendants was likewise filed, and on February 3rd, 1913, the court heard the arguments of counsel for plaintiff and defendants, and on February 15th, 1913, the District Court of Montgomery County, Kansas, delivered its opinion and rendered judgment in said action, made findings of fact, conclusions of law, and issued certain restraining orders, injunctions and rendered its decree, all of which are filed herewith, marked "Kansas Petition Exhibit B" and made a part hereof, but not physically attached owing to its size, and for the greater convenience of this court.

(7). Said opinion and judgment, findings of fact, conclusions of law, restraining order, injunction and decree held that evidence introduced sustained all the material allegations of the plaintiff's petition, declared the Kansas Natural Gas Company an illegal combination in restraint of trade, and that each and all of the defendants had perverted, misused and abused their corporate privileges, had violated the Kansas anti-trust laws and the federal anti-trust laws, which federal anti-trust laws are a part of the civil jurisprudence of the State of Kansas; and the said court appointed two of these petitioners, John M. Landon and R. S. Litchfield, as receivers for the Kansas Natural Gas Company, fixing their bonds in the sum of Fifty Thousand Dollars each, and on the same date, February 15, 1913, said petitioners, duly qualified as such, and gave said bonds, which bonds were duly approved by the court, and now appear before this Honorable Court in obedience to the order of the District Court of Montgomery County, Kan-

sas, which order is filed herewith as part hereof, marked "Kansas Petition Exhibit B," at pages 36 to 42, inclusive, and at page 50 thereof, and which order is in part as follows:

"The relationship of these companies to the public is such that a complete judgment of dissolution and ouster would punish the public rather than the offending companies. A dissolution of the Consolidated Gas, Oil and Manufacturing Company is not advisable, nor would a complete ouster of the Kansas Natural Gas Company be advisable, so that the court will take charge of all the gas business of the Consolidated Company and all the business of the Kansas Natural Gas Company, by its receivers, and manage the corporate property and business, protecting all gas consumers and the public until the abuses are fully corrected."

And here is presented a question of conflicting jurisdiction. It is brought to the attention of this court on the argument on February 3, 1913, that receivers have been appointed for all the property of the Kansas Natural Gas Company in the Federal Court for the District of Kansas, and that such receivers are now in charge. It seems that on October 9, 1912, after the trial of this case on October 1, 1912, a suit was brought in the Federal Court at Kansas City, Kansas, by one John L. McKinney, a bond holder, against the Kansas Natural Gas Company, and that the President of the Kansas Natural Gas Company, who was also attorney and of counsel for the defendant company in the case in this court, appeared with the complainant in the federal court, admitted all the allegations of the complaint, confessed insolvency, waived notice of the application for a receiver and receivers were appointed; he himself being one of the three receivers appointed by the court. This court cannot enjoin the receivers of the Federal Court or render any effective judgment, because the Kansas Natural Gas Company is not in the possession of the property—in a

word, this court is powerless to execute its decrees herein
* * *.

The receivers herein appointed will be directed in conjunction with the Attorney General of the state to appear in the federal court, urge the prior jurisdiction of this court and the rights of the state of Kansas herein and petition the discharge of the receivers appointed at the instance of the bond holders and pray a delivery of the property to the receivers appointed by this court. * * *

It is further ordered, [that] * * * the receivers herein appointed by this court for the Kansas Natural Gas Company are hereby ordered and directed in conjunction with the Attorney General of the state of Kansas to appear in the said United States Court and they are directed to urge the prior jurisdiction of this court over the subject matter and the parties and the rights of the state of Kansas, herein; and petition a discharge of the Receivers appointed at the instance of the bond holders and pray a delivery of the property to the receivers appointed by this court. * * *

Wherefore, and in obedience to the order of the Montgomery County District Court as above, and having disclosed to this Court facts and circumstances which if made known to this court at the time of the application for the appointment of receivers in this cause was made to this court, would have caused this court to refuse such application, and which demonstrates the prior jurisdiction of the District Court of Montgomery County, Kansas, and the present right of said last named Court to alone exercise dominion over the properties hereinbefore referred to, these petitioners respectfully appear before this Honorable Court and urge the prior jurisdiction of the Montgomery County District Court and respectfully show that the State of Kansas is without adequate power to enforce its laws and vindicate its offended authority, and that the District Court of Montgomery County, Kansas, is powerless to enforce its judgment because the property of the Kansas Natural Gas

Company is now in the control of this Honorable Court through its receivers heretofore appointed, and these your petitioners respectfully petition the discharge of the receivers of this court and pray a delivery of the property of the Kansas Natural Gas Company to the receivers of the Montgomery County, Kansas, District Court. And this your petitioners, as in duty bound, will ever pray.

JOHN S. DAWSON,
Attorney General of the State of Kansas.

JOHN M. LANDON,
R. S. LITCHFIELD,
Petitioners.

By JOHN H. ATWOOD,
Their Solicitor.

No. 806.

**Petition of Receivers of Gas Company for Authority to Execute
Certain Contracts, and Order Thereon.**

[Caption.]

The petition of Conway F. Holmes, Geo. F. Sharrit, and Eugene Mackey, Receivers of the Kansas Natural Gas Company, respectfully shows:

1. That your receivers have entered into negotiations with The Sedgwick Oil Company, a corporation, and now have ready to close, a contract for the gas produced and to be produced from the following described lease, to-wit:

The East Half of the Southwest Quarter of the Southeast Quarter; and the West Half of the Southeast Quarter of the Southeast Quarter of Section 20; and the South Half of the Northeast Quarter of the Northwest Quarter; and the Southeast Quarter of the Northwest Quarter of Section 28; all in Township 21 North, Range 14 East, Tulsa County, Oklahoma, containing 100 acres, more or less,

upon terms and conditions satisfactory to your said receivers, and said receivers recommend the execution of said contract.

2. Your said receivers further represent that they have entered into negotiations with A. T. Sticelbar, A. R. Jones, D. J. O'Connor and C. S. Kunny, of Independence, Kansas, and now have ready to close, a contract for gas produced and to be produced from the following described lease, to-wit:

The North Half of the Southeast Quarter and the Southwest Quarter of the Southeast quarter and the West Half of the Southeast quarter of the Southeast quarter of the Southeast Quarter and the South Half of the Southwest Quarter of the Northeast Quarter and the South Half of the Southeast Quarter of the Northeast Quarter, and the Northeast Quarter of the Southeast Quarter of the Northeast Quarter, all in Section 21, Township 21 North, Range 14 East, Tulsa County, Oklahoma, containing 190 acres more or less.

upon terms and conditions satisfactory to your said receivers, and said receivers recommend the execution of said contract.

3. That your receivers have entered into negotiations with the Dorathea Oil Company, a corporation, and now have ready to close a contract, for the gas produced and to be produced from the following described lease, to-wit:

The Northeast Quarter of the Southeast Quarter and the southwest Quarter of the southeast quarter of the southwest quarter of Section 29, Township 21 North, Range 14 east, Tulsa County, Oklahoma, containing 50 acres, more or less,

upon terms and conditions satisfactory to your said receivers, and said receivers recommend the execution of said contract.

4. Your said receivers further represent that they have entered into negotiations with the Texas Producing Company, a corporation, and now have ready to close a contract, for gas produced and to be produced from the following described lease, to-wit:

The southwest quarter of the southeast quarter of the southwest quarter, less 5 acres reserved for Owasso Cemetery, and the North half of the Southeast quarter of the Southwest quarter and the Northeast quarter of the Southwest quarter, all in Section 29, Township 21 North, Range 14 East, Tulsa County, Oklahoma, containing 65 acres, more or less,

upon terms and conditions satisfactory to your said receivers, and said receivers recommend the execution of said contract.

5. That your said receivers have entered into negotiations with C. E. Roth, and now have ready to close a contract, for the gas produced, and to be produced from the following described lease, to-wit:

The East half of the Northwest quarter and the Southwest quarter of the Northeast quarter and the Northwest quarter of the Southeast quarter, all in Section 30, Township 33, Range 16, Montgomery County, Kansas, containing 160 acres, more or less,

upon terms and conditions satisfactory to your said receivers, and said receivers recommend the execution of said contract.

Your said receivers further represent and show that all of said contracts are upon the best possible, obtainable terms and conditions and that it is necessary for your receivers to secure the largest possible supply of gas for consumption during the present winter.

Your said receivers recommend that the last mentioned contract be made and entered into by the receivers of the Kansas Natural Gas Company; that the contracts on leases, referred to in paragraphs (1) and (2) hereof, are upon property located in Oklahoma, and your said receivers represent and show that said contracts should be made and executed in the name of The Marnet Mining Company, a West Virginia corporation. Said receivers further represent and show that the contracts on leases described in paragraphs (3) and (4) hereof are also on properties in Oklahoma, and recommend that said contracts be made in the name of The Marnet Mining Company and guaranteed by the receivers of the Kansas Natural Gas Company.

Wherefore, your receivers pray for an order authorizing and directing them to execute said contracts and each of them and to guarantee the contracts on leases described in paragraphs (3) and (4) of said petition, and for all further proper orders in the premises.

JOHN J. JONES,
Solicitor for Receivers of the
Kansas Natural Gas Company.

State of Kansas,

County of Montgomery—ss.

I, Geo. F. Sharitt, one of the receivers of the Kansas Natural Gas Company, have read the foregoing petition and the facts therein stated are true, as I verily believe.

GEO. F. SHARITT.

Subscribed and sworn to before me this 27th day of November, A. D. 1912.

WALTER S. SICKELS,
Notary Public.

Order.

Now on this 29th day of November, A. D. 1912, upon presentation and full consideration of the above petition and the court being fully advised in the premises, it is ordered that said receivers be and they are hereby author-

ized and directed to execute the contracts mentioned in the above petition, and recommended by said receivers for execution, and in the manner therein stated.

JOHN C. POLLOCK,
Judge.

No. 807.

Petition of Receivers for Appointment of Attorney and Counsel, and Order Appointing John J. Jones.

[Caption.]

To the Honorable the Judges of the Above Court.

The petition of Conway F. Holmes, George F. Sharitt and Eugene Mackey, Receivers appointed by this Honorable Court of and for the above named defendant, Kansas Natural Gas Company, respectfully report and state to this honorable court, that they have selected as the attorney and counsel of and for the receivers, John J. Jones, Esq., of Chanute, Kansas; this because he is a fit person to so act because learned in the law and also because he has been the attorney of the defendant company for many years and well acquainted with the law governing the oil and gas producing, transporting and marketing business and also with several suits of importance now pending against the Receivers, which it is necessary should be prosecuted and defended by the Receivers.

Your petitioners and receivers therefore recommend that this court formally appoint the said Jones as their attorney and counsel in matters growing out of the Receivership.

And they will ever pray, etc.

C. F. HOLMES,
GEO. F. SHARITT,
EUGENE MACKEY,
Receivers of The Kansas Natural Gas Company.

And now October 28, 1912, upon the presentation and full consideration of the above petition and recommendation, the court being fully advised in the premises and of the fitness of the said John J. Jones, Esq., he is now and hereby appointed the attorney and counsel of the Receivers, effective Oct. 10, 1912, at such recompense and remuneration as may hereafter be fixed and allowed by the court.

JOHN C. POLLOCK,
Judge.

No. 808.

Petition of Receivers for Order Directing them to Advertise for Bonds Sufficient to Meet Sinking Fund Payments, and Order of Court Thereon.

[Caption.]

The petition of Conway F. Holmes, George F. Sharitt and Eugene Mackey, Receivers of the Kansas Natural Gas Company, represents and declares to this honorable court that the company operates, under lease, a system of gas pipe lines substantially 18 inches in diameter, with all field, gathering and branch lines running to the same, and extending from a point about one rod north of the Kansas-Oklahoma State line, and extending southwardly across such line into Washington County, Oklahoma, and to a point in the Hogshooter Field, so-called.

That this gas pipe line system is owned by the Marnet Mining Company, a West Virginia corporation.

That by the terms under which the Kansas Natural Gas Company leases and operates the same, that Company is required to pay a rental sufficient to enable The Marnet Mining Company to meet all the sinking fund payments and interest payments required under a certain bond issue of the Marnet Mining Company, secured by a mortgage upon all of its pipe lines and property wheresoever situated.

That by the terms of the said mortgage, as set out in the 22nd paragraph of the bill filed herein, a sinking fund of

ten per cent (10%) of the amount of bonds then outstanding, is required to be paid each year; that this ten per cent (10%) is to be paid in monthly installments and that the monthly installments shall be as follows:

For August, four per cent (4%) of such 10%; for September, three per cent (3%); October three per cent (3%); November four per cent (4%) and December nine per cent (9%).

That these percentages amount to the following sums:

| | |
|-----------------|----------|
| August | \$ 8,000 |
| September | 6,000 |
| October | 6,000 |
| November | 8,000 |
| December | 18,000 |

That no part of the sinking fund payments for the said months of August, September, October, November and December have been paid.

That in addition thereto, on December 1, 1912, semi-annual interest coupons on all bonds of the Marnet Company then outstanding mature and aggregate \$23,790.00; that it is vital to the continued operation of the system of the Kansas Natural Gas Company that its lease of the Marnet lines be kept alive and not be allowed to forfeit or lapse, inasmuch as sixty per cent (60%) estimated, of all the gas which will be marketed and sold through the Kansas system, passes through and is obtained from the Marnet lines.

That the mortgage and bonds of the Marnet Company contain a provision that instead of making the said sinking fund payments in cash, bonds may be purchased on the open market, equal at their par value, to the amount of such sinking fund payments, and such bonds delivered to the Trustee under the mortgage in lieu of such cash.

Heretofore bonds sufficient to make the said sinking fund payments have been purchased in the open market as low as \$555 per bond, and your receivers believe that they can

now purchase sufficient bonds for the sinking fund payments of August, September, October, November and December, 1912, at the same, or perhaps better figure.

Your petitioners, for the information of the court and to insure the court that the application of all moneys paid under the said lease shall be used in the discharge of the said sinking fund payments, now represent to the court that the president of the Marnet Mining Company is one of your Receivers, and the Secretary and Treasurer of the Marnet Company is now the Treasurer for the Receivers.

Wherefore, your Receivers pray this Honorable court that out of and from moneys received from the sales of gas through the system of the Kansas Natural Gas Company, they be ordered and directed to advertise for bonds sufficient to meet the said sinking fund payments of August, September, October, November and December, and to purchase said bonds at the lowest price offered, and also to pay the sum of \$23,790.00, the amount of interest due on the said bonds on December 1, 1912.

Your petitioners further aver that the rental due under its lease of the Marnet Mining Company, is a sum sufficient to meet and discharge all taxes thereon, and such sinking fund and interest payments, and that all taxes upon the Marnet system have been paid by the Kansas Natural Gas Company, so that none thereon remain in arrears. It therefore follows that there are no other payments of rental required from the Kansas Natural Gas Company except the said sinking fund and interest payments.

And your petitioners will ever pray, etc.

CONWAY F. HOLMES,
GEO. F. SHARITT,
EUGENE MACKEY,
Receivers of the Kansas Natural
Gas Company.

JOHN J. JONES,
Solicitor for said Receivers.

No. 809.**Order Directing Receivers as to Building and Construction of Betterments under Way, etc.**

[Caption.]

And now, October 22, 1912, this cause came on for hearing upon the application of the receivers for permission to continue the building and construction of the betterments under way by the company at the time the receivers herein were appointed, and said petition was granted upon condition that the receivers—

(a) Secure and file in these proceedings the written consent signed by the trustee of the first mortgage to the expenditures prayed for in said petition.

(b) Secure and file in these proceedings the written consent signed by the trustee of the second mortgage to the expenditures prayed for in said petition.

(c) That the receivers make and file herein at the very earliest moment, and with the least possible delay, a report to this court showing: (1) The cost per thousand cubic feet of procuring and transporting from some common initial point all gas carried through the company's system to each of the many cities to which the operated lines of the company run; (2) the value and worth of the gas per thousand cubic feet delivered at the gates of each of the said cities.

It being the intent and meaning of this order that the receivers furnish the court with all information showing definitely and exactly the actual cost and worth of the gas per thousand cubic feet delivered at the gates of each city when metered to the distributing company at the gates of the city.

In making the said reports the receivers are authorized to engage such experts as in their judgment they may deem best. The receivers are enjoined said report must be definite, accurate and exact.

JOHN C. POLLOCK,
Judge.

No. 810.**Order Extending Receivership in One Case to the Property
Involved in Another Case.**

[Caption.]

On motion of complainant, the defendant, The Kansas Natural Gas Company, herein appearing and consenting thereto,

It is ordered, that the receivership heretofore existing by order of this court in a certain suit, No. 1351, wherein John L. McKinney and The Fidelity Title & Trust Company were complainants, and The Kansas Natural Gas Company defendant, be and the same hereby is extended on the same terms and conditions to this suit, and the receivers, Conway F. Holmes, George F. Sharitt and Eugene Mackey, be and they are hereby appointed receivers of all and singular the property described in the bill of complaint herein.

JOHN C. POLLOCK,
United States District Judge.

No. 811.**Order Giving Surviving Receiver Sole Authority.**

[Caption.]

Now on this 25th day of March, 1916, this cause came on for hearing upon the application of John M. Landon, receiver, for such proceedings as may be proper in the premises by reason of the death of R. S. Litchfield, and it being called to the attention of the court that R. S. Litchfield, one of the receivers of The Kansas Natural Gas Company, appointed in the above entitled action by this court on February 15, 1913, departed this life on or about the 20th day of March, 1916, that the estate entrusted to the said John M. Landon and R. S. Litchfield, as receivers, is not fully administered or settled, and that it is necessary that the receivership be continued; and it further appearing that the business, estate and

affairs of said receivership is in such condition and being so directed that the surviving receiver is fully acquainted and conversant therewith, and qualified, able and willing to continue the administration thereof under the direction of this court, and that a successor to the said R. S. Litchfield is not necessary or advisable at this time.

It is therefore by the court ordered that John M. Landon, the surviving receiver under the former orders of this court, be and he hereby is continued as receiver and appointed and constituted sole receiver of and for all of the property and assets of Kansas Natural Gas Company heretofore in the possession and control of John M. Landon and R. S. Litchfield, and all other assets and property of Kansas Natural Gas Company. It is further ordered that the said John M. Landon as sole receiver be and he hereby is given and granted all the powers and authority heretofore conferred upon the receivers of this court aforesaid, by the former orders of this court or by law, and that said John M. Landon execute bond in the sum of \$50,000 conditioned for the faithful performance of his duties of such receiver, and that all acts, matters and things done and performed ad interim from the death of R. S. Litchfield to the date hereof be and they are hereby ratified and confirmed.

No. 812.

Order Appointing Ancillary Receivers.

[Caption.]

Now on this 9th day of January, A. D. 1915, this cause came on for further hearing upon the petition in intervention of John M. Landon and R. S. Litchfield, and upon the written consent of the complainants, defendants and interveners, and Marnet Mining Company, and waiving all notice of the application for the appointment of ancillary receivers, complainants appearing by Charles Blood Smith, their solicitor,

and Kansas Natural Gas Company by V. A. Hays, its president; Kansas City Pipe Line Company and Fidelity Trust Company, by J. W. Dana and George R. Allen, their solicitors, and Marnet Mining Company by T. S. Salathiel, its solicitor, and it appearing to the court that by virtue of orders heretofore entered in this cause said interveners, John M. Landon and R. S. Litchfield, have taken possession of and are now controlling and operating the property of the said Kansas Natural Gas Company, Marnet Mining Company and Kansas City Pipe Line Company within the states of Kansas, Oklahoma and Missouri, and it further appearing to the court that all pipe lines owned and leased by the said Kansas Natural Gas Company, Marnet Mining Company and Kansas City Pipe Line Company extending from the state of Oklahoma through the state of Kansas and to certain cities in the state of Missouri, constituting a continuous pipe line for the transportation and distribution of natural gas, are of a fixed character and that the properties above mentioned constitute one complete system or unit which can not be operated except as one connected unit or system, and it is necessary for the operation of said plant and for the preservation of the property that the same be managed throughout by the same administrative officers, and it further appearing that in order to protect and preserve the reversionary estate and potential possession of the receiver of this court and to carry out the provisions of a certain stipulation of all parties in interest, dated December 17, 1914, and of record in this cause, the said interveners should be appointed ancillary receivers for the properties above mentioned situated in the eastern district of Oklahoma and the western district of Missouri.

It is therefore ordered, adjudged and decreed that the prayer of said intervening petition of John M. Landon and R. S. Litchfield be granted, and that the said John M. Landon and R. S. Litchfield be and they are now hereby ap-

pointed ancillary receivers of all the property of the Kansas Natural Gas Company, Kansas City Pipe Line Company and the Marnet Mining Company, above described, situate in the eastern district of Oklahoma and the western district of Missouri.

That each of the said receivers shall before entering upon his duties hereunder give and file with the court a bond in the penal sum of twenty thousand dollars, with surety or sureties, approved by the court or the clerk thereof, and conditioned that he will faithfully perform his duty as ancillary receiver herein and well and truly account for any and all moneys or property coming into his hands as such ancillary receiver and abide and perform all things which he is herein or may hereafter be directed to perform in this cause.

It is further ordered, adjudged and decreed that the said John M. Landon and R. S. Litchfield, and their successors, shall have the right as receivers ancillary to their appointment as receivers of the district court of Montgomery county, Kansas, to retain the actual possession, control and management of the estate, property, money, funds, assets and earnings of the said Marnet Mining Company, Kansas City Pipe Line Company and Kansas Natural Gas Company, including the leasehold estates, contracts of and with the Kansas City Pipe Line Company and the Marnet Mining Company situated in the eastern district of Oklahoma and the western district of Missouri, under the terms and conditions expressed in the order of this court made January 24, 1914, as modified; the intent hereof being that when the district court of Montgomery county, Kansas, has surrendered, lost or abandoned possession, jurisdiction or control over said properties or any part thereof (otherwise than loss of control resulting from the sale or other disposition by order of said court), the same shall thereupon revert to the possession of the receiver of this court; to the end that no other person, officer or court shall be enabled or permitted to seize, levy upon, possess,

control or exercise jurisdiction over any of the properties, estates or assets of said Kansas Natural Gas Company, including the leasehold, estates and contracts of and with the Kansas City Pipe Line Company and the Marnet Mining Company, and any other property, assets or earnings of the Marnet Mining Company and the Kansas City Pipe Line Company within this the eighth judicial circuit, except the district court of Montgomery county, Kansas, and the said John M. Landon and R. S. Litchfield, receivers appointed by said court, and that, by virtue of the prior right and possession and jurisdiction of said court to said properties situate in the state of Kansas, pursuant to and upon the terms and conditions provided for in said order of January 24, 1914, as modified; and all persons and officers and receivers appointed by other courts will take notice hereof and they are hereby restrained and enjoined from attempting to levy upon, seize, possess or control any of the properties of the Kansas Natural Gas Company, including the leasehold, estate and contracts of and with the Kansas City Pine Line Company and the Marnet Mining Company, and any other property, assets or earnings of the Marnet Mining Company and the Kansas City Pipe Line Company, or any part thereof situate in the states of Missouri or Oklahoma, and from molesting, disturbing or interfering with the actual possession and control of said properties by the said John M. Landon and R. S. Litchfield as ancillary receivers of this court.

It is further ordered, adjudged and decreed that the receiver of this court, George F. Sharitt, shall retain the reversionary estate and potential possession of the estates, properties and assets of the Kansas Natural Gas Company, including the leasehold estates and contracts of and with the Kansas City Pipe Line Company and Marnet Mining Company situate in the states of Kansas, Missouri and Oklahoma, or elsewhere in this the eighth judicial circuit.

RALPH E. CAMPBELL, Judge.

No. 813.**Order Confirming and Continuing Receivers, and Authorizing them to Accept Possession of Property from a State Court.**

[*Caption.*]

On this 5th day of June, 1917, comes John M. Landon, receiver of the properties of the Kansas Natural Gas Company, heretofore appointed as such receiver by the state court of Montgomery county, Kansas, accompanied by his counsel, John H. Atwood, Esq., and T. S. Salathiel, Esq., and presents to this court an order entered by the state court of Montgomery county, Kansas, on the 2nd day of June, 1917, approving his report as such receiver, and his accounts, and discharging him as such receiver, and directing him to turn over all the properties of the Kansas Natural Gas Company now in his possession or under his control to this court; and it appearing that said Landon has heretofore been acting as receiver of said properties under appointment heretofore made by this court, and it appearing further that George F. Sharitt is also receiver of said properties under an order of this court heretofore made,

Now, therefore, it is hereby ordered that said Landon and said Sharitt be and they are hereby confirmed and continued as receivers of said properties under this court, each with the same powers as heretofore conferred upon them or either of them;

Ordered further, that as such receivers of this court they forthwith accept from said state court of Montgomery county, Kansas, possession of the properties belonging to said Kansas Natural Gas Company, wherever situated, in accordance with the order above mentioned made by said state court of Montgomery county, Kansas, and also in accordance with orders heretofore made by this court; and that they execute such receipt or other papers upon taking possession as may be deemed advisable by said state court of Montgomery county, Kansas;

Ordered further, that said John M. Landon as such receiver continue in the active charge of the management and operation of said properties until the further order of this court;

Ordered further, that said John M. Landon as such receiver take any and all steps necessary or advisable to maintain any actions or suits now pending to which he is a party, until the further order of this court;

Ordered further, that all administrative orders heretofore made by the district court of Montgomery county, Kansas, relative to the management and operation of the properties of the Kansas Natural Gas Company by said receivers, and now in force, are hereby adopted and continued in full force and effect until the further order of this court.

A. B., Judge.

No. 814.

Oath of Receiver.(1)

[*Caption.*]

I, the undersigned, S. M., having been appointed receiver of the C. & D. Railway Company, do solemnly swear that I will faithfully perform the duties of that office and obey all the orders of said court. So help me God. S. M.

Subscribed and sworn to before me this — day of —.

J. S., District Judge.

(1) As to necessity for oath. See *Union Trust Co. v. Ill., etc., Ry. Co.*, 117 U. S. 434.

No. 815.

Bond of Receivers.(1)

[*Caption.*]

This undertaking, made and entered into the — day of —, witnesseth: that we, S. M., as principal, and E. F. and G. H., as sureties, do promise and undertake to and with the clerk of said court, for the benefit of whom it may con-

cern, in the penal sum of ——— dollars, that the said S. M. will faithfully discharge the duties of receiver of the C. & D. Railway Company, and obey all orders of the court herein.

Witness our hands and seals this ——— day of ———, 1894.

S. M. [*Seal.*]

E. F. [*Seal.*]

G. H. [*Seal.*]

State of ———,
County of ———, ss.

I, E. F., one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of ——— dollars over and above all my debts and liabilities and legal exemptions.

E. F.

Sworn to before me this ——— day of ———, 1894.

[*Seal.*]

E. G., Notary Public.

Approved this ——— day of ———, 1894.

J. S.,

District Judge.

(1) Receivers are required to give bond. See *Union Trust Co. v. Ill., etc., Ry. Co.*, 117 U. S. 434; *Fosdick v. Schall*, 99 U. S. 249.

No. 816.

Order Overruling Petition to Rehear Application for Appointment of a Receiver.

[*Caption.*]

The petition of the C. & D. Company to the court to grant a new hearing of the application of complainant for the appointment of a receiver, and to set aside the order heretofore made appointing a receiver in this suit, came on to be heard and was argued by counsel, on consideration whereof the court overrules said petition.

No. 817.**Order that Receivers Give Notice to Stockholders by
Publication.**

[Caption.]

And now, this — day of —, 1893, come S. M. and H. C., receivers of the property of the C. D. Co., appointed and confirmed by an order of this court made in this cause on the — day of —, 1893, and present their petition, verified the — day of —, 1893, upon consideration whereof it is by this court hereby

Ordered that the creditors of the C. D. Co. bring in and present to said receivers, in writing, their several claims and demands, and make proof thereof upon oath to the satisfaction of the said receivers, on or before the — day of —, 1893, and in default thereof that the said creditors be debarred from participating in any dividend or distribution of the assets of said corporation which may be made by the receivers.

And it is further ordered that the receivers give notice of the foregoing order by causing such notice to be published in the [*name of paper*], a daily newspaper published in the city of —, once a week for the space of four weeks, the first publication to be made within ten days from the date of this order.

Dated —.

J. S.,
District Judge.

No. 818.**Notice of Petition by Receivers.**

[Caption.]

Notice to A. B. Trust Company and the C. & D. Railway Company, or their Solicitors of Record:

You, and each of you, are hereby notified that the petition of S. M. and H. C., receivers of the C. & D. Railway, a copy of which is hereto attached and made a part hereof, will be presented in the above entitled cause to the above-named

court, or to one of the judges thereof, in chambers, at the city of —, on the — day of —, at 10 o'clock in the forenoon of that day, or so soon thereafter as the said court or judge may hear the same, and that said receivers will ask the order of the court thereon at that time. Z. & Z.,

Solicitors for S. M. and H. C., Receivers of the C. & D. Railway.

No. 819.

Answer to Petition.(1)

The District Court of the United States for the — District of —.

The A. B. Trust Company

vs.

The C. & D. Railway Company *et al.*

The answer of the Union Trust Company, of —, to the petition of the C. & D. Railway Company, as to the receivers in the above entitled action appointed making certain payments on the securities of the Northern Railroad Company, respectfully shows to this court:

That this respondent has lately exhibited and filed in this court its certain bill of complaint against the said C. & D. Railway Company and the E. & F. Railway Company, and that, as respondent is informed and believes, the defendants have appeared therein, and said suit is now pending in this court.

This respondent says that all and singular the allegations in said bill of complaint as therein made are true, and that respondent refers to the same on the files of this court, and makes the same and the allegations thereof a part of this answer, the same as if fully set out and incorporated herein.

Respondent further says that it is informed and believes that at some time heretofore, but long after the execution and delivery of the bonds and mortgages in respondent's said bill of complaint mentioned, as made and delivered to this

respondent and its *cestui que trusts*, said petitioner did obtain the stock of the Northern Railroad Company, by exchanging therefor a large amount of respondent's own stock, issued for that purpose.

Whether such exchange was valid, or within the corporate powers of petitioner, respondent is not informed; but submits that it was invalid and beyond the powers of petitioner.

Respondent denies that said stock of said Northern Railroad Company was acquired at an enormous or any outlay. It was simply an exchange of stock.

Respondent admits that the revenues of the Northern Railroad Company are insufficient to meet its accrued and presently accruing obligations, and that it is now in the hands of receivers, appointed by a court of ———; and that the interest due on the second mortgage is in default, and has not been and will not be paid.

Respondent does not admit that the reason thereof is that alleged in the petition. The reason alleged is mere opinion and speculation; and respondent knows of no reason to suppose that the management in the future will be improved.

Quite likely a suit to foreclose the Northern second mortgage will be commenced, but respondent denies that it can embarrass petitioner, as petitioner has not the possession or management of its road. Respondent has no knowledge as to whether there is any probability that in the near future the Northern Railroad Company can or will earn its present fixed charges, whether operated by the receivers or others.

If it ever could do it, it would be vastly more likely to do it if operated by the trustee of the mortgages taking possession thereof, for it would then have the attention and interest of owners. Respondent has no knowledge or information as to the telegrams in the petition referred to; respondent, however, has no doubt but that the receivers would like the receivers of the petitioner's road, or any one else, to pay the debts of the Northern Railroad Company.

Respondent further shows that the revenues of petitioner's road in the hands of the receiver are insufficient to pay its own current indebtedness, which is in default and rapidly accumulating.

That the part of the road covered by the mortgage to respondent is by far the more valuable. Respondent is informed and believes that by the report of the receivers recently filed, and which respondent makes a part of this answer, more than four-fifths of the income of the road is from the part covered by the mortgages to this respondent.

That by the terms of such mortgages, copies of which are annexed to said bill of complaint of this respondent, such income belongs to and is the property of this respondent, and this respondent respectfully submits that this court, and any court, has no power to take such property from respondent without its consent.

Wherefore respondent asks that the prayer of said petition be denied.

UNION TRUST COMPANY,

[Seal.]

By E. K., President.

Y. & Y.,

Respondent's Solicitors.

State of —, County of —, ss.

E. K., being duly sworn, says that he is president of Union Trust Company of —, the respondent named in the foregoing answer; that said answer is true to the knowledge of this deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

E. K.

Sworn to before me this — day of —.

[Seal.]

J. V.,

Notary Public, — County.

(1) Taken from the record in *Mercantile Trust Co. v. Missouri, Kansas & Texas Ry. Co.*, pending in the circuit court of the United States for the district of Kansas.

No. 820.

Petition of Defendant for an Order Authorizing Receivers to Deliver to it the Possession of Railway Property in their Hands.

[*Caption.*]

The petition of the C. & D. Railway Company, defendant herein, respectfully shows to this court:

First. That this is a cause ancillary to the main suit between the same parties, in the district court of the United States for the ——— district of ———.

Second. That in the said main suit the C. & D. Railway Company has heretofore presented its petition praying for an order of the court requiring the receivers of the C. & D. Railway to turn over and deliver possession of the said railway and property to the said C. & D. Railway Company; and that prior to the submission of the petition the receivers filed a report, and that upon the said petition and report the court did, upon the ——— day of ———, enter an order conformably to the prayer of the said petition, and that copies of the said petition, and of the said report, and order of court are hereto annexed and marked respectively Exhibits A, B, and C, and made a part hereof.

Wherefore your petitioner prays that the said order of the court may be spread upon the records in this court, and may be by this court confirmed and approved, and made the order of this court in this ancillary cause so far as the same may be necessary in order to protect all the rights of all the parties in interest as against the property within the jurisdiction of this court.

C. & D. Railway Co.,

Attest:

By J. W., 3d Vice-President.

[*Seal.*] H. B., Secretary.

R. X.,

R. L.,

Solicitors for C. & D. Ry. Co.

[*Attach exhibits "A," "B" and "C."*]

No. 821.

Petition for an Order upon a Defendant to Deliver to the Receivers the Deed Records, Plats, and Other Muni-ments of Title (1).

[*Caption.*]

The receivers, S. M. and H. C., respectfully show:

First. The title papers to the real property in their possession consist of deeds of conveyances for right of way, depot grounds, and other parcels and tracts of land used by the railway company in the operation and maintenance of said railway, and lands purchased or donated to said railway or its grantors as authorized by its charter.

Second. That said C. & D. Railway Company, and the other corporations whose property is now in the possession of these receivers, and their grantors during the time of the construction of said railways, and from time to time as their requirements rendered necessary, condemned by proceedings in court in the different counties along the lines of said railways, tracts of land for right of way, depot grounds, and for other necessary purposes, and for their convenience, had prepared and on file in their offices copies of all such condemnation proceedings.

Third. That said C. & D. Railway Company, also for the convenience and use of its officers and employees, that they might readily ascertain the exact boundaries of the different tracts and parcels of land, so conveyed to it and its grantors, or the other lines of railway in its possession and operated by it, or condemned as aforesaid, caused full and accurate surveys of the same to be made, and caused plat books and surveys made thereof, and caused indexes to be prepared thereof.

Fourth. That said papers, records, plats, etc., show in convenient shape all the property along the lines of said railway now in the possession of these receivers, and the title thereof, and the rights of all of said railways in each piece of

said property, and how acquired, and from whom and under what contracts or conditions, if any.

Fifth. That said papers, plats, etc., are of great necessity in the operation of said railway, in that they constitute the muniments of title to all of said property, and show the boundary and extent thereof from actual surveys, and enable your receivers to readily ascertain what real estate is covered by the orders of this court, of what they are entitled to take possession, and of what they are required to defend the possession against adverse claimants or intruders, and of what they may rightfully occupy and use in the operation and maintenance of said railway, and by which they may ascertain any conditions upon which any tract of land is held, and determine how, or in what respect, they may be required to comply with demands on them for performance of such conditions.

Sixth. That these receivers require said muniments of title and surveys in many respects as fully and as necessarily as the C. & D. Railway Company did at the time they procured the same.

Seventh. That all of said plats, surveys and books and indexes are in the possession of the defendant, the Missouri Pacific Railway Company, and they have neglected and refused to deliver the same to these receivers, though requested to do so.

Wherefore, these receivers pray for an order upon said C. & D. Railway Company, defendant herein, to deliver to them all of said deeds, papers, plats, surveys, and books and indexes.

Z. & Z.,

Solicitors for the Receivers.

(1) The order asked for in this petition is usually included in the order appointing receiver, and this petition is only needed when such is omitted from the order appointing the receiver

No. 822.**Order Requiring Defendant to Turn Over to Receivers
Books, Plats and Deeds.**

[*Caption.*]

At this day the petition of the receivers for an order directing the defendant, the C. & D. Railway Company, to deliver to them certain deeds, records, plats, surveys and other muniments of title to the real property in their possession under the order of this court having been presented to this court, and the court having duly considered the same, it is ordered that the said C. & D. Railway Company deliver to said receivers all deeds of conveyance, records, plats, surveys and books, and all other papers and muniments of title in their possession or under their control pertaining to or affecting the title or right to the possession of the real estate in the possession of the receivers under the orders of the court, or show cause on the — day of —, at 10 a. m., before me at the United States court-room in the city of —.

J. S.,

Dated —.

District Judge.

The foregoing order made absolute, and the receivers and C. & D. Railway Company shall make schedule, and receivers shall receipt for same.

J. S.,

Dated —.

District Judge.

No. 823.**Petition By Receiver for Authority to Settle Traffic Balance.**

[*Caption.*]

Petition by the receivers for authority to adjust, settle, and pay traffic balances between the C. & D. and other railroads.

S. M. and H. C., receivers of the C. & D. Railway, respectfully show :

I. By the decree made in this case on the —— day of ——, and filed herein on the —— day of ——, being the decree appointing your petitioners receivers, among others the following order was made :

"Fifth. The matter of the payment of balances due or to become due to other railroads or transportation companies growing out of the exchange of traffic is reserved for further orders."

II. Since your receivers have taken possession of the C. & D. Railway, there have arisen traffic balances between the C. & D. Railway, operated by your receivers, and other railways and transportation companies. These traffic balances consist generally of,—

First. Freight balances, which are amounts found to be due as between freight delivered to connecting lines by the C. & D. Railway, and received from connecting lines by said railway.

Second. Ticket accounts. These result from the sale of coupon tickets by the C. & D. Railway over foreign lines, and the sale by foreign lines of such tickets over the C. & D. Railway.

Third. Mileage accounts. These accounts comprise the mileage of the cars of other railway companies over the line of the C. & D. Railway, and the mileage of its cars over other railways.

These traffic balances are sometimes in favor of one road and sometimes in favor of the other. It is vitally necessary in the transaction of railway business that these traffic balances should be promptly paid by the respective railways at stated times.

III. There are traffic balances which will soon have to be discharged arising out of the operation of the railway in charge of your receivers, which will have to be settled, adjusted, collected, or paid within a short time, and your re-

ceivers should have full authority to adjust, settle, collect, or pay them according to the prevailing usage existing among railway companies, so that there may be no interruption of the relations between the railway in charge of your receivers and other railways of the country.

Wherefore your petitioners pray that an order be entered granting them authority to adjust, settle, collect, and pay all traffic balances arising out of the operation of the C. & D. Railway since —, 1894, and which may hereafter arise from time to time.

Z. & Z.,

Solicitors for the Receivers.

State of —,
County of —, ss.

I, S. M., on oath, state that I am one of the receivers of the C. & D. Railway; I have read the foregoing petition, and the facts therein stated are true, as I verily believe.

S. M.

Subscribed and sworn to before me this — day of —.
[Seal.]

E. G.,
Notary Public.

No. 824.

Order Authorizing Receiver to Settle Traffic Balances (1).

At this day the petition of the receivers for authority to adjust, settle, collect, and pay all traffic balances arising in the operation of the C. & D. Railway since —, 1894, when the receivers took possession of said railway, having been presented to the court, and the court having fully considered the same, and being fully advised in the premises, it is ordered that the receivers be and are hereby authorized to adjust, settle, collect, and pay all traffic balances between the railway in their charge and other railroads or transportation companies arising out of the operation of the C. & D. Rail-

way since —, 1894, and which shall hereafter arise, according to the usual methods prevailing among the railroad and transportation companies of the country.

J. S.,
District Judge.

(1) Current traffic balances are entitled to be paid in full out of current earnings as a preferential lien.

No. 825.

Order to Pay Rent.

[Caption.]

This day came the receiver and represented to the court that the installment of rent due to the Northern Railway Company the — day of —, 18—, under the lease referred to in the bill herein, has not been paid, and that the period of ninety days' grace provided in said lease will expire the — day of —, 18—, and that said receiver expects to have on hand sufficient funds to pay said rental on or before said last-named date, and asks authority of the court to make such payment, and thereupon it is ordered by the court that the receiver be and is hereby authorized to make such payment.

J. S.,
District Judge.

No. 826.

**Petition of Receiver for Permission to Defend Suits and
Compromise Claims.**

[Caption.]

Your petitioner, S. M., would respectfully show to your honors that prior to his appointment as receiver herein certain suits had been brought against the C. & D. Railway Co., praying for damages to person or property; that under the laws of the state of —, and —, such claims, when reduced to judgment, are liens prior in right to the mortgage

issued by the defendant upon its property, and that there are certain suits pending in the courts of the state of —, and in the Circuit Court of the United States for the —, district of —.

Your petitioner further shows that such suits or claims can generally be compromised and adjusted at sums which it is to the interest of the defendant and its creditors to promptly accept, thereby saving much cost of litigation and other considerable amounts as compared with the usual expense and the results of such litigation; and that other of such suits will have to be defended by your petitioner as receiver at the cost of the fund in the hand of your petitioner.

Your petitioner, therefore prays that an order of court be made herein, permitting your petitioner as receiver of the defendant corporation to appear and defend the suits that have heretofore, or may hereafter, be brought in this state against the defendant corporation to recover damages for injuries to persons or property, and that your petitioner be given the right and discretion to compromise and adjust and settle any suits or claims against the defendant corporation for damages to persons or property, or any claims arising in the operation of the road committed to his charge, if, in the judgment of his counsel, it is proper to compromise, adjust, and settle such cases or claims, upon such terms as may be agreed upon between him and the litigants or claimants, and as in duty bound, he will ever pray, etc. S. M.

[*Verification.*]

No. 827.

Order Appointing Special Master to Hear and Report Claims.

[*Caption.*]

It is now ordered by the court that suits and proceedings against the receivers herein upon any cause of action or claim against the C. & D. Railway Co. accruing prior to the —

day of —, 18—, be brought only by intervening petition filed in this cause; also that no process of attachment or execution, or other final process whatever be issued against said receiver for any act of his in the operation of the C. & D. Railway Co. otherwise than upon leave granted upon intervening petition.

It is further ordered that R. P. be, and he hereby is appointed a commissioner of this court for the purpose of hearing and considering the above claims; and also such other claims against the receiver herein, growing out of his operation of the road, as may be brought before him; and that the said commissioner have the power to hear and consider all such claims, and that the receiver be directed to appear before the said commissioner upon short notice served upon himself or upon an agent authorized by him to be served in his stead, to answer any claim filed with the said commissioner; and that said commissioner have the power to take testimony and report the same with his findings to this court, and that unless such claimant or receiver shall within thirty days after the filing of the said report appeal from the same to this court, said report shall become final, and the receiver herein is hereby directed and authorized thereupon to pay out of any moneys coming into his hands such amount as the commissioner may award on said claim.

It is further directed that said receiver do not in any case hereafter appear to answer any garnishment against any of his employees, but that all claims against said employees be presented to the said commissioner hereinbefore appointed; and that upon his notice of such claim the said receiver shall forthwith notify said employee, and shall withhold from said employee from money otherwise due a sufficient amount to satisfy said claim, and that upon order of said commissioner the same shall be paid either to the said employee or to the said claimant, as said commissioner may direct and adjudge.

And it is further hereby ordered that that certain order heretofore entered herein on the — day of —, 18—, re-

quiring, among other things, that suits of every kind against the receiver be brought only in the district court of the United States, be and the same is hereby rescinded and set aside from and after the entry of this order, and that the order shall stand in lieu thereof.

J. S.,
District Judge.

No. 828.

Order Appointing Master to Hear and Report Claims (Another Form).

[*Caption.*]

It having been represented to the court that claims are arising in — against the receivers appointed and confirmed in this case, growing out of the operations of the railway property in — for stock killed, personal injuries, damages to freight, damages for short delivery, etc.; and it appearing to the court that such claims will constantly arise during the pendency of the receivership in this case, and that such claims should be adjudicated, settled, and paid without requiring the parties interested to seek relief from the circuit court of the United States in —, having original jurisdiction:

It is therefore ordered by the court that E. M., Esq., be and he is hereby appointed special master in chancery for this cause; and

It is further ordered that all claims for damages of every kind that may arise against the receivers, growing out of their operation of the C. & D. Railway in —, may be filed and presented to said commissioner, who shall examine and report thereon in due course.

That the special master is directed to give reasonable public notice of this order, and is authorized to hold sessions pending examination of claims at such points as he may designate.

He shall report his conclusions to the court from time to time, and such reports shall stand confirmed, unless ex-

cepted to within thirty days from the filing thereof, upon proper order entered according to the rules in the chancery order book.

Dated ———.

A. P.,
District Judge.

No. 829.

Oath of Special Master.

[*Caption.*]

I, E. M., having been appointed special master in chancery in the above entitled cause, do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me as such special master in chancery, according to the best of my skill and ability, agreeably to the constitution and laws of the United States; so help me God.

E. M.

Subscribed and sworn to before me this ——— day of ———, as witness my hand and official seal at ———.

[*Seal.*]

C. H.,

United States Commissioner, ——— District of ———.

No. 830.

Proof of Claim before Master by One Receiver Against Another.(1)

State of ———,
County of ———, ss.

Before me, a notary public in and for said county and state, personally appeared E. S., auditor for the receivers of the S. & R. Railway Company, who, being duly sworn, says that he is the authorized representative of the owner of the claims, copies of which are hereto attached, and that said claims are correct, just and lawful, and the consideration therefor was balance due on ticket, miscellaneous (or car repairs), and mileage account; that no part of same has been paid; and

there was no counterclaim or set-offs against said balances, to the knowledge of affiant, and that there is justly due the said receivers of the S. & R. Railway Company thereon the sum of \$——, bearing interest at six per cent. per annum, from the dates of the respective items of said accounts, to ——, with interest, amounts in all to \$——, making the total of principal and interest due to said receiver, the sum of \$——.

E. S.

Sworn to before me and subscribed in my presence, this
—— day of ——, A. D. ——.

J. M.,

[Seal.] Notary Public, —— County, ——.

[Attach itemized statement of account.]

(1) A claim against a receiver may be presented by intervening petition to the court or it may be proved before the master. When the latter course is taken it may be done by affidavit or frequently by examining a witness orally before the master. See also Bates' Fed. Eq., Sec. 630.

• No. 831.

**Order to Pay Claims Accruing Prior to the Appointment
of the Receiver.**

[Caption.]

It is hereby ordered that the receiver herein be and is hereby authorized to pay out of any funds in his hands and applicable to the business of the railway being operated by him under the order of the court herein, and all claims accruing during the period of six months immediately prior to the appointment of the receiver herein, for supplies, materials, wages, salaries, and expenses incurred by agents and employees, traffic balances with other common carriers, injury to or loss of property of shippers in transit, and for the use of the tracks, terminals, or other facilities of other railways used by the C. & D. Railway Co. in the ordinary transaction of its business.

J. S.,

District Judge.

No. 832.**Petition for Order Limiting Time to Present Claims, etc.**

[*Caption.*]

The petition of S. M. and H. C., receivers of the C. D. Co., respectfully shows to the court:

That on the — day of —, 1893, by a certain order or decree of the chancellor of the state of New Jersey, upon a bill filed by J. W. against the C. D. Co., a corporation duly organized and existing under the laws of the said state of New Jersey, showing that said corporation was insolvent, and was not about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders, your petitioners were duly appointed receivers of the said company, with power to receive or take into their possession all property of the company of whatever nature, and with other powers and duties in said order set forth, and that they duly qualified and gave the bond required by said court and entered into the possession of the property of said corporation as such receivers.

That on the — day of —, 1893, upon a bill filed in this court in the above-entitled suit, setting forth the insolvency of said corporation, and the appointment of your petitioners as receivers by the chancellor of New Jersey, as aforesaid, your petitioners were also appointed and confirmed receivers of this court, of all and singular the property of said company, with the powers and duties in said order prescribed; and your petitioners duly qualified as such receivers, as in said order directed, and entered into the possession of all the property of said corporation, and have since been and now are engaged in the discharge of their duties as such receivers, under the orders and decrees aforesaid.

Your petitioners show that they have been appointed and confirmed receivers of the property of said C. D. Co. by the decrees of the district courts of the United States in and for the — district of — [naming all of the courts in which pro-

ceedings have been had], all of the foregoing appointments being ancillary to the said receivership in the state of New Jersey, the domicile of the said corporation.

Your petitioners further show that on the — day of —, 1893, an order was made by the chancellor of New Jersey, directing the creditors of the said C. D. Co. to bring in and present to the said receivers, in writing, their several claims and demands, and to make proof thereof upon oath to the satisfaction of the said receivers within three months from the date of said order, and to cause notice of such order to be published and made as therein provided, such publication to be commenced and notices mailed within ten days from the entry of said order, as by said order, a copy of which is hereunto annexed, marked "A," will more fully appear.

That by a further order of the said chancellor, made the — day of —, 1893, the time within which the said creditors of said corporation should bring in and present to the said receivers their several claims and demands, and make proof thereof, as provided in said order of the — day of —, 1893, aforesaid, was extended to the — day of —, 1893, and the publication required by said order to be made was directed to be begun within ten days from the said — day of —, 1893, and it was directed that the mailing of notices to creditors required by said order might be done at any time before the expiration of said month of —, as by said order of the — day of —, 1893, a copy of which is hereto annexed, marked "B," will more fully appear. Publication of the notices to present claims has been commenced by your petitioners, pursuant to the terms of said order of the — day of —, 1893, a copy of said notice being hereto annexed, marked "C," and copies thereof will be mailed to all the creditors of said corporation known to your petitioners during the present month, as in said order directed.

Your petitioners therefore pray that, to conform the proceedings in this court to those in the court of chancery of

New Jersey, this court will make an order in terms similar to those of the chancellor of New Jersey aforesaid, limiting the time within which the creditors of said company shall bring in and present their several claims and demands, and directing notice of such order to be published in such newspaper as this court may direct, and that in default of presentation of such claims pursuant to such order and notice, the said creditors be debarred from participating in any dividend or distribution of assets of said corporation which may be made by the receivers.

And your petitioners will ever pray, etc.

Y. & Y.,

Solicitors for Receivers.

[*Attach exhibits "A," "B" and "C."*]

S. M.,

H. C.,

Receivers.

No. 833.

Verification of Above Petition.

State of ———,

County of ———, ss.

S. M. and H. C., the receivers of the C. D. Co., and as such petitioners in the foregoing petition named, being severally duly sworn, say that the facts set forth in the foregoing petition by them subscribed are true.

S. M.

H. C.

Subscribed and sworn to before me this ——— day of ———, 1893.

J. N.,

[*Seal.*]

Notary Public.

No. 834.

Notice to Creditors to Prove Claims Before the Master.

The District Court of the United States for the ——— District of ———.

The C. & D. Railroad Company *et al.*

vs.

The A. B. Trust Company

} In Equity No. ———.

On the —— day of ——, A. D. ——, the said court made an order in substance that said cause be referred to H. M., as Master, to take and state an account of the indebtedness of the receiver of said railroad company, and also of the indebtedness of the said company itself, as to all claims and demands for materials, supplies and labor and other services rendered to the said receiver, and also to the said railroad company, within six months prior to the appointment of the said receiver, and of all traffic balances with other railroad companies accruing within six months prior thereto;

Ordered, that, except as hereinbefore noted, all and any accounts and demands for which a preferential right may be claimed or asserted, be produced and proved before the said Master on or before the —— day of ——, under penalty of thereafter being disallowed, within the discretion of the court.

Creditors and claimants who are specifically made parties to the above entitled suit are excepted from the operation of said order of said court.

Ordered, that said Master give published notice to claimants to present their accounts and demands before him, as aforesaid, once a week for two successive weeks in one newspaper of general circulation in ——, and one newspaper of general circulation in the city of ——.

Special attention is called to the shortness of the time for presentation of claims and to the desirability of promptness on the part of creditors.

H. M.,

Master in said cause.

No. 835.

Receiver's Petition for Authority to Purchase Rails and Ties.

The District Court of the United States for the —— District of ——.

The A. B. Trust Company, Complainant,
vs.
The C. & D. Railway Company and the
E. & F. Railway Company. } **In Equity.**

The petition of S. M. and H. C., receivers of the C. & D. Railway Company, respectfully shows:

First. On the lines of the railway in the possession of your receivers, there are portions of the track, aggregating to many miles, which are laid with iron rails, and which are light in weight, and badly worn out, so that trains cannot be operated with safety and ordinary speed over the same.

Some of the more important points where such iron rail is laid and where the same is peculiarly dangerous and unsafe are the following: [*Naming the points as near Waco, Texas, twenty-five (25) miles; between Denton and Dallas, Texas, thirty-eight (38) miles*].

Second. The main line of the C. & D. railway extends from —, to —, a distance of about eight hundred and thirty-three miles. The total mileage of the C. & D. railway and the kind of rails used is given in an itemized form, attached hereto, marked Exhibits "A" and "B." Exhibit "A" shows the mileage and weight of rails south of Denison, and Exhibit "B" that north of Denison.

Third. It would be inexpedient and not at all advisable, in the judgment of your receivers, to buy iron rails to replace those which are worn out or are in a bad condition, as hereinbefore stated, but that the best course to pursue is to replace those worn out and useless rails with the light-weight steel rails, fifty-two pounds and fifty-six pounds, taken from the line between — and —, and to restore the places between — and —, from which the fifty-two pound and fifty-six pound rails are taken, with sixty-three pound steel rails.

Fourth. Your receivers have made a careful investigation and believe that the best interests of the railway in their possession require that instead of buying iron rails they should

buy steel rails of sixty-three pound weight; that the sixty-three pound rail is that being generally put in at the present time by all good railroads. Railroads now in operation are putting sixty-three pound rails into their main lines. If permitted to buy sixty-three pound steel rails, your receivers can take the fifty-two pound and fifty-six pound rails from its main line between ———, and ———, and use them in putting the railroad at the points hereinbefore referred to in a safe condition and then put the sixty-three pound rails into the main line.

Fifth. In order to put the lines of railway in charge of your receivers in proper condition it will be necessary to have them purchase about fifteen thousand tons of steel rails of sixty-three pounds weight, and all angle bars, bolts and spikes for properly laying the same, so that the same may be delivered in time to be laid during the next year, and that about two (2,000) thousand tons of said rails should be delivered during the present month, three (3,000) thousand tons during the month of January, ———, and one (1,000) thousand tons on each succeeding month until wholly delivered.

Sixth. The receivers are advised that the present is a favorable time to purchase steel rails; that it is necessary, in order to have the steel rails when needed, that the contracts therefor should be made in advance.

Seventh. Your receivers further show that in order to place the lines of railway in their charge in proper repair, and to maintain the same, it will be necessary to purchase ties, and that such ties should be contracted for at as early a date as possible.

Wherefore, your petitioners ask an order authorizing them to purchase fifteen thousand tons of sixty-three pound steel rails, and ties in sufficient number to keep and maintain the road in proper repair.

X. & X.,

Solicitors for the Receivers.

State of —,
County of —, ss.

We, S. M. and H. C., receivers of the C. & D. Railway Company, have heard read the foregoing petition, and the facts therein stated are true, as we verily believe.

S. M.

H. C.

Subscribed and sworn to before me this — day of —,
A. D. —, P. H.,
[Seal.] Notary Public.

No. 836.

Order Authorizing Receivers to Purchase Material, etc.

In the District Court of the United States for the — District of —.

The A. B. Trust Company

vs.

The C. & D. Railway Company *et al.*

On application of the receivers heretofore appointed in this case, it is ordered that they be authorized to purchase the material and contract for the completion of fifteen miles of road from — to —, in —, and that if necessary they borrow money for the carrying out of this contract on the credit of the property in their possession.

Dated —.

W. T.,
District Judge.

No. 837.

Order Authorizing Receiver to Pay Master's Fees.

The District Court of the United States for the — District of —.

The A. B. Trust Company

vs.

The C. & D. Railway Company *et al.*

The petition of E. E., of the city of —, for the payment by the receivers herein of the sum of — dollars for moneys

advanced by him to pay the fees of Samuel A. Blatchford, Esq., the master in the suit of M. B. against the C. & D. Railway Company, in the circuit court of the United States for the — district of —, as is more fully set out in the said petition, coming on to be heard, and the court being fully advised, now, on motion of R. X., Esq., of counsel for the said E. E., it is—

Ordered, that the receivers herein be and they are hereby directed to pay unto the said E. E. the said sum of — dollars in full of his advances for master's fees, as in the said petition is fully set forth.

Dated —.

No. 838.

**Petition of S. M., Receiver, for Authority to Borrow \$150,000
on Receiver's Certificates.**

The District Court of the United States, — District of —.

| | |
|-----------------------------------|------------------------|
| The A. B. Trust Company, Trustee, | } In Equity. No. —. |
| <i>vs.</i> | |
| The C. & D. Railway Company. | |

To the Judge of the District Court of the United States for the — District of —:

S. M., receiver, shows to the court that he is indebted as receiver to sundry persons and corporations in the sum of \$150,000 on account of materials and supplies furnished to him and services rendered to him and traffic balances to other railroads due from him. Said indebtedness was incurred by your petitioner in operating said C. & D. railroad as receiver, in pursuance of the orders of this court, in the regular course of the business of said operation and was necessary to said operation.

There is due your petitioner, as receiver, from the T. Company, a corporation organized under the laws of the state of —, heretofore owning and operating mines along the line of said railroad, and the principal shipper over said railroad, the sum of \$——, on account of freight due to your petitioner from said the T. Company. On or about — day of —, said the T. Company, being insolvent, was placed in the hands of a receiver by the order of this court. Your petitioner is therefore unable to collect any of said indebtedness due to him from said company.

There is also due to your petitioner from sundry railroad companies, on account of traffic balances accruing since your petitioner's appointment as receiver, the sum of \$——, which said companies refuse to pay, and which your petitioner is unable to collect, because said C. & D. Railroad Company is indebted to said railroad companies on account of traffic balances accruing prior to the appointment of your petitioner as receiver, and said railroad companies insist upon setting off said indebtedness of said C. & D. Railroad Company against their indebtedness to your petitioner, as receiver.

By reason of said insolvency and failure of the T. Company and said refusal of said railroad companies to pay traffic balances due to your petitioner, your petitioner is without funds to pay said indebtedness of \$150,000 due from him as receiver.

Your petitioner therefore prays for authority to borrow \$150,000, as receiver, upon receiver's certificates.

R. X.,
Counsel.

S. M.,
Receiver.

No. 839.**Order Authorizing Receiver to Issue Receiver's Certificates to the — for \$150,000.**

[*Caption.*]

It appearing to the court that the receiver has not funds on hand with which to pay the Lane Machine Company the sum of \$150,000 which the court, by its order entered herein —, authorized the receiver to pay to said company in settlement of its claim for the Thornburgh unloader at —, and that it is necessary to make said payment in order to secure the benefit of said settlement, and that said machine is necessary for the operation of said railroad, and that said Lane Machine Company is willing to accept receiver's certificates for said amount bearing interest at five per cent. per annum from —, and maturing not later than —.

It is now on this — day of —, ordered, adjudged and decreed by the court that S. M., receiver, be and he is hereby authorized to issue and deliver his three certificates, as receiver, to said Lane Machine Co., for the sum of \$5,000, each, bearing interest at the rate of five per cent. per annum from —, and maturing on or before —, the same to be received and accepted by said Lane Machine Company in payment of said machine and in full settlement of the claim covered by said order of the court entered herein —. Said certificates shall be a first lien on all and singular the property of the defendant. The C. & D. Railroad Company, now by it owned or hereafter acquired, and upon the income thereof, and shall be prior in right to the mortgage of the A. B. Trust Company and to the mortgage of the E. & F. Trust Co., trustee, provided that nothing in this order shall in any wise prejudice or affect the lien, if any exists, of the receiver's certificates issued and now outstanding under and in pursuance of the orders of the Court of Common Pleas of — county, —, in case No. 6491, on the docket of that court. of the

E. & F. Trust Company against the C. & D. Railway Company; and provided further that the lien of the certificates issued under this order shall be of equal rank with the lien of the certificates to the amount of \$—— issued under the orders of this court, entered herein ——, and ——, and with the lien of the certificates to the amount of \$—— issued or to be issued under the order of this court entered herein on ——, and with the lien of the certificates to the amount of \$—— issued or to be issued under the order of this court entered herein on ——, and that none of the certificates issued under this order, or under said orders of ——, and ——, shall have any priority the one over the other.

The certificates under this order shall be countersigned by the clerk of the court and registered by him in a record to be kept by him for that purpose, and shall be in the following form: [*Here set out form as in next form below.*]

No. 840.

A Receiver's Certificate.

The C. & D. Railroad Company.

Receiver's Certificate of Indebtedness.

This is to certify that S. M., receiver of the C. & D. railroad, as such receiver, and not individually, is indebted unto the Lane Machine Company, or the bearer hereof, in the sum of —— (\$——) dollars payable on or before ——, with interest from ——, at the rate of five per cent. per annum, out of the earnings of said C. & D. railroad, first after such payments as may be necessary for the operation of said railroad, or out of the proceeds of the sale of the said railroad property, in the event the same is sold, before the bonds secured by the mortgages hereinafter mentioned are paid.

This certificate is one of three of \$—— each issued under the authority of an order of the district court of the United

States for the — District of —, — division, made —, in a cause pending in said court, wherein the A. B. Trust Company, trustee, is complainant, and said the C. & D. Railroad Company is defendant.

The said three certificates are by the terms of said order a first lien on all and singular the property of said the C. & D. Railroad Company, owned by it at the date of said order, or thereafter acquired by it, and upon the income thereof, and are prior in right to the mortgages of the said railroad company to said the E. F. Trust Company and the A. & B. Trust Company of the city of —; provided, however, that the said certificates shall not in any wise prejudice or affect any lien of receiver's certificates issued and now outstanding under and in pursuance of the orders of the Court of Common Pleas of — county, —, in suit No. —, of said E. F. Trust Company of the city of — against the C. & D. Railway Company, and provided further, that the lien of the certificates issued under said order of —, shall be of equal rank with the lien of the certificates to the amount of \$— which have been issued by said S. M., receiver, under the orders of said District Court of the United States for the — district of —, — division, entered in said cause on —, and —, and with the lien of the certificates to the amount of \$— issued or to be issued by said S. M., receiver, under the order of said court entered in said cause on —, and with the lien of the certificates to the amount of \$— issued or to be issued by said S. M., receiver, under the order of said court entered in said cause on —, and that none of the certificates issued under said order of —, or under said orders of —, and —, shall have any priority the one over the other.

This certificate shall not become obligatory until countersigned by the clerk of the District Court of the United States for the — district of —, — division, and certified by

him that the same has been duly issued under the order of the court.

This is to certify that the foregoing certificate has been duly issued by S. M., under the order of the District Court of the United States for the — district of —, — division, therein mentioned.

Witness the seal of said court and the signature of the clerk thereof, this — day of —.

[Seal.]

B. R.,
Clerk.

In witness whereof, the said S. M., as receiver aforesaid, but not individually, has signed this certificate this — day of —.

S. M.,
Receiver.

No. 841.

Order Allowing Receiver to Renew Notes.

[Caption.]

It appearing to the court that S. M., receiver, has not funds with which to pay at their maturity the notes to the amount of \$—— which he has issued pursuant to the order of this court entered on —, and that the holders of said notes are willing to extend or renew the same for six months, it is now, on this — day of —, ordered that said S. M., receiver, be authorized to renew or extend said notes for a period not exceeding six months from the date of their maturity, with interest at a rate not exceeding six per cent. per

ANNUUM.

And it is further ordered that said S. M., receiver, shall reserve and set aside \$—— of the certificates authorized to be issued by the order of this court entered on —, and that he shall not issue or use said certificates unless or until the notes authorized by this order to be extended or renewed are paid, and only to the extent and in the proportion that the same are paid.

No. 842.**Petition by a Receiver of a Lessee Railroad Company to Replace Bridges under Terms of Lease (1).**

[Caption.]

Your petitioner having heretofore, on the — day of —, been appointed by this honorable court receiver of the property of the C. & D. Railway Company, the defendant herein, with direction to operate the same as a common carrier, and having entered upon his duties as such receiver and continued in the exercise of same to the present date, respectfully represents to the court: That after a careful examination and inspection thereof recently made by G. B., a civil engineer of high attainment and authority in such matters, who was also in charge of the construction of said railway, including the bridges, and who is familiar therewith, and after a like examination, made by competent employes of your receiver, he finds that:

The following expenditures for bridge replacement are necessary to be incurred in order to properly and safely continue the operation of said railway in the business of a common carrier: [*Here state the bridges desired to be replaced as:*

1. Two spans, 187 feet long, of the north approach of the bridge of said railway at Cincinnati, over the Ohio river, at an estimated cost of..... \$35,000
2. Three spans of the railway bridge over the Ohio river at Cincinnati, in length, 112 to 120 feet, to cost, as per contract already let\$17,350]

The ownership of the defendant railway company in the said railway is that of lessee under and by virtue of a certain lease made the — day of —, by the trustees of the Cincinnati Southern Railway to the defendant herein, for the term of twenty-five years then next ensuing, at an annual

rental of \$——, for the first period of five years, \$—— for the second period of five years, \$—— for the third period of five years, \$—— for the fourth period of five years, and \$—— for the fifth period of five years, in addition to the sum of \$——, paid by him yearly to the trustees of said railway in accordance with requirements of said lease.

Clause five of said lease contains the obligations of the defendant, as lessee, concerning repairs, replacements and renewals, wherein the defendant company agrees that it would:

“Whenever needed, do all repairs, replacements and renew-all on said line of railway,” and that it would “maintain, preserve and keep the same and every part thereof in thorough repair, working order and condition,” and that it would at the end of said lease “re-deliver and surrender the same with all conditions to and improvements thereon, in such thorough repair, working order and condition, in which they are required to be put and kept by this lease, and such repairs and renewals to be made by the party of the second part, shall include, among other things, the arching with brick or stone of the tunnels now lined with timber, or untimbered tunnels which require arching; the filling of all wooden trestle work required to be filled, and replacing all other wooden works and bridges with permanent structures of stone and iron.”

Your petitioner says that such bridge replacements are made necessary by reason of defective workmanship in the original construction of said bridges, as well as by the fact that said bridges when built, were designed to carry loads very much less than the weight of loaded cars now necessarily in use on said roads and generally throughout the United States.

Your petitioner asks the authority of the court for making such expenditures, and that it instruct him whether the same shall be charged by him to the said lessee, the defendant herein, or to the city of Cincinnati, by deducting same from the rent aforesaid reserved in said lease in favor of the city

of Cincinnati, which your petitioner as such receiver aforesaid is paying, as in the former event it may become necessary that your petitioner borrow the money by means of certificates to pay for said expenditures, and he will ever pray, etc.

State of ———,

County of ———, ss.

S. M., being by me first duly sworn, says that allegation of the foregoing petition is true as he verily believes.

S. M.

Sworn to before me and subscribed in my presence this
—— day of ———, A. D. ———.

S. E.,

[Seal.]

Notary Public for ——— County, ———

(1) Taken from the record in the case of Thomas vs. C. N. O. & T. P. Ry., pending in Circuit Court of the United States for the Southern District of Ohio.

No. 843.

Petition of Receiver to Pay for Electric Block System.

[Caption.]

E. F., hereinbefore appointed receiver of the railway and property of the defendant, respectfully represents to this honorable court that the defendant company had, before the appointment of a receiver, purchased certain equipment, payments for which were to be made in installments; that the company had paid many of such installments, and that it is necessary to pay the remaining ones in order to save those already made, and secure the property free of the lien for balance due, the present value of the property being in excess of the undue payments.

He further respectfully represents that during the past two years said company has been carrying out a system of electric block signals in the mountain region over which the road operated by the company passes, and about \$23,000 has already been expended thereon, and that prior to his appoint-

ment, the company had negotiated for twenty-four additional block signals for said region, which were necessary to continue said system, at a total expense of about ten thousand dollars; that said region is uninhabited, and it would be very much more expensive to use an ordinary block system than such self-operating electric one; that the use of said block system has since its adoption saved to the company a very large sum of money, over and above its cost, and that the remaining number aforesaid will, your petitioner believes, result in equal benefit.

Your petitioner therefore respectfully asks the authority of the court to complete such payments on equipment and to purchase and put in operation the remaining block signals as aforesaid.

E. F.,

By R. X.,

Attorney for Receiver.

State of ———,

—— County, ss.

E. F., receiver, being duly sworn, deposes and says that the averments of the foregoing petition are true as he verily believes.

E. F.

Sworn to before me and subscribed in my presence, this
—— day of ———, A. D. ———.

J. N.,

[Seal.]

Notary Public, ——— County, ———.

No. 844.

Order Directing Filing of Receiver's Petition and Service of Copy of this Order on E. A. Ferguson, President Board of Trustees Cincinnati Southern Railway (1).

[Caption.]

The receiver heretofore appointed herein having presented to the court a petition to be filed in this cause, showing the necessity for expenditures for bridge replacements on the

railway of the Cincinnati, New Orleans and Texas Pacific Railway Company, to the amount of one hundred and twelve thousand, one hundred and three (\$112,103) dollars, by reason of the alleged defective workmanship in the original construction of said bridges as well as by reason of the fact that said bridges were designed, when built, to carry loads very much less than the weight of loaded cars now necessary for use on the said railway, and generally throughout the United States, and asking the authority of the court for making said expenditures and for instructions whether the same should be charged to the said lessee of the Cincinnati, New Orleans and Texas Pacific Railway Company or to the city of Cincinnati, by deducting same from the rent aforesaid reserved in said lease, in favor of said city, which said receiver is paying.

And the court having ordered said receiver to file said petition, which has been accordingly filed, does now on its own motion, direct that a copy of said petition and of this order be served upon the trustees of the Cincinnati Southern railroad, requiring them to show cause, if any they have, within twenty days, why the prayer of said petition should not be granted and why the cost of such expenditures should not be charged to the city of Cincinnati, by deducting the same from the rent which said receiver is paying for the use of said railroad. And that the service of this order and of the said petition be made by delivering a copy of the same to E. A. Ferguson, Esq., president of said board.

(1) Copied from the record in the case of *Thomas vs. C. N. O. & T. P. Ry.*, pending in the Circuit Court of the United States for the Southern District of Ohio.

No. 845.

Order Directing Replacements of Bridges to be Made and Reserving Questions as to Party to be Charged Therewith (1).

[Caption.]

The receiver heretofore appointed herein having on the 6th day of March, 1896, filed in this cause a petition showing necessity for expenditures for bridge replacements on the railway of the Cincinnati, New Orleans and Texas Pacific Railway Company, as specified and set forth in said petition, not exceeding the amount of one hundred and twelve thousand one hundred and three (\$112,103) dollars, and the court being satisfied that there is immediate necessity for said replacements of said bridges,

It is now ordered that said receiver forthwith have said replacements of said bridges made, at an expenditure not exceeding the amount hereinbefore named, other questions suggested in said petition, by request for instructions concerning the party to be charged with said expenditures are deferred for future consideration, without prejudice.

(1) Copied from record in *Thomas vs. C. N. O. & T. P. Ry.*, in the Circuit Court of the United States for the Southern District of Ohio.

No. 846.

Entry Granting Motion to Vacate Order of March 11, 1896, and to Discharge Rule Issued in Pursuance Thereof (1).

[Caption.]

This cause coming on further to be heard this day on the motion of the trustees of the Cincinnati Southern railway, to set aside that certain order hereinbefore made on the 11th day of March, 1896, whereby they are required to show cause why the expenditures necessary to replace certain spans of

the Ohio river bridge and Cumberland river bridge of the Cincinnati Southern railway be not charged to the city of Cincinnati, by deducting the same from the rent paid to it by said receiver for the use of said railway, or otherwise, the said trustees of the Cincinnati Southern railway having appeared by W. T. Porter, their solicitor, and filed their motion to vacate said order of March 11, 1896, and to discharge the rule made upon them in pursuance thereof, and having appeared for the purpose of said motion only, and the court being of opinion that the proper mode, if any, in this court, to raise the question intended to be presented by said rule, would be by ancillary bill or by separate and independent bill in equity, and it is now ordered that the motion of said trustees to set aside said rule be, and the same is, hereby granted. Said rule is accordingly set aside and vacated and discharged, and this order is made without prejudice to the rights of the parties on the merits of the question involved, as the same may be hereafter presented.

(1) Taken from record in *Thomas vs. C. N. O. & T. P. Ry.*, in the Circuit Court of the United States for the Southern District of Ohio.

No. 847.

Petition for Direction to Receivers.

The District Court of the United States, — District of —.

Union Trust Company of New York

vs.

The C. & D. Railway Company *et al.*

The A. B. Trust Company

vs.

The C. & D. Railway Company *et al.*

To the Honorable the Judge of the District Court of the United States for the — District of —.

The petition of the Union Trust Company of New York respectfully shows to this court:

Petitioner has lately exhibited in this court its bill of complaint against the C. & D. Railway Company *et al.* to foreclose certain mortgages therein described, and that all and singular the allegations in said bill of complaint are true in manner and form as therein made.

Petitioner shows that heretofore the A. B. Trust Company, complainant in the second above-entitled suit, exhibited its bill of complaint against said C. & D. Railway Company *et al.* to foreclose a certain mortgage therein described. The copies of said respective mortgages are annexed to said respective bills of complaint.

In the suit of said A. B. Trust Company in September, —, this court, on the application of complainant, appointed Messrs. S. M. and H. C., receivers of the mortgaged property, and in the suit wherein petitioner is complainant, this court, in March, —, appointed the same persons receivers of the property described in said mortgages to petitioner.

Petitioner refers to the said bills of complaint, and to the exhibits thereto annexed, and to the said orders, and makes the same parts of this petition the same as if incorporated herein.

Petitioner further shows that the said mortgages to your petitioner are a lien on the said property therein described prior to the lien of the mortgages to said A. B. Trust Company, and that the mortgages to said A. B. Trust Company constitute a lien on the property described in the mortgages to your petitioner junior and subject to the lien thereon of said mortgages to your petitioner. That the mortgages to said A. B. Trust Company are also a lien on property therein described, and which is not described in the mortgages to your petitioner, and on which the mortgages to petitioner are not a lien.

By each of the orders entered, respectively, one in each of above-entitled suits, said receivers were directed to keep accounts of the earnings of the separate properties described in

said respective mortgages, to the end that the rights and interests of the several parties therein might be ascertained.

Petitioner further shows that it is informed and believes that the part of said property covered by said mortgages to petitioner is valuable and productive of net income over operating expenses, and that the part of said property covered only by the mortgages to said A. B. Trust Company is of very much less value and is productive of very little net income over and above the operating expenses, and is in bad repair and needs the expenditure of large sums for repairs and replacements.

That since the possession of said receivers they have filed in this court their accounts for the first two months of their operation of said property, to wit, for November and December, —.

Said receivers in said accounts have divided the said property into seven divisions, and state the earnings and expenses of each.

The property in the first four of said divisions, to wit, [*naming them as* Missouri, Kansas and Texas, North Division, Hannibal and Central Missouri, Tebo and Neosho, Union Pacific, Southern Branch,] is all covered by the mortgages to petitioner.

By the report of said receivers the earnings for said two months of the property, subject to petitioner's mortgage, amounted to \$679,153.76, and the expenses charged to the same amounted to \$424,409.99, the difference, \$234,743.77, being net earnings. To that sum the said report shows that \$6,666.66, rental of Osage division, should be added, making net earnings of \$261,410.43.

Deducting from that sum the taxes for the Missouri and Kansas portions of the property, to wit, \$68,286.64, leaves \$193,123.79 as the net earnings of the part of the property covered by petitioner's mortgages.

The said report shows that the earnings of the property not covered by petitioner's mortgages for said two months were \$452,820.34, and the expenses charged to the same amounted to \$370,164.74, and the difference, \$82,655.60, constitute the net earnings.

Said report, however, shows that the taxes on the Texas property were \$50,128.33, which, when deducted, leave the net earnings of the property not covered by petitioner's mortgage \$32,527.27, as against net earnings of property covered by petitioner's mortgage, \$193,123.79.

These two items of \$193,123.79, for the property covered by petitioner's mortgages, and \$32,527.27, for the property not covered by petitioner's mortgages, make the total of net income of \$225,651.06, as stated in said receivers' accounts to December 31, 1888.

The net income of the property not covered by petitioner's mortgage is therefore but little more than one-seventh, and that of the property covered by petitioner's mortgage little less than six-sevenths, of the total income of the whole property, the one-seventh of said net income being \$32,235.86 4-7.

Petitioner is informed and believes that the receivers have spent and are spending a large amount of the net income from the property covered by the mortgages to petitioner on the property not covered by said mortgages, to the injury of the petitioner and petitioner's *cestui que trust*, holders of bonds secured by said mortgages to petitioner.

Petitioner is advised that all and singular the net income of the property covered by petitioner's mortgages should be applied, first, to such repairs and replacements as may be necessary to preserve and protect the property covered thereby pending the said suit of petitioner, and thereafter to the payment of the interest on the bonds secured by said mortgages to your petitioner, and that so long as any interest is due and unpaid on said bonds secured by said mortgages to your petitioner, none of said net income should be spent for the

care or improvement of property not covered by said mortgages to your petitioner.

Petitioner has within the last day or two, in New York city, been informed by Mr. H. C., one of said receivers, that said receivers are spending the income of said property in the repair and replacement of the whole property wherever it may be needed, without regard to where it has been earned; and petitioner is informed and believes that much more than the share of said net income belonging thereto and earned thereby is being spent on the property on which petitioner's mortgage is no lien.

Petitioner is further informed and believes that the net income of the said respective portions of property since the date of said report to the present time is in about the same proportion as is stated in said report for the time covered by said report, to wit, that the property not covered by petitioner's mortgage earns but about one-seventh thereof.

Petitioner is further informed and believes that the accounts of said receivers are or should be balanced monthly, and petitioner alleges that the receipts of copies of monthly balances would greatly facilitate petitioner in discharging its duties to its *cestui que trust*, the holders of bonds secured by said mortgages.

Wherefore petitioner prays that the said receivers may be directed to spend no part of the income derived from or earned by the property covered by the petitioner's mortgages upon property not covered by petitioner's mortgages, and that all the income derived from the property covered by petitioner's mortgages over and above the operating expenses thereof be held and reserved pending the suit for the benefit of said property and the payment of the interest on the bonds secured by said mortgages, and that if said receivers do not already do so, they be directed to have their accounts balanced at least monthly, and that copies of such balances, or of statements of accounts made at least monthly, should monthly be

furnished to petitioner, and that petitioner may have such other or further relief as may be just.

Union Trust Company of New York,

By E. K., President.

X. & X.,

Solicitors for Petitioner.

G. S.,

Of Counsel.

State of——,

County of——, ss.

E. K., of the city of ——, being duly sworn, says that he is president of the Union Trust Company of New York, and knows the contents of foregoing petition, and that the same is true to the best of deponent's knowledge, information and belief.

E. K.

Subscribed and sworn to before me, March 29, 1889.

[Seal.]

J. V.,

Notary Public, —— County.

No. 848.

Order in re Petition for Direction to Receivers.

[Caption.]

And now comes the Union Trust Company of New York, by its solicitors, and it appearing to the court that said the Union Trust Company has filed its petition in the above-entitled suits for direction to the receivers therein as to the application of the income of said road, and praying that said receivers may be directed to spend no part of the income derived or earned by the property covered by the mortgage given to the Union Trust Company upon property not covered by said mortgage given to said the Union Trust Company, and that incomes derived from the property covered by said mortgage given to the Union Trust Company, over and above

the operating expenses thereof, be held and reserved pending said suits for the benefit of said property and payment of the interest due upon the bonds secured by said mortgage to the Union Trust Company, and for other purposes as in said petition set forth. And the same having been presented to the court, it is ordered that the same be set down for hearing before me, at chambers, in the city of —, on the — day of —, at 10 o'clock a. m., or as soon thereafter as counsel be notified of the time and place of the hearing thereof.

Dated —.

No. 849.

Petition of Receiver for Protection.(1)

[Caption.]

To the Honorable the Judge of the United States District Court for the — District of —.

Your petitioner, S. F., respectfully represents that by an order of this court made on the — day of —, he was appointed receiver of the C. D. Company, owner, as lessee, of a line of railroad from the city of — and state of —, through the state of — to the city of — in the state of —, with directions to operate the same as a common carrier of passengers and freight, which he has been doing ever since and which he is still engaged in doing.

Your petitioner further says that, owing to the falling off in the receipts of the railroad from causes beyond his control, it became necessary to reduce the wages of the officers and employes employed by him as such receiver, in the operation of said road, and that accordingly on the — day of —, he issued an order reducing by ten per cent. monthly salaries exceeding \$35.00, or daily wages exceeding \$1.10 to be effective on the first day of —.

Your petitioner further says that A. B. and others, claiming to represent the employed of said road, did file in this

cause their petition on the — day of —, asking the court to modify said order of —, and that said petition was fully heard by this court upon the evidence and was upon argument and after due consideration thereof denied and dismissed by an order herein made on the — day of —, and that most of said employes, as your petitioner is informed and believes, acquiesce in said decision and wish to continue in the employ of your receiver, but that others are not satisfied therewith and propose to leave the employ of the receiver; that your petitioner recognizes the right of any of said employes to leave his employ if dissatisfied with their wages and is prepared to fill their places with new men, should they withdraw. But your petitioner says that as a result of careful investigation he has reason to believe and does believe that such dissatisfied employes propose "to tie up" the road operated by your petitioner, that is, to interfere with and obstruct the operation of said railroad and of said property at —, and other places, by molestation or otherwise, and that there is imminent danger that they will, by themselves and others, interfere with the operation of said railroad and said property at —, and other places, by your receiver in this cause, and that there is imminent danger of damage and destruction being done at said places at their hands, for prevention whereof your petitioner asks that by an order of this court the marshal of the United States for the — District of — be directed to take such means by the appointment of sufficient deputy marshals as may be necessary to fully protect said property and persons engaged in the operation thereof from molestation of any sort or description by any person or persons not authorized to interfere therewith.

S. F.

[*Verification.*]

(1) This petition was filed in the case of Thomas vs. C. N. O & T. P. Ry., pending in the Circuit Court of the United States for the Southern District of Ohio.

For order on this petition granting relief prayed. see next form.

No. 850.**Order Directing Marshal to Appoint Deputies to Protect
Property in the Hands of Receiver (1).**

[Caption.]

S. F., the receiver of this court heretofore appointed in this cause, having by his petition this day filed herein made it appear to the satisfaction of this court that there is danger of damage to the property of the C. D. Company in the state of —, in his possession as receiver of this court, and of interference with his employes engaged in the operation, management and control of said property by certain ill-disposed persons; and said receiver having by his said petition prayed this court to make such orders as may be necessary for the protection of said property and of said employes.

It is now hereby ordered that the marshal of the United States for the — District of —, be, and he hereby is directed and required to take all steps that may be necessary and proper to guard and protect the property of the C. D. Company in the — District of the state of — from any molestation whatever or from any unauthorized interference therewith, or any trespass thereon by any person or persons whatsoever, and to protect the employes of said receiver in said district engaged in the operation, care or control of said property, and that he do appoint such number of deputy marshals and watchmen as may be required to carry this order into full effect.

Dated —.

(1) This order was entered in *Thomas vs. C. N. O. & T. P. Ry.* in the Circuit Court of the United States for the Southern District of Ohio.

No. 851.**Intervening Petition to Recover a Judgment of a State Court.**

[*Caption.*]

To the Honorable District Court of the United States for the
—— District of ——:

Your petitioner, B. F., who resides in ——, in the county of ——, in the state of ——, praying for leave to intervene in the the above-styled and numbered cause, and for other orders, respectfully represents to the honorable court that on, to wit, the —— day of ——, 1894, prior to the order of this honorable court placing the mortgaged property of the said C. & D. Railway Company into the control and possession of the receivers, S. M. and H. C., and prior to the order of the honorable district court of the United States for the district of —— placing such property in control and possession of said receivers, the intervenor herein, said B. F., instituted suit in the justice's court for precinct No. 1, in —— county, ——, against the T. & H. Railroad Company, on a claim of —— dollars for damages for material taken and appropriated by the said C. & D. Railway Company in the construction and building of its said railroad; that the T. & H. Railroad Company is and was the C. & D. Railway Company constructing, operating, owning, and controlling under the said name of the T. & H. Railroad Company, a line of railway called the T. & H. Railroad, and running from T., in —— county, ——, through S, in —— county, ——, and into —— county, ——, on in the direction of H., in —— county, ——, together with a tap or spur running from said town of S, in said —— county, to the town of L., in the county of ——, state of ——.

That during the pendency of said suit in said justice court said property, known as aforesaid as the T. & H. Railroad, was by order of the district court of the United States for the district of —— and by order of this honorable court made in this cause, placed in the possession and control of said S. M. and H. C. as receivers as

aforesaid. That during the pendency of said suit in said justice court, and after the said order appointing said S. M. and H. C. as receivers as aforesaid, placing said T. & H. Railroad in their possession, in this cause said S. M. and H. C., receivers, were duly served with citations in terms of law to appear and answer the suit of the said B. F. in said justice court, and thereafter, to wit, on the — day of —, said service of citation on said receivers being perfect and complete, said justice court, at and during its regular term thereof, gave judgment in favor of the said B. F. for the sum of — dollars, and for costs of suit, which said costs amount to the sum of — dollars against the said T. & H. Railroad Company and against S. M. and H. C., receivers; and said judgment declares and establishes said sum, together with said costs, as a charge and lien on the earnings of the said T. & H. Railroad Company.

And this intervenor says said judgment is a lien of the sixth class on the earnings of said C. & D. Railway, and prays an order of this honorable court conferring the same as such lien and for the payment thereof by said receivers.

Your petitioner attaches hereto, marked "Exhibit A," a true copy of said judgment of said justice court, certified to as being true and correct by S. H., said justice trying said cause, accompanied by the certificate of W. W., clerk of the county court of — county, —, under the seal of said county court, that said S. H. is, and on the — day of —, was, a duly elected justice of the peace, and that the signature attached to said copy of judgment is the genuine signature of said justice of the peace, and intervenor asks that the same be taken as a part of this petition.

And the intervenor prays for such further or other orders respecting said claim as may seem to the honorable court equitable, proper, and necessary under the fact, and so as in duty bound will ever pray.

D. H.,

Attorney for Intervenor, B. F.

[*Attach Exhibit "A."*]

a lien is hereby established and fixed in the earnings of said defendant corporation, the T. & H. Railroad Company, which may now be in the hands of said receivers aforesaid, or C. R., agent of said receivers, in — county, as aforesaid, and in the earnings of said defendant railroad company which may hereafter come into the hands of said receivers and said R., agent of said receivers as aforesaid; and said S. M. and H. C. are hereby directed out of the earnings of said railroad company coming to their hands to pay off and satisfy the judgment herein rendered in favor of said plaintiff, B. F., within thirty days from the date of this judgment. That if said receivers shall fail or refuse to pay off and satisfy said judgment herein rendered in favor of plaintiff, B. F., within the time as herein directed, then that the said C. R., so representing said receivers in — county as aforesaid, is hereby directed to pay off and satisfy said judgment within sixty days from the date of this judgment out of any money coming to his hands, the earnings of said T. & H. Railroad Company. Upon failure of said receivers and said C. R. to pay off and satisfy the judgment herein given in favor of plaintiff, B. F., as hereinbefore directed, then let execution issue against the defendants, the T. & H. Railroad Company and S. M. and H. C., for the amount unpaid on said judgment. Done this — day of —.

S. H.,
J. P. C. Co.

No. 853.

Motion to Refer Intervention to a Special Master.

[*Caption.*]

In re Intervention of B. F.

Now comes B. F., intervenor, by counsel, and moves the honorable court that his petition of intervention filed in the papers of this cause on the — day of —, be referred in all things to E. M., Esq., master in chancery, for his examination and report; and intervenor with respect so prays.

D. H.,
Attorney for B. F.

No. 854.

Petition to Intervene to Foreclose a Mortgage.

[Caption.]

The Petition of the Safe Deposit Company of the city of —, State of —, Trustee:

The petition of the Safe Deposit Company respectfully shows:

First. Your petitioner is a corporation duly incorporated, organized, and existing under the laws of the state of —, and has been such since long prior to the 1st day of June, 18—.

Second. The defendant, the E. & L. River Railroad Company, was specially chartered by an act of the legislature of the state of —, entitled "An act to organize and incorporate the E. & L. River Railroad Company," which act was duly approved on the — day of —.

Third. On the 1st day of June, 18—, the said E. & L. River Railroad Company executed its mortgage to your petitioner, as trustee, to secure certain first-mortgage bonds as by said first mortgage provided. A copy of said mortgage is hereto attached, marked "Exhibit A," and made part hereof. By the terms of said mortgage the railroad of said E. & L. River Railroad Company, and all of its property then existing and to be afterwards acquired, was conveyed to your petitioner, as trustee, to secure certain mortgage bonds in said mortgage particularly described. The number of bonds authorized to be issued under said mortgage was not to exceed —, being at the rate of \$— per mile of railroad constructed at the time of the execution of the said mortgage, and a further issue of \$— per mile as additional road should be constructed in sections not less than — miles.

Fourth. The railroad of said E. & L. Railroad Company is constructed from —, via —, to —, through the counties of [name all the counties and state], a distance of about — miles. From — to — is a standard gauge, and from — to — is a narrow gauge.

Fifth. There have been certified and delivered, and are now outstanding, — of the bonds secured by the said mortgage, but the rights of the holders of — thereof to share in the protection of the lien of the mortgage is disputed by the holders of the remaining — bonds, as will more fully appear by reference to the sixteenth section of this petition.

Sixth. On the — day of —, the said E. & L. River Railroad Company executed and delivered to the C. & D. Railroad Company its certain deed or instrument in writing, whereby it conveyed all of its property to the C. & D. Railway Company, defendant herein. The said conveyance was made by virtue of authority claimed by the parties thereto to be conferred by section 4 of an act of the legislature of the state of —, approved the — day of —, entitled "An act in relation to the C. & D. Railway Company, late the U. P. Railway Company, Southern Branch," and also by virtue of the charter powers of the E. & L. River Railroad Company.

Seventh. On December 1, 18—, the said E. & L. River Railroad Company leased all of its lines then owned and thereafter to be acquired to the M. P. Railway Company.

Eighth. After the C. & D. Railway Company acquired the E. & L. River Railroad, the said railway company turned over, under its lease, the said E. & L. River Railroad to the M. P. Railway Company, which was thereafter operated by the said last-named company, under the lease, as a part of the C. & D. Railway.

Ninth. On the — day of —, a suit in equity was begun in the circuit court of the United States for the district of — by The A. B. Trust Co. of —, trustee, under the mortgage made by the C. & D. Railway Company, to secure certain bonds therein described, to foreclose the said mortgage, and for the appointment of receivers for the said mortgaged property, default having been made in the payment of interest on said mortgage bonds; in which suit the C. & D. Railway Company and the M. P. Railway Company were

made parties defendant, duly served and appeared. The bill of complaint and of subsequent pleadings and proceedings in the said United States district court for the ——— district of ——— have been, under the order of this court in this cause, filed herein, and your petitioner begs to refer thereto.

Tenth. On the ——— day of ———, in the said cause, an order was entered appointing S. M. and H. C. receivers of the C. & D. Railway Company, including all of its properties in [*name the states*], and including the line of railroad hereinbefore referred to as the E. & L. River Railroad.

Eleventh. On the ——— day of ——— the ancillary proceedings, in which this petition is now presented, were begun by the said A. B. Trust Company in the district court of the United States against the C. & D. Railway Company and the M. P. Railway Company, in each of the districts, viz., the northern, southern and eastern, of the state of ———, to foreclose the said mortgage of the C. & D. Railway to the said A. B. Trust Company, and in aid of the said suit in ———, and asking for the appointment of receivers.

Twelfth. On the ——— day of ———, an order was made in each of said courts in ———, appointing and confirming the said S. M. and H. C. receivers of the C. & D. Railway Company, including all of its lines in the state of ———, among which was the E. & L. River Railroad.

Thirteenth. Afterwards, on the ——— day of ———, an amended bill was filed in the original suit in the district court of ———, making certain other railroad companies parties defendant, among which was the E. & L. River Railroad Company, and an order was made on that day extending the receivership of the said S. M. and H. C., specifically and by name, over certain lines of road in ———, among them the E. & L. River Railroad.

Fourteenth. On the ——— day of ———, an amended bill was filed in each of the said district courts of the United States for ———, making certain other parties defendant, among whom was the E. & L. River Railroad Company, and by an

order entered in the said cause the receivership of the said S. M. and H. C. was specifically extended over certain railroads in —, and among them was the said E. & L. River Railroad.

Fifteenth. By virtue of the original orders appointing them, the said receivers, S. M. and H. C. took possession of all the lines of the C. & D. Railway Company, including the E. & L. River Railroad, on the — day of —, and have since been in possession of and operating the same, and they are now in possession of and operating said railroads by virtue of the said original orders and aforesaid orders made upon the said amended bills.

Sixteenth. That there were prepared for issue by the said E. & L. River Railroad Company, and certified by your petitioner, under mortgage dated —, [*state number*] bonds. Of this [*state number*] bonds are now outstanding in hands of owners whose title is not in dispute, and they allege that the remaining [*state number*] of said bonds were acquired by the A. B. Trust Company of New York, trustee, under the mortgage made by the C. & D. Railway Company, under such conditions that the said A. B. Trust Company is not entitled, as against them, to enforce the same as if entitled to the protection of the lien of the mortgage made to your petitioner. A copy of a notice received from the holders of certain of the bonds is hereto attached as "Exhibit B." The said E. & L. River Railroad Company has made default in the payment of the coupons which fell due, and upon all coupons maturing subsequently thereto.

Seventeenth. Your petitioner has been requested by the said A. B. Trust Company, as the holder of [*state number*] bonds, and also by the holders of the said [*state number*] bonds, to take steps to protect the rights of the owners of the bonds secured thereby, so that the holders of all the bonds now outstanding have now united in the request that this action be taken.

Eighteenth. The mortgage of the said E. & L. River Rail.

road Company to your petitioner constitutes a prior and paramount lien upon all of the railroads and property of the said E. & L. River Railroad Company to any claim of the said A. B. Trust Company or the said C. & D. Railway Company, or any of the other parties to this suit, or to the said foreclosure suit in the said district court of the United States for the ——— district of ———.

Nineteenth. Your petitioner further shows that in the said mortgage, made and executed by the said E. & L. River Railroad Company to your petitioner, it is provided as follows:

"In case of default of the payment of any interest upon said bond, and such default continuing twelve months, the whole principal sum mentioned in each and all of said bonds then outstanding shall, at the option of the holders of one-third in interest of the said bonds then outstanding, become due and payable, and in that event, or in case of default in payment of the principal of said bonds, or any of them, at the maturity of said bonds, the party of the second part or its successor or successors in this trust shall foreclose this mortgage by legal proceedings, and sell, or cause to be sold, the said railway and property, and all the rights, privileges, and franchises, and all the appurtenances herein conveyed, as above expressed, including lands and land scrip, as well as all the benefit of the equity of redemption of the party of the first part in and to the same, with the benefit of the franchise aforesaid, which sale shall be at public auction in the city of New York, or at ———, on previous notice of the time and place of such sale by advertisement, published not less than three times per week for ten weeks, in at least two newspapers of general circulation published in the city of New York, two in the city of ———, and two in the state of ———, and in such other places as may be required by law."

Wherefore, your petitioner prays permission to file a bill to foreclose the said mortgage in the district court of the United States for the ——— district of ———, at ———, and for the appointment of a receiver thereunder, and for such other and further

order in the premises as may be necessary to fully protect the rights of the owners of the bonds secured by said mortgage.

R. Z.,

Solicitor for the Safe Deposit Co.

[*Attach exhibits "A" and "B."*]

No. 855.

**Order Granting Leave to Intervene to Foreclose a
Mortgage.(1)**

And now, this — day of —, the petition of the Safe Deposit Company being before the court, upon consideration thereof and upon motion of R. Z., solicitor for said petitioner, and W. B., appearing for the E. & L. River Railroad Company, and R. X. appearing for the C. & D. Railway Company:

It is ordered that the prayer of the petitioner be granted, and that the said petitioner have leave to file a bill to foreclose the mortgage referred to in said petition, and for other relief as prayed for in said petition.

A. P.,

District Judge.

(1) Parties may intervene to foreclose a mortgage on a railroad in a suit in which the property is in custodia legis, or file an independent bill. This question is thoroughly discussed in the case of *Compton v. R. R. Co.*, 15 C. C. A. 397, 68 Fed. 263; and *Toledo, St. L. & K. C. R. R. Co. v. Continental Trust Co.*, 36 C. C. A. 155, 95 Fed. 497; see also *Morgan's Co. v. Tex. Central Ry. Co.*, 137 U. S. 201; *Lumley v. R. R. Co.*, 22 C. C. A. 60, 76 Fed. 66; *Blake v. Coal Co.*, 28 C. C. A. 678, 84 Fed. 1014.

No. 856.**Petition for Leave to Intervene to Replevy Goods Furnished a
Manufacturing Company.**

[*Caption.*]

Now comes the W. D. Co., a corporation organized under the laws of the state of —, and represents to this honorable court that the said defendant and its receivers have now in their possession and control large quantities of [*state the goods, as, Manilla and New Zealand hems and the products thereof, or as may be*], the property of this company received from it by defendant for the sole and only purpose of being manufactured by said defendant into [*binder twine, or as may be*] by this company under contract in that behalf entered into on the — day of —, which hems and twine are of the value of — thousand dollars. Said property is now in large part at defendant's mills in — and —, in the state of —, the exact amount thereof in each mill this company is unable to say, because it is unable to get the required information from said company or its receivers.

There is great and imminent danger of said fibre and the twine manufactured therefrom being mixed and mingled with other fibres and twine pertaining to said company, and thus entailing great and irreparable loss upon this company.

The company avers that the means of identification are such now as that—if permitted by this court—it can recover its property in large amount. This company therefore moves this honorable court for an order for leave to bring an action, or actions, in this court or elsewhere, against said receivers, to enable it to recover its said property and prevent the imminent and impending loss aforesaid.

It further moves the court to require said company and its said receivers to make an immediate statement to this company, showing the exact whereabouts of all its said fibre and the twine manufactured therefrom, and for such other relief as equity and justice may require.

X. & X.,

Attorneys for W. D. Co.

No. 857.**Motion to Restrain Receivers in Accordance with the
above Petition.**

[*Caption.*]

The said W. D. Co. now comes and moves the court to restrain the said receivers from shipping away or delivering any binder twine in their possession within the jurisdiction of this court to any other person than to said W. D. Co. until the question can be tried as to their right to the same under the contract referred to in their said bill filed herein on the — day of —.

X. & X.,

Attorneys for W. D. Co.

No. 858.**Petition for Permission to make Receiver Party to a Suit
in a State Court (1).**

[*Caption.*]

C. L., the above-named petitioner, respectfully shows to your honors, that an action is now pending in the superior court of —, a court of the state of —, sitting in the city of —, in said state, numbered — on the docket of said court, wherein said C. L. is plaintiff and the C. & D. Railway Company is defendant. In said action your petitioner avers that said defendant has, without her consent and authority, and without authority of law, constructed a railroad track on premises owned by your petitioner on the south side of S street, east of H street, in said city; that said defendant has also constructed a railroad track across S street in the neighborhood of said premises of your petitioner without authority of law or the consent of your petitioner; that said defendant was at the time said action was brought maintaining and operating said tracks, and thereby obstructing the ingress and egress of your said petitioner to her said property, and using her property illegally. In said action your petitioner prayed that the said

defendant, the C. & D. Railway Company, might be perpetually enjoined from maintaining and operating said tracks, and required to pay the plaintiff the sum of — dollars damages for the use of same already had. On the — day of —, said superior court of —, made an order, upon the motion of your petitioner, enjoining the said C. & D. Railway Company, until further orders of said court, from maintaining and operating said tracks on the premises aforesaid of your petitioner and on said S street, upon your petitioner's giving bond in the sum of — dollars. Said bond was that day given, and the injunction, as ordered by the court, was issued and served upon the C. & D. Railway Company. On the — day of — said railway company filed its answer in said cause, taking issue with the averments of your petitioner that said track on S street was laid without the authority of law, and while admitting that the track, at the time the petition of said C. L. was filed in said court, was laid upon the premises of your petitioner, averring further that since said track had been removed, and was then situated upon the premises of said railway company; and at the same time said railway company filed its motion praying said court to dissolve said order of injunction. On the — day of —, by leave of said court, your petitioner filed her reply in said court, admitting that said track that was upon her premises at the time said action had been begun had been moved, but averring that the same as then located was still upon the property of your petitioner.

Said injunction is still in full force and unrevoked.

Afterwards in this suit brought by A. B. against the C. & D. Railway Company in this court, your honors, upon the — day of —, 18—, appointed S. M. receiver of said railroad company. Said S. M. now claims that the order of injunction of said superior court of — is not operative and binding upon him; and further, that, as your petitioner is informed, he, the said S. M., is not a party to said cause in said superior court of —; and said S. M. is now using,

maintaining and operating said tracks in defiance of said orders of said superior court of —, and to the prejudice of your petitioner.

Your petitioner therefore prays the leave of this court to sue said S. M. as such receiver, and to cause him to be made a party defendant in said cause now pending in said superior court of —, and that he be required to submit himself fully to the jurisdiction of said court with reference to the right of said C. & D. Railway Company, and of himself as its receiver, to construct, maintain and operate the tracks of which your petitioner in said action complains. C. L.

R. X.,

Of Counsel for Petitioner.

(1) It is a general rule, that before suit is brought against a receiver that leave of court must be had from the court appointing such receiver, and suing without such leave is contempt of the court appointing him. See Beach's Modern Eq. Prac., Sec. 744; Wiswell v. Sampson, 14 How, 65; Davis v. Gray, 16 Wall. 203 (218); Naumburg v. Hyatt, 24 Fed. 898; Thompson v. Scott, 4 Dill. 508. But see also 25 Stat. at L., chap. 866, Sec. 3, p. 436; 24 Stat. at L., chap. 373, Sec. 3, p. 554, and for cases involving a construction of this act, see Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co., 41 Fed. 310 (314); Central Trust Co. v. St. Louis, etc., Ry. Co., 41 Fed. 551; Atkins v. Wabash Ry. Co., 41 Fed. 193 (194); Pine Lake Iron Co. v. LaFayette Car Works, 53 Fed. 853. As to torts. See McNulta v. Lockridge, 142 U. S. 1. Now, see Judicial Code, Sec. 66 and Colonial Trust Co. v. Pacific, etc., Co., 142 Fed. 298; Nashville Co. v. Bunn, 168 Fed. 862; Foster's Fed. Prac., 5th ed., Sec. 314. Also see Buckhannon, etc., Ry. Co. v. Davis, 135 Fed. 707, 68 C. C. A. 345; Wilcox v. Jones, 177 Fed. 870, 101 C. C. A. 84; Central Trust Co. v. Wheeling, etc., Ry. Co., 189 Fed. 82; Investment Registry v. Chicago, etc., Electric R. Co., 204 Fed. 500.

Mortgagees without leave of court may not proceed in foreclosure, and injunction will issue to prevent it. Slade v. Mass. Coal Co., 188 Fed. 369.

No. 859.

Order Granting Leave to Make the Receiver Party to Suit in State Court.

[Caption.]

The petition of C. L., for leave to make S. M., receiver in this cause, party defendant in an action now pending in the superior court of —, numbered — on the docket of said court, wherein said C. L. is plaintiff and the C. & D. Railway

Company is defendant, having been presented and considered by the court, it is now ordered that the prayer of said petition be granted, and that C. L. be permitted to cause said S. M., the receiver heretofore appointed in this suit, to be made a party defendant in said cause pending in the superior court of —, and that said S. M., receiver, submit himself fully to such orders as may be made by said superior court of — in an action now pending therein. J. S.,

United States District Judge.

No. 860.

Petition for Leave to Garnishee Receiver.

The District Court of the United States, — District of —.

A. B.,

vs.

C. & D. R. R. Co.

Intervening petition of the Fidelity Trust Company and the Brick Company.

Petitioners respectfully show to the court that they are corporations duly chartered by the laws of the state of — and that they have brought suit in the — circuit court in said state wherein they seek to recover from the Newport Valley Company the sum of — dollars for breach of contract, and in said suit they have given bond with good surety in the sum of — thousand dollars, and have obtained a general attachment against the said Newport Valley Company.

Petitioners further show that by an order heretofore entered in this cause the receivers have been ordered to pay to the said Newport Valley Company a large sum of money and that, being unable to find other assets of said company in this state, they are desirous of levying their attachment upon the sum so ordered to be paid, by serving the said writ of attachment upon the receivers as garnishees.

Wherefore they pray the court to make such order as may be proper and equitable in the premises.

R. X., for Petitioners.

No. 861.**Order on Foregoing Petition.**

The District Court of the United States, — District of —.

A. B.

vs.

C. & D. R. Co.

Came the Fidelity Trust Company and the Brick Company and presented their petition, asking leave to serve upon the receivers, as garnishees, a writ of attachment from the — district court, in the state of —, in a suit wherein said companies are plaintiffs and the Newport Valley Company is defendant; and the matter having been heard it is considered by the court that petition be filed and that the petitioners have leave to have said writ served upon the receivers.

It is further ordered that after such service proceedings to enforce the attachment against said receivers shall not be prosecuted in the — district court, but the claim of petitioners may be presented and prosecuted in this suit if petitioner shall obtain a judgment in the said state court against the said Newport Valley Company.

No. 862.**Intervening Petition for Materials Furnished Railway Company Claiming Preference.(1)**

The District Court of the United States for the — District of —.

A. B.

vs.

C. & D. Ry. Co.

To the Judge of the District Court of the United States for the — District of —:

Your petitioner, the E. F. Co., by leave of the court, files this his intervening petition in the above entitled cause and states:

That your petitioner is a corporation organized under the laws of the state of — with its principal office in the city of —, and respectfully shows unto your honors that the bill in this cause was filed by the said A. B. in behalf of himself and of other creditors of the C. & D. Railway Company against said C. & D. Railway Company, alleging among other things that the said railway company was insolvent and asking for the appointment of a receiver, which said bill has been sustained as a creditors' bill, and S. M. and H. C. have been, under the orders of this honorable court, in this cause, appointed receivers of said railway, and said receivers are now operating and running said line of railroad under the orders of this honorable court in this cause.

Your petitioner further states that it is a manufacturer and dealer in different sorts of hardware and other material necessarily used in the operation and running of railroads, and petitioner further shows that during the months of — and — in the year — the above named defendant, the C. & D. Railway Company, purchased of your petitioner and your petitioner furnished and delivered to said railway company, different sorts of materials, and at the fair and reasonable price mentioned and set forth in the sworn statement herewith filed and marked Exhibit "A" to this petition and made a part of the same and thus your petitioner avers that said railway company became and is indebted unto your petitioner in the sum of \$—— for the aforesaid materials which were used in equipping, operating and repairing said railroad and its rolling stock and other property and was necessary for such purposes.

Said materials were furnished and delivered by your petitioner to the said railway company in the months of — and —, which was within six months prior to the — day of —, and for this reason petitioner comes within the provisions and benefits of the order appointing said receiver, and is entitled to have payment in full of its said claim. Pe-

tioner has often demanded payment of the said amount and the payment has been refused and is still due and unpaid.

Wherefore your petitioner prays for a decree for the amount of said debt, to wit, \$—— and interest, and that the same may be directed to be paid by the receivers out of the funds now in their hands or out of the first moneys that come into their hands. It prays for general relief.

X. & X.,

Solicitors for Petitioner.

[*Verification.*]

[*Attach itemized statement of account under oath, as "Exhibit A."*]

(1) The well settled doctrine that the "current earnings" of a mortgaged railroad are applicable primarily to the payment of the current debts made in the course of the ordinary operation of the railroad, arises partly out of the public interest in the maintenance of such a highway for the public use, and partly out of the necessity for such expenditures for the preservation of the property for the benefit of those having liens thereon. The peculiar character of the property and the public character of its use have led to the conclusion that "every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income." *Fosdick vs. Schall*, 99 U. S. 235, 252; *Miltenberger vs. Railroad Co.*, 106 U. S. 286, 311, 312, 1 Sup. Ct. 140; *Burnham vs. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675; *Virginia & A. Coal Co. vs. Central Railroad & Banking Co.*, 170 U. S. 355, 365, 369, 18 Sup. Ct. 657; *Southern Ry. Co. vs. Carnegie Steel Co.*, 176 U. S. 257.

The equity in favor of such claims grows out of the fact that they are debts incurred during the current operation of the railroad, and for necessary labor or supplies to maintain it in operation, and under circumstances which support the presumption that the expectation was that they would be paid out of the current income. If credit is given by agreement upon such claims for a time which indicates that there was no expectation that the current earnings were to be applied in their payment, or they are allowed to stand unsettled, and without suit, for such a time as indicates that the creditor has ceased to look to current earnings, he will be regarded as a simple unsecured creditor, relying alone upon the general credit of the company, and not upon the interposition of a court of equity. There is no fixed time limit upon these preferential claims, but six months is now generally fixed by order of court. See discussion of this subject and cases cited in *Central Trust*

Co. v. East Tenn. V. & G. R. Co., 26 C. C. A. 30, 80 Fed. 624; and Farmers Loan & Trust Co. v. R. R. Co., 53 Fed. 187.

The courts have allowed as preferences payable out of the current earnings, claims for hardware and supplies to the machinery department of a railroad. *Hale v. Frost*, 99 U. S. 389; *Gregg v. Mercantile Trust Co.*, 109 Fed. 220. For rails used for repairs. *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257. For coal for engines. *Burnham v. Bowen*, 111 U. S. 776. For cross ties to replace ties decayed. *Gregg v. Mercantile Trust Co.*, 109 Fed. 220. Current traffic balances. *Gregg v. Mercantile Trust Co.*, 109 Fed. 220.

The courts have declined to allow as preferences payable out of the current earnings claims for repairs which are so extensive as to amount to reconstruction or the construction of new road, as rails. *Lackawanna R. R. Co. v. Trust Co.*, 176 U. S. 298. Or a new dock. *R. R. Co. v. Hamilton*, 134 U. S. 296. Or for car rentals. *Thomas v. Car Co.*, 149 U. S. 95; *Fosdick v. Schall*, 99 U. S. 235; *Kneeland v. Trust Co.*, 136 U. S. 89. Or for new locomotives. *Rhode Island Locomotive Works v. Continental Trust Co.*, 108 Fed. 5. Or for money borrowed to pay interest on matured mortgage coupons. *Morgan's Co. v. Texas Central R. Co.*, 137 U. S. 171. Or claims for legal services rendered a railroad company. *Gregg v. Mercantile Trust Co.*, 109 Fed. 220; *R. R. Co. v. Wilson*, 138 U. S. 501, 34 L. Ed. 1023. Or for rentals under a lease for a track and terminal facilities. *L. & N. R. R. Co. v. Central Trust Co.*, 31 C. C. A. 89, 87 Fed. 500; *Foster's Fed. Prac.*, 5th ed., Secs. 301 to 325.

No. 863.

Intervening Petition for Materials Furnished R.R., Claiming Preference Over Mortgagee.(1)

The District Court of the United States, — District of —.

The A. B. Trust Company, Trustee,
Complainant,

vs.

The C. & D. Railroad Company,
Defendant.

In Equity.

No. —.

To the Judge of the District Court of the United States,
— District of —:

Your petitioner, S. G., by leave of the court, files this his intervening petition in the above entitled cause and states:

First. That by order of the court heretofore made herein, on the — day of —, S. M. was duly appointed and

thereafter qualified as receiver of the C. & D. Railroad Company, defendant herein;

That in said order appointing said receiver, said receiver was, among other things, directed to pay the employes, officials and other persons having claims for wages, materials and supplies due, and to become due, and unpaid, growing out of the operation of the railroad of the defendant, including current and unpaid vouchers; to settle accounts incurred in the operation of the defendant company; to pay any and all obligations accrued or accruing upon any equipment trust made by the defendant railroad company, and providing that said receiver should pay no claims against the said railroad company which had accrued due more than six months prior to the date of said order.

Second. Your petitioner further states that, as he is informed and believes, in pursuance of the several orders of the court, the said receiver has borrowed money and issued receiver's certificates and applied the same as ordered and directed by the court and as a result thereof has, up to this time, except in meeting the obligations of the pay rolls and any and all obligations upon the equipment trusts made by the defendant railroad company and except as hereinafter stated, been unable to pay the employes, officials and other persons having claims for wages, services, materials and supplies at the time of the appointment of said receiver due, and to become due, and unpaid, growing out of the operation of the railroad of the defendant, including current and unpaid vouchers, in pursuance of said order of June —, and which accrued due less than six months prior to the date of said order of June —, and that the claim of your petitioner, hereinafter set forth, being a claim for materials and supplies which accrued due less than six months prior to the date of said order last mentioned and which said receiver was, by the terms of said order as aforesaid, authorized and directed to pay as aforesaid, still remains due and unpaid.

Third. Your petitioner further states that large sums of money, which should have been used in paying and discharging the operating expenses of said road and for materials used in said operations, which, in equity, are first charges upon the property of said railroad, have been diverted by said railroad company and its officers and agents operating it, from such purposes, and have been used in making permanent improvements upon the roadbed and other properties of said railway company, thereby greatly enhancing the security of its mortgage and bond creditors, and so your petitioner states that said claim has prior right of satisfaction over any such creditor by mortgage or bond. (1.)

Fourth. Your petitioner further states that in pursuance of a contract duly made with the said C. & D. Railroad Company, on to wit, the — day of —, your said petitioner sold and delivered in the months of — and on the — day of —, as to a part thereof, after the appointment of the said receiver under said order of June —, to the said C. & D. Railroad Company and said receiver certain railroad materials and supplies, to wit, railroad ties, the claim for which was one necessarily incurred and growing out of the operation and maintenance of the said railroad by the said defendant company and said receiver to the number and at the prices set forth in the account attached hereto and made a part hereof marked Exhibit "A" which said account, in accordance with said contract, became due and payable to your said petitioner from said defendant railroad company and said receiver on the — day of —, and which said account aggregates the sum of \$—, upon which there is now due and payable the said sum of \$—, with interest at 6 per cent. from the — day of —. [*Set out the other notes in like manner.*]

That said account was duly presented to the said receiver as a claim against said receiver in said amount and as such allowed by said receiver for said sum of \$— for material furnished by your petitioner to said company and as a claim

which accrued due within six months prior to the appointment of said receiver of said company a copy of which said allowance is hereto attached and made a part hereof, marked Exhibit "B."

Your petitioner further says that although a part of said ties were delivered to said defendant railroad company prior to the appointment of said receiver, that he is informed and believes and therefore alleges that a large portion thereof, if not all, were used by said receiver after his appointment as aforesaid in the maintenance and operation of said railroad company by him as such receiver.

Your petitioner further states that he also holds as claims against said defendant company and said receiver certain promissory notes given by said defendant railroad company in payment for certain materials and supplies sold and delivered to said railroad company and payment for which accrued due within six months prior to the appointment of said receiver.

[*First.* One note for \$194.96, dated Columbus, Ohio, May 12, 1897, payable to the order of your petitioner sixty days after date at the Clinton National Bank, with interest at the rate of 7 per cent. per annum from date, a copy of which said note is hereto attached and made a part hereof and marked Exhibit "C." *Set out the other notes in like manner.*]

Fifth. Your petitioner further states that the total amount due from said defendant railroad company and said receiver on account of the claims above set forth is the sum of \$—, with interest as heretofore stated.

The said receiver is unable to pay the same, although admitting the validity thereof, out of the net earnings of said property in his hands.

That as the amount heretofore authorized to be borrowed, or receiver's certificates to be issued therefor, has been used and applied by said receiver as heretofore ordered by the court, the said receiver is not authorized to borrow further sums of money upon receiver's certificates at this time to pay

the said claims, nor is he able to carry out the said order of June —, directing him to pay said claims, among others, which had accrued within six months prior to his said appointment.

That said road has not as yet been sold, nor as your petitioner is informed and believes is there at the present time any prospect for the immediate sale thereof and the payment of said claims.

That said claims in the form in which they now are cannot be negotiated by your said petitioner nor otherwise made available to your petitioner and that to compel your petitioner to further await the sale of said road, or the reorganization thereof by the bondholders and to be deprived of the money due upon said claims, would work great hardships upon your petitioner.

That said claims are a lien upon said road prior to the claims of the complainant or defendants herein and are entitled to rank with and be paid equally with the receiver's certificates heretofore authorized and issued by said receiver under the orders of the court, as well as the claims for wages, services, obligations upon car trusts and other claims and obligations which have heretofore been paid by said receiver and which to enable the said receiver to pay, receiver's certificates have been authorized by the court and issued by said receiver.

Wherefore your petitioner prays:

That the said claims amounting to \$—, with interest at the rate of 6 per cent. per annum on \$— from the — day of — on \$— at the rate of 7 per cent. per annum, from the — day of —, and on \$— at the rate of 7 per cent. per annum from the — day of —, may be adjudged and declared by the court to be lawful and valid claims for materials and supplies due and unpaid, growing out of the operation of the railroad of the said defendant company and which accrued due after or within six months prior to the date of the appointment of said receiver and as such a

lien upon said property in the hands of said receiver prior to the claim of the complainant and defendants to said original bill and of equal rank and validity with the receiver's certificates heretofore authorized and ordered to be issued by the said receiver and issued by him herein.

That said receiver may be authorized and directed forthwith to pay the same as such; that if for any reason the said receiver has not at the time of making such order sufficient funds on hand to pay said claims that he may be authorized and directed to borrow money for such purpose and to that end be authorized and directed, if necessary, to issue receiver's certificates for the purpose of procuring the necessary funds to pay said claim, which said certificates shall be similar in form and of the same tenor, effect and priority as those heretofore authorized and ordered to be issued and sold, or otherwise used by said receiver, or that said property of the railroad company may be forthwith sold without further delay and free from the claims of all the parties hereto, and the proceeds distributed in accordance with the priority of liens, as may be established by the court, and for such other and further relief as to the court may seem just and equitable.

And your petitioner will ever pray, etc.

S. G.

R. X.,

Solicitors for Petitioner.

State of —

County of —, ss.

S. G., being first duly sworn, deposes and says: That he is the petitioner above named, that he has read the foregoing intervening petition and knows the contents thereof; that as to the facts therein stated on knowledge the same are true and as to those stated on information and belief, he believes the same to be true.

And further deponent saith not.

S. G.

Sworn to before me and subscribed in my presence, this
 — day of —, A. D. —, J. N.,
 [Seal.] Notary Public, — County.

(1) As to diversion: There are cases where, owing to special circumstances, an equity arises in favor of certain classes of creditors of an insolvent railroad corporation otherwise unsecured, by which they are entitled to outrank in priority of payment, even upon a distribution of the proceeds of a sale of the body of the property, those who are secured by prior mortgage liens. Illustrations and instances of these cases are to be found in *Fosdick vs. Schall*, 99 U. S. 235, 25 L. Ed. 339; *Miltenberger vs. Railroad Co.*, 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117; *Trust Co. vs. Souther*, 107 U. S. 591, 2 Sup. Ct. 295, 27 L. Ed. 488; *Burnham vs. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; *Union Trust Co. vs. Illinois M. R. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; *Dow vs. Railroad Co.*, 124 U. S. 652, 8 Sup. Ct. 673, 31 L. Ed. 565; *Sage vs. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694; and *Trust Co. vs. Morrison*, 125 U. S. 591, 8 Sup. Ct. 1004, 31 L. Ed. 825.

"The rule governing in all these cases was stated by Chief Justice Waite in *Burnham vs. Bowen*, 111 U. S. 776, 783, 4 Sup. Ct. 675, 679, 28 L. Ed. 596, 599, as follows: 'That, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.'

"To bring a claim within this rule it is necessary to allege and prove that there has been a diversion of the current earnings, either before or since the receivership, which the mortgagees should equitably restore. *International Trust Co. vs. T. B. Townsend Brick & Contracting Co.*, 37 C. C. A. 396, 95 Fed. 850; *Central Trust Co. vs. East Tennessee, V. & G. R. Co.*, 26 C. C. A. 30, 80 Fed. 624; *Virginia & A. Coal Co. vs. Central Railroad & Banking Co.*, 170 U. S. 365, 18 Sup. Ct. 657, 42 L. Ed. 1068; *Southern Ry. Co. vs. Carnegie Steel Co.*, 176 U. S. 257, 285, 20 Sup. Ct. 347, 44 L. Ed. 458;" Foster's Fed. Prac., 5th ed., Secs. 301 to 325.

No. 864.

Master's Report on Intervention.

[Caption.]

Special master's report in the matter of the claim of J. D. Bros. & Co. against the receivers of the C. & D. Railway Company.

To the Judges of said Court:

Under a general order of reference, dated —, made in this cause, providing for the examination by the special

master commissioner of claims against the receivers appointed herein, to wit, S. M. and H. C., arising from their operation of the defendant railway company's property in ———.

J. D. Bros. & Co., a copartnership, doing a general merchandise business at ———, in the county of ———, state of ———, filed with me their intervening petition, complaining that on the ——— day of ———, they shipped from ——— to ———, in the state of ———, over the C. & D. Railway, ——— head of beef cattle; that while said beef cattle were *en route* to ——— they were injured and delayed, on said railway, to intervenors' damage ——— dollars.

By consent of the parties I appointed the ——— day of ———, at ———, to consider the matter. At which time and place appeared W. C., solicitor for the receivers, and W. B., solicitor for intervenors.

After hearing the evidence and argument of counsel, I took the matter under advisement, and now report my findings:

I find that the receivers and intervenors executed on the ——— day of ———, a certain live-stock contract, whereby the former engaged to transport, as common carriers, for hire, ——— head of beef cattle, the property of intervenors, from ——— to the National Stockyards in the city of ———.

I find that in pursuance of this contract ——— head of beef steers were delivered on the same day to said receivers at ———, and that they were in good condition and of the average weight of eight hundred and fifty pounds a head.

I find that thereafter, on the ——— day of ———, while a train operated by said receivers was transporting said cattle from ——— to ———, it was detained by a wreck caused by a derailment of one of its cars, at ———, for twenty-four hours.

I find that said cattle were delivered on the ——— day of ———, to the consignee at the National Stockyards in ———, in bad condition, and greatly injured by the wreck and delay.

I find that the delay was unreasonable, and not without the fault of the receivers, and that if said delay had not

occurred the cattle would have been delivered to the consignee on the —— day of ——, and in good condition, and that intervenors would have received a better price for them than the price offered and received by intervenors for them on the —— day of ——, the same day when they were sold.

I find that the difference between the value of these cattle at a fair valuation on these dates amounts to the sum of —— dollars.

Premises considered, I am of the opinion that intervenors are entitled to recover the difference between the price they would have received on the —— day of ——, and the price actually received on the —— day of ——.

I therefore recommend the adoption by the court of a decree to the following effect:

That intervenors, J. D. Bros. & Co. have of and from S. M. and H. C., as the receivers of the defendant railway company, the sum of —— dollars, actual damages; the same to be decreed as a charge upon the current income of the receivership, and a part of the expenses thereof, and all costs in this behalf.

Respectfully submitted, E. M.,
Special Master Commissioner in Chancery.

No. 805.

**Decree Confirming Master Commissioner's Report on
Intervention.**

[*Caption.*]

On this —— day of ——, came on to be heard the exceptions of intervenor M. D. to the report of the special master filed herein on the —— day of ——, and the same was argued by counsel, where upon consideration thereof, because it is the opinion of the court that the law is against said exceptions. it is therefore ordered, adjudged, and decreed by the court that said exceptions be, and they are hereby overruled, and the report of said special master is in all things confirmed.

A. P.,
District Judge.

No. 866.

Quarterly Statement of Receiver (1).

S. M., Receiver, in Account with C. & D. Railway Company,
from July 1, 18—, to September 30, 18—, inclusive.

| Receipts. | Accrued prior to appointment of receiver and collected under receivership. | Accrued and collected under receivership. |
|------------------------------------|--|---|
| Balance July 1, 18—, \$— | | |
| Agents' remittances, | \$— | \$— |
| Conductors' remittances, | \$— | \$— |
| Mail earnings, | \$— | \$— |
| Miscellaneous earnings, | \$— | \$— |
| Express earnings, | \$— | \$— |
| Ticket balances, | \$— | \$— |
| Mileage balances, | \$— | \$— |
| Sundry railroads, | \$— | \$— |
| Sundry individuals, | \$— | \$— |
| Audited pay-rolls, | \$— | \$— |
| Total, | \$— | \$— |

| Disbursements. | Accrued prior to appointment of receiver. | Accrued under the receivership. |
|-------------------------------|---|---------------------------------|
| Audited vouchers, | \$— | \$— |
| Audited pay-rolls, | \$— | \$— |
| Audited claims, | \$— | \$— |
| Ticket balances, | \$— | \$— |
| Mileage balances, | \$— | \$— |
| Sundry railroads, | \$— | \$— |
| Sundry individuals, | \$— | \$— |
| Car trust notes, | \$— | \$— |
| Rental of roadway, | \$— | \$— |
| Total, | \$— | \$— |

RECAPITULATION.

| Receipts. | |
|--|-----|
| Balance July 1, 18—, | \$— |
| Accrued prior to appointment of receiver and collected under receivership, | \$— |
| Accrued and collected under receivership, | \$— |
| Total, \$— | \$— |

Disbursements.

Accrued prior to appointment of
receiver, \$——
Accrued under receivership, . . . \$—— Total, \$——
Balance September 30, 18—, \$——

(1) As to receiver's accounts generally, see Beach's *Modern Eq. Prac.*, Sec. 748. Bates *Fcd. Eq.*, Sec. 600.

No. 867.

Certificate of Special Master to Statement of Receiver.

[*Caption.*]

I, A. H., special master, hereby certify that I have examined the accounts of S. M., receiver, and the receipts and disbursements for the quarter ending September 30, 18— [the period covered by the foregoing statement], and that I find the same correct and as shown in said statement.

Given under my hand this —— day of ——, 18—.

A. H.,
Special Master.

No. 868.

Petition of Receiver for Discharge.

The District Court of the United States, —— District of

The A. B. Trust Company } In Equity.
vs.

The C. & D. Railroad Company. } No. ——.

Petition of S. M., receiver for order of final settlement and discharge.

Your petitioner shows to the court that he has fully accounted for all assets and property that came into his hands as receiver, and prays for an order of final discharge, and also for the release of the sureties on his bond as receiver.

S. M.

State of ——,
County of ——, ss.

S. M., being first duly sworn, says that the allegations of his foregoing petition are true.

S. M.

Sworn to before me and subscribed in my presence this
— day of —, J. N.,
[Seal.] Notary Public, — County, —.

No. 869.

Order Accepting Resignation of S. M., Receiver, and Appointing J. R. Receiver.

This day came S. M., and tendered his resignation as receiver; on consideration whereof the same is accepted to take effect at midnight of —, and it is ordered that J. R. be and he is hereby appointed receiver in the stead of said S. M., resigned, with authority and directions to carry out in his, said J. R.'s, name as receiver all of the orders of the court heretofore entered, the same as if said S. M. had not resigned, and with all the rights, powers, duties and authority which said S. M. would have had if he had continued to be receiver, including authority to prosecute and defend all suits brought by or against said S. M., receiver, and to commence any suits which the said S. M. might have brought.

The accounts of said S. M., receiver, are ordered, for convenience, to be closed as of — 31, —, and all funds and property in his possession as receiver he shall turn over on —, at midnight, to said J. R. as his successor.

Said J. R. is ordered to execute a bond as receiver, with surety duly approved as to form and sufficiency by this court, or a judge thereof, in the sum of one hundred thousand dollars, conditioned upon the faithful discharge of his duties as receiver.

No. 870.**Order Discharging Receiver.(1)**

[Caption.]

It appearing to the court that S. M., Esq., receiver herein, filed his account of receipts and disbursements for the month of —, on —, and his final account for —, on —, covering the period to —, on which dates the receiver ceased operating said road;

And it further appearing that the Special Master, appointed to audit said accounts, has filed his report thereon on —, finding, among other things, that said accounts are true and correct, that said receiver has turned over to the C. & D. Railroad Company all the property of every kind and description which came into his hands as receiver herein; and recommending that said accounts be approved and said receiver discharged;

And it further appearing from the receipt of said C. & D. Railroad Company (a copy of which is attached hereto and ordered spread upon the journal), that said receiver has turned over to said company the cash and accounts, amounting to \$—, and said company has assumed the liabilities of said receiver, amounting to —, all as audited to —;

And it further appearing that no exceptions have been filed to said Special Master's report within thirty days after the same was filed;

It is therefore ordered that said report of the Special Master and the accounts of S. M., receiver herein, be and the same are hereby approved and confirmed in all respects, and said Special Master, J. N., Esq., is hereby allowed the sum of \$50 for his services as Special Master, payable out of the funds in the court's registry to the credit of this cause, or if there are no such funds, by the said C. & D. Railroad Company.

The court further finds that said S. M., receiver, has faithfully discharged the duties of his office, and obeyed in all respects the orders of this court, and his acts as receiver herein are hereby approved and confirmed; and there being no cause why said receiver should not be finally discharged,

It is, therefore, ordered, adjudged and decreed that said S. M., as received in this cause, be, and he is, hereby discharged from further duties herein; and the sureties on his official bond, as receiver, are hereby released and discharged.

(1) As to discharging receivers. See Bates' Fed. Eq., Sec. 616.

No. 871.

Order Discharging Receiver (Another Form).

[Caption.]

In this cause upon application of the Southern Railway Company the purchaser of the property of the C. & D. R. R. Co., sold under decrees of the court herein and the other parties hereto for an order discharging E. F. & G. P., receivers heretofore appointed herein upon consideration of which it is ordered and decreed that upon the execution of the decree confirming the report of the sale made herein by the Special Master on February —, and the surrender by them of the possession of said properties to the purchasers by said receivers as directed therein, said receivers shall be discharged from further responsibilities herein and their bonds as such shall be surrendered and collected. The Southern Railway Company hereby waiving an accounting by said receivers. The Southern Railway Company having entered its appearance herein and assented thereto, is hereby substituted in the room and stead of said receivers and is substituted in their room and stead in respect of any and all liabilities outstanding

or against said receivers growing out of their receivership herein or against said C. & D. R. R. Co., or the proceeds of sale herein claiming priority of payment over the mortgage foreclosed herein with leave to resist the payment of any such claim, and of appealing from any order entered in relation thereto.

No. 872.

Order Allowing Account and Discharging Receiver.

[Caption.]

The final account and the thirty-four current accounts of the receiver herein having been filed and presented for allowance and having been examined and found to be correct, the same are hereby approved and confirmed; and the said receiver is discharged of his trust herein.

It is further ordered that in the event that claims should hereafter be presented for indebtedness or costs incurred, which would properly be chargeable against said receiver, such obligations be paid by The Superior Portland Cement Company out of the cash sum of \$3,117.09 paid by the receiver to said company, or out of the proceeds of the \$3,000 of bonds of the Miama Hotel Company of Dayton, heretofore transferred by said receiver to said company.

X. R., Judge.

No. 873.**Order Discharging Railway Receivers and Restoring Property.**

[*Caption.*]

A decree having been entered in this suit upon the —— day of ——, wherein and whereby it was, among other things, ordered, adjudged, and decreed that the C. & D. Railway Company should, on or before the expiration of thirty days from the date of the said decree, pay into this court, or into the hands of a depository to be named by this court, to the credit of this suit, for the use and benefit of the holders of the bonds and unpaid coupons secured by the mortgage of December 1, 18——, and the several mortgages and the certain indenture supplemental thereto, the sum of —— dollars, together with the amount of interest accrued or to accrue on the said bonds from the 1st of December, 18——, to the time of such payment, and also a sum of money sufficient, in addition, to defray the costs of this action.

On reading and filing a satisfaction piece, dated the —— day of ——, duly executed, acknowledged, and delivered by the A. B. Company, of the three certain indentures of mortgage, dated respectively December 1, 1880, December 1, 1886, and December 1, 1887, and a certain other satisfaction piece, dated the 14th day of October, 1890, duly executed, acknowledged, and delivered by the A. B. Company, of a certain indenture, dated March 1, 1882, being the same mortgages and the indenture referred to and described in the bill of complaint herein, by which satisfaction pieces the A. B. Company certifies that the three mortgages and the certain indenture as aforesaid, and the bonds secured by the same, are paid and satisfied, and consents that the said mortgages and the said indenture be discharged of record.

And on reading and filing a stipulation, dated ——, and signed by the counsel for all parties to this suit, by which it appears that all of the bonds secured by the said mortgages and by the said indenture, and of all the interest due thereon,

have been paid by the C. & D. Railway Company to the A. B. Company, trustee; and by which it further appears that the C. & D. Railway Company has also paid and discharged all the other sums of money which by the said decree it was required to pay; and by which stipulation it is also consented that a proper order, satisfying and discharging the said decree of the — day of —, may be entered in this suit.

And on reading and filing the petition of the C. & D. Railway Company, verified the — day of —, praying that the receivers of the railway and property of the petitioner be upon the — day of — discharged, and the said railway and property restored to the petitioner.

And on reading and filing the report of the receivers, Messrs. S. M. and H. C., verified on the — day of —, showing, among other things, the total amount of their receipts and disbursements, substantially, to the date of the hearing upon the motion for the entry of this decree, containing also a statement of suits now pending against them as receivers, or against the C. D. Railway Company and any of its ancillary companies, and of all claims filed against or presented to said receivers, or said railway company, so far as they have come to the knowledge of the said receivers, and a general statement of the outstanding liabilities of the said receivers, growing out of the possession, operation, and management of the property of the C. & D. Railway Company by said receivers.

And Messrs. S. M. and H. C., receivers of all of the said property, appearing by R. Z., Esq., their solicitor, and the matters and things hereinbefore suggested being submitted to the court, and the court being advised.

Now, on motion of R. X., Esq., of counsel for the petitioner, the C. & D. Railway Company,

It is hereby ordered, adjudged, and decreed as follows:

First. That the said decree of the — day of —, is, in all respects, satisfied and discharged, in so far as the same

requires the payment by the C. & D. Railway Company of any sums of money. This cause, however, being retained as and for the purposes hereinafter provided.

Second. That the C. & D. Railway Company has duly and fully paid to the A. B. Company, trustee, all the sums of money which by the said decree, were directed to be paid; the said payments amounting to the sum of — dollars, together with the amount of interest accrued upon the said sum from the 1st day of December, 18—, to the date of the payment thereof; and the said railway company has also duly and fully paid to the said A. B. Company, trustee, and to its counsel, in full, all its and their reasonable commission, charges, fees, and disbursements in the execution of the trust, and in the prosecution of the litigation herein, which said several sums and amounts have, by it and them been accepted by them in full for its and their services rendered herein, and the said railway company has also duly and fully paid all costs and allowances which by the said decree were directed to be paid.

Third. That on the — day of —, at the hour of noon that day, Messrs. S. M. and H. C., as receivers, are hereby ordered and directed to deliver to the C. & D. Railway Company all the railroads and other property of the said C. & D. Railway Company, the D. & W. Railway Company, etc. [*name all the railways included in this order*], wheresoever situated, whereof they took possession as receivers, under and pursuant to the orders of this court, and under and pursuant to the orders in causes ancillary hereto, and which shall then remain in their possession or under their control, together with all the assets of every name and nature, funds, books and accounts, papers and vouchers in their possession, or under their control as receivers; and the said receivers shall, contemporaneously with the delivery of the said railroads and property, assign and transfer to the C. & D. Railway Company all the assets, uncollected accounts, and choses in action of the said C. & D. Railway Company, or of either of

the before-mentioned railway companies remaining in their hands, and which have accrued to them as such receivers from the possession and operation of said lines of railway or of any of them; and the said C. & D. Railway Company, on the day and at the hour aforesaid, to wit, upon the — day of —, at the hour of noon of that day, shall receive and take possession of all the railroads and other properties, real, personal, and mixed, and of all the funds and assets, books and accounts, papers and vouchers, claims, demands and choses in action in the hands of S. M. and H. C. aforesaid, receivers of the C. & D. Railway, heretofore appointed and now acting under orders made in this cause and in the ancillary causes between the same parties pending in the district courts of the United States for [*here name all the courts wherein ancillary proceedings have been had*]; and upon such transfer, assignment, and delivery of the property aforesaid by the receivers to the railway company, the property of the said C. & D. Railway Company and of the other companies heretofore mentioned shall become liable for all claims and demands accrued, accruing, or to accrue against said receivers, arising out of their possession and operation of the said railroads and property which are and have been in their hands or under their control as receivers, including all claims or demands against them arising out of their operation of the E. & F. Railroad, which has heretofore been surrendered under orders made in this cause and in the ancillary cause pending in the district court of the United States for the — district of — at —, and also all claims and demands existing against said receivers under their receivership by order of appointment made in the cause pending in the district court of the United States for the — district of — at —, wherein the Safe Deposit Company of — is plaintiff, and the C. & D. Railway Company, the E. & F. Railroad Company and others are defendants; and also all the current liabilities of said receivers, and all contracts for which the said receivers are or may be responsible.

Fourth. That the said C. & D. Railway Co., and those claiming under them, shall take and receive, on said — day of —, 18—, the railroads and properties so transferred, assigned, and delivered as hereinbefore ordered, subject to all claims, demands, and liabilities now existing, or which hereafter may be made against said receivers, arising out of their receivership, and this court reserves and retains jurisdiction over the said railroads and properties, and the said parties hereto and those claiming under them, for the purpose of determining in this cause, or having determined in any of the district courts of the United States in any of the ancillary causes having ancillary jurisdiction herein, all such claims, liabilities, and demands, and for the purpose of fully protecting the receivers against any liability on any claims or demands existing or to exist against them, and for the purpose of protecting those having claims against said receivers.

Fifth. That this cause is retained and kept open for the purpose of ascertaining and determining all claims, demands, and liabilities against said receivers, and against the property in their possession, and to be surrendered by them, which have arisen or may arise out of their said receivership. All such claims, demands, and liabilities, if not paid by the C. & D. Railway Co. in due course, shall be made and presented by intervention in this cause, or in the causes ancillary hereto, for the purpose of being ascertained and determined in and by such proper intervention proceedings; and any orders, judgments, or decrees so rendered in such proceedings may be enforced, and shall only be enforced, against the property of the said railway company to the same extent that judgments could have been enforced if said property had not been surrendered into the possession of said company but was still in the possession of said receiver. Such intervention proceedings must be filed in this cause in this court, or in any of the district courts of the United States having jurisdiction in any of the ancillary causes, on or before the

1st day of January, 18—, and after that date no further intervention shall be permitted in this cause, and the rights of any claimants who shall not, on or before that date, have commenced intervention proceedings to avail themselves of the remedies herein provided for their benefit, shall cease and determine. The receivers shall advertise in daily newspapers published respectively in [*name of cities or towns*] the date of the intended delivery of the said property to the said company, and shall in said advertisement notify all claimants to present their said claims to the C. & D. Railway Co., and if the same are not settled or adjusted, that then the said claimants shall intervene in the manner aforesaid, and within the time aforesaid, to wit, on or before the 1st day of January, 18—. The said advertisement shall be commenced within five days after the entry of this order, and shall be inserted once a week for three successive weeks.

Sixth. That nothing in this decree contained is intended to affect, or shall be construed as affecting, the status of any pending or undetermined litigation in which said receivers appear as parties. Such litigations may continue to determination in the name of the receivers, but for the use of the C. & D. Railway Co., and at its cost and expense, and with the right to that company, should it be so advised, to appear and be substituted in any such litigation.

Seventh. That on the — day of —, on the day fixed for the delivery of said properties by the receivers to the said railway company, the title or right of possession of S. M. and H. C., receivers, as fixed and determined by the certain order made in this cause, dated —, and filed —, and the said title or right of possession, as fixed and determined by certain subsequent orders made in this cause, extending and continuing the said receivership to the railroads and properties hereinbefore mentioned, shall cease and terminate.

Eighth. That the receivers' quarterly accounts and the reports of T. M., Esq., and A. P., Esq., masters, as the same have from time to time been made to this court, which re-

ceivers' and master's reports were respectively filed as follows: [*here set forth dates of filing, as, receivers' report for November and December, 1888, filed March 4, 1888, master's report thereon filed May 28, 1889*], are hereby, and each of the said receivers' and master's reports respectively, is in all things confirmed and approved, the parties having expressly waived the right under the rules to file objections thereto.

Ninth. That the receivers shall file an additional report containing statement of the receipts and disbursements from the 1st day of April, 18—, to the time of the delivery of the property aforesaid, to wit, July 1, 18—, and simultaneously with its submission to the master mail a duplicate of such report to the defendant, the C. & D. Railway Co., to its New York office, and thereupon, without further order, said report shall stand referred to the master heretofore appointed in this cause, and he shall forthwith proceed to pass upon the same and report to this court. Within five days after such report of the master has been filed, objections, if any thereto, shall be filed, and, if no objections are filed thereto, the same may be submitted to the court without further notice; and if and when approved, the said receivers shall be finally discharged as to an accounting with the C. & D. Railway Co., and the other companies hereinbefore mentioned, and their bonds cancelled and discharged.

Tenth. That the C. & D. Railway Co., and the said receivers, S. M. and H. C., may apply at the foot of this decree for such other and further relief as may be just.

J. S.,
District Judge.

We hereby consent to the entry of the foregoing decree.

The A. B. Co.,
By X. & X., Solicitors.
M. P. Railway Co.,
By Z. & Z., Solicitors.

No. 874.**Assignment by Railway Receivers of Choses in Action, etc.,
on the Surrender of the Property.**

Know all men by these presents:

Whereas, we, S. M. and H. C., receivers of the C. & D. Railway, duly appointed and acting as such under certain orders and decrees made in a certain suit in equity pending in the district court of the United States for the ——— district of ———, wherein the A. B. Company is plaintiff and the C. & D. Railway Company and others are defendants, and also under certain orders and decrees made in certain ancillary causes between the same parties pending in the district court of the United States for [name the courts], have been ordered and directed by the certain order entered in said main cause in the district court of the United States for the district of ———, on the ——— day of ———, to deliver at the hour of noon on the 1st day of July 18—, to the C. & D. Railway Company all the railroads and other property of the C. & D. Railway Company, the D. & W. Railway Company, [etc., naming all the companies], wheresoever situated, whereof they are in possession as receivers under and pursuant to the orders of the courts hereinbefore referred to; and,

Whereas, by said order of the ——— day of ———, said receivers were directed simultaneously with the delivery of the aforesaid railroads and property, to assign and transfer to the C. & D. Railway Company all the assets, uncollected accounts, and choses in action of the said C. & D. Railway Company, or of either of the before-mentioned railroad companies, remaining in their hands and which have accrued to them as such receivers from the possession and operation of said lines of railway, or either of them; and

Whereas, orders have been entered in each of said ancillary suits between the same parties in the above-named district courts of the United States for, [naming them], expressly

approving and confirming said order of said district court of the United States for the ——^d district of ——, of date, ——.

Now, therefore, in consideration of the premises, and pursuant to the orders and directions of the courts made as hereinabove stated, we, the said S. M. and H. C., receivers of the C. & D. Railway (duly appointed and acting as such by virtue of the orders and decrees in the aforesaid suits in the above-mentioned courts), do hereby assign, transfer, and set over to the C. & D. Railway Company all and singular the assets, uncollected accounts, and choses in action of the said C. & D. Railway Company, the D. & W. Railway Company, etc. [*naming them*], remaining in our hands at the date of the delivery of said railways and properties by us to the said C. & D. Railway Company as aforesaid, and which have accrued to us as receivers from the operation and possession of said lines of railway or either of them.

This assignment to become effective at the hour of noon of the 1st day of July, 18—, simultaneously with the delivery of the possession of the railroads and properties of the foregoing companies to the C. & D. Company as required by the orders and decrees of the courts hereinabove referred to.

In witness whereof we have hereunto signed our names and affixed our seals this —— day of ——, 18—.

S. M. [*Seal.*]

H. C. [*Seal.*]

[*Acknowledgment.*]

No. 875.

Acknowledgment to Assignment by Receiver.

The United States of America,

State of ——, County of ——, ss.

Be it remembered, that on this —— day of ——, before me, E. G., a notary public, duly commissioned, qualified, and acting in and for the county and state aforesaid, came S. M., one of the receivers of the C. & D. Railway, and who is per-

sonally known to me to be the identical person described in, and who executed and signed, the foregoing instrument of writing, and duly acknowledged that he executed the same as his free act and deed for the purposes and consideration therein expressed.

In witness whereof, I have hereunto set my hand
[Seal.] and affixed my official seal the day and year
last above written.

My commission expires on the — day of —, 1893.

E. G., Notary Public.

(Similar acknowledgment for other receiver.)

No. 876.

Deed of Receivers of a Railroad Company, Trustee and the Purchasers to the Railroad Property.(1)

In the District Court of the United States for the Western
District of Tennessee.

The Farmers' Loan & Trust Company

vs.

The Memphis & Charleston Railroad
Company, The Central Trust Com-
pany of New York and Samuel
Thomas.

In Equity.

An indenture, made the third day of March, 1898, by and between Henry Fink and Charles M. McGhee, receivers of The Memphis & Charleston Railroad Company, appointed in the suits in equity hereinafter mentioned (hereinafter called the receivers), parties of the first part; and

The Memphis & Charleston Railroad Company, a corporation created by and existing under the laws of the states of Tennessee, Alabama and Mississippi (hereinafter called the railroad company), party of the second part; and

The Farmers' Loan & Trust Company, a corporation created by and existing under the laws of the state of New

York (hereinafter called the trustee), party of the third part; and

Adrian Iselin, Jr., and Melville E. Ingalls, Jr., both of the city of New York and state of New York, and John W. Fewell, of the city of Meridian and state of Mississippi (hereinafter called the purchasers), parties of the fourth part; and

Southern Railway Company, a corporation created by and existing under the laws of the state of Virginia, party of the fifth part; and

Memphis & Charleston Railway Company, a corporation created by and existing under the laws of the state of Mississippi, party of the sixth part;

Witnesseth:

Whereas, on or about the second day of August, 1895, The Farmers' Loan & Trust Company, trustee, as complainant, filed its bill of complaint, in equity, in the Circuit Court of the United States of America for the Western District of Tennessee, Western Division, against The Memphis & Charleston Railroad Company, a corporation created by or existing under the laws of the states of Tennessee, Alabama and Mississippi, and others, as defendants, for a foreclosure of the consolidated first mortgage of said The Memphis & Charleston Railroad Company, dated the 20th day of August, 1877, and upon or about that day duly executed, acknowledged and delivered by said Railroad Company to said The Farmers' Loan & Trust Company, as trustee, and for a sale of the mortgaged property and premises, being the railroads, property, privileges and franchises of said The Memphis & Charleston Railroad Company, as more specifically described in said consolidated first mortgage; and

Whereas, in said cause Henry Fink and Charles M. McGhee were duly appointed receivers of all the property of every name and nature of the said railroad company, and the said receivers, parties of the first part, have continued, and now are, receivers of such railroad property; and

Whereas, such proceedings were had in the said cause that on the 2d day of March, 1897, a decree of foreclosure and sale was entered therein by the District Court of the United States for the Western District of Tennessee, Western Division, at Memphis, Tennessee, and upon November 24, 1897, a decree supplemental thereto was also entered by said court pursuant to the mandate of the Circuit Court of Appeals for the Sixth Circuit: and

Whereas, similar decrees foreclosing such mortgage, ancillary to said decree of said District Court of the United States for the Western District of Tennessee, Western Division, made on March 2, 1897, were subsequently entered, on or about the fifth day of April, 1897, in similar suits brought by The Farmers' Loan & Trust Company, complainant, against the said The Memphis & Charleston Railroad Company, the Central Trust Company of New York and Samuel Thomas, as defendants, in the District Court of the United States for the several districts hereinafter mentioned — that is to say, the Eastern District of Tennessee, Southern Division; the Northern District of Alabama, Northern Division, and the Northern District of Mississippi, Eastern Division; and

Whereas, in and by the said decrees Louis B. McFarland was appointed Special Master to execute the said foreclosure decrees and to make the sale of property therein provided for and directed; and

Whereas, in pursuance of such appointment the said special master afterwards, to wit, on the 26th day of February, 1898, after due advertisement and notice of sale, as prescribed in the said decrees, and in said supplemental decree, at public auction at the railroad station upon the rail of The Memphis & Charleston Railroad Company, in the city of Memphis and state of Tennessee, on the day and at the hour fixed by said special master, in his advertisement of sale, and in the manner specified and directed in the said decrees and the said supplemental decree, did sell all and singular the

railroad, equipment, property and premises, rights, assets, privileges and franchises, which the said Special Master was directed by the said decrees and supplemental decree to sell, upon the terms and conditions in said decrees and said supplemental decree set forth, to which decrees reference is hereby specially and expressly made; and

Whereas, at such sale the said parties of the fourth part became the purchasers of all such railroad and property and franchises, offered and sold as a single parcel, the said parties having made such purchase as joint tenants and not tenants in common, for the benefit of the Southern Railway Company, a corporation organized and existing under the laws of the state of Virginia, as to all of said railroad, real estate and franchises, within the states of Tennessee and Alabama, and as to all of the equipment, chattels and choses in action of said The Memphis & Charleston Railroad Company, wherever situate; and for the benefit of a corporation to be called The Memphis & Charleston Railway Company, and to be organized under the laws of the state of Mississippi, as to all of the railroad, real estate and franchises, within the state of Mississippi, as to all of the railroad, real estate and franchises, within the state of Mississippi, as more fully set forth in the petition of said purchasers filed in said cause for the confirmation of said sale; and

Whereas, the said parties of the fourth part did thereafter duly pay and satisfy their said bid; and

Whereas, the said Special Master did duly make his report of said sale to said District Courts of the United States for the Western District of Tennessee, Western Division; the Eastern District of Tennessee, Southern Division; the Northern District of Alabama, Northern Division, and the Northern District of Mississippi, Eastern Division, and the said sale was thereafter, by decrees, entered of record, duly approved and confirmed; and

Whereas, an order was thereafter made authorizing and directing the said Louis B. McFarland, as Special Master,

upon the terms and conditions set out in the decree of confirmation of the said District Court of the United States for the Western District of Tennessee, Western Division, to execute, acknowledge and deliver a deed of conveyance to the said Southern Railway Company, conveying to it, its successors or assigns, forever, all and singular the said railroad, real estate and franchises, within the states of Tennessee and Alabama, and also all estate, equipment, personal property and choses in action, wheresoever situate; including also all income, proceeds of income, bills and accounts receivable, cash and other property, received by the said receivers, and all causes of action and judgments, by them acquired or obtained, in the management or operation of the said mortgaged premises embraced in the conveyance thereof, or pertaining thereto; and also any and all property of the said railroad company, appurtenant to the premises and required for use in connection with or for the purposes of said railroad, or for the business of said railroad company, and vested in or standing in the name of the said receivers, or to which the said receivers in any manner had acquired title; and a deed of conveyance to the purchasers, conveying to them, or to their successors or assigns, forever, subject to the same conditions, all and singular the railroad, real estate and franchises, within the state of Mississippi, so as aforesaid sold under the said decree and said supplemental decree, free from any and all equity of redemption of the said The Memphis & Charleston Railroad Company, or any one claiming by, under or through it, except certain liens specified in said decree; and

Whereas, the said Special Master thereafter did make, execute and deliver his conveyance to the party of the fifth part, and to the parties of the fourth part, respectively, which said deed or conveyance bears date the 26th day of February, 1898, and to which reference hereby is made; and

Whereas, The Memphis & Charleston Railway Company, party of the sixth part hereto, has been duly organized as a

corporation under the laws of the state of Mississippi; and

Whereas, the said parties of the fourth part desire to vest in the party of the fifth part, and in the party of the sixth part, severally and respectively, the full and complete title to the several properties and franchises by them so purchased for the benefit of the said parties of the fifth part and sixth part, respectively; and

Whereas, the decree of confirmation of said United States District Court for the Western District of Tennessee, Western Division, further provided that by way of further assurance and confirmation of title to the said Southern Railway Company, and to the said Memphis & Charleston Railway Company, severally and respectively, the receivers of said court in said cause, and also the said The Memphis & Charleston Railroad Company, by its proper officers, and under its corporate seal, and The Farmers' Loan & Trust Company, trustee, should, under the direction of the Special Master, and upon request of the said Southern Railway Company, and of the said purchasers, or their successor, the said Memphis & Charleston Railway Company, severally and respectively, sign, seal, execute, acknowledge and deliver to the said two corporations, parties hereto of the fifth part and sixth part, severally and respectively, all proper deeds of conveyance, transfer, release and further assurance of all and singular the mortgaged property and premises, and every part and parcel thereof, of every kind and description, and wherever situate, so as aforesaid sold under the said decree and said supplemental decree of the said court, and embraced in the said deed of the Special Master so as fully and completely to transfer to, and to vest in, the Southern Railway Company, party hereto of the fifth part, and in the Memphis & Charleston Railway Company, party hereto of the sixth part, severally and respectively, their successors and assigns, the full, legal and equitable title to all such railroad property rights, assets and franchises, sold or intended to be sold under the said decree and said supplemental decree of said court; and

Whereas, the said purchasers, parties hereto of the fourth part, and the said party hereto of the fifth part, and the said party hereto of the sixth part, have respectively complied with and fulfilled all the terms and conditions of the said decrees; and

Whereas, the said parties hereto of the fifth part and sixth part, severally and respectively, are now entitled to a conveyance of the property so purchased for and confirmed to them:

Now, therefore, this indenture witnesseth: That the said receivers, parties of the first part, the said railroad company, party of the second part, the said trustee, party of the third part, and the said purchasers, parties of the fourth part, in consideration of the sum of one dollar to each of them in hand paid by the parties of the fifth part and sixth part, severally and respectively, and according to their several and respective interests and in pursuance of the directions of the said decree,

Have granted, bargained, transferred, sold and conveyed, and by these presents do hereby grant, bargain, transfer, sell and convey.

First. Unto said Southern Railway Company, and its successors and assigns forever:

All of the railroad, real estate and franchises, hereinafter described or referred to, within the states of Tennessee and Alabama, and as to all of the equipment, chattels and choses in action of said The Memphis & Charleston Railroad Company, wherever situate;

Together with all the corporate estate, equity of redemption, rights, privileges, immunities and franchises of said The Memphis & Charleston Railroad Company, and all the tolls, fares, freights, rents, income, issues and profits of the said railroads, and all interest and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, including all the said mortgaged premises and property in said decrees directed to be sold, at any time owned or acquired by said The

Memphis & Charleston Railroad Company, and including also all income, proceeds of income, bills and accounts, receivable, cash and other property received by the receivers, and all causes of action, and judgments, by them acquired or obtained, in the management or operation of the mortgaged premises embraced in this conveyance or pertaining thereto, and also any and all property of the said railroad company appurtenant to the premises and required for use in connection with or for the purposes of said railroad, or the business of said railroad company, and vested in or standing in the name of the said receivers, or to which the said receivers in any manner have acquired title; excepting, however, all such leases and contracts sold with the said property as the parties of the fifth and sixth parts, severally and respectively, shall within ninety days after the delivery of this deed elect not to assume and adopt; and

Second. Unto Memphis & Charleston Railway Company, and its successors and assigns forever:

All of the railroad, real estate and franchises within the state of Mississippi;

A more full and particular description of the property intended to be conveyed by this instrument being contained in said decree of the 2d day of March, 1897, and said supplemental decree of November 24, 1897, and in said Special Master's deed on the 26th day of February, 1898, to which reference hereby is made:

To have and to hold, all and singular, the above mentioned railroads, premises, rights, privileges, interests, franchises, lands, tenements, hereditaments, appurtenances and property of every description, whether real, personal or mixed, herein conveyed or intended to be conveyed, unto the said Southern Railway Company, party of the fifth part, its successors and assigns, as to all of the said railroad, real estate and franchises, within the states of Tennessee and Alabama, and as to all the equipment, chattels and choses in action of said The Memphis & Charleston Railroad Company, wherever sit-

uate; and unto the said Memphis & Charleston Railway Company, party of the sixth part, its successors and assigns, as to all of the railroad, real estate and franchises, within the state of Mississippi; and the said Southern Railway Company and the said Memphis & Charleston Railway Company, their and each of their successors and assigns forever, hereby severally and respectively, are invested with the same (the said Southern Railway Company, as to all said railroad, real estate and franchises, within the states of Tennessee and Alabama, and as to all said equipment, chattels and choses in action, wherever situate; and the said Memphis & Charleston Railway Company as to all of the railroad, real estate and franchises, within the state of Mississippi), as fully and completely as said The Memphis & Charleston Railroad Company, one of the defendants in said suits in equity, held or enjoyed, or was entitled to hold or to enjoy, or was seized of, or was entitled to, at the time of the entry of the said decree, or at the time of the commencement of said suits, and as fully and absolutely as the said parties of the first, second, third and fourth parts, severally and respectively, may or ought, by virtue of said decrees, to bargain, sell, release, assign or convey.

It is understood and agreed that nothing herein contained shall be construed as expressly or impliedly subjecting the parties of the first part, or the party of the third part, or the parties of the fourth part, or any of said parties, to any personal covenant or liability whatsoever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals as of the third day of March, 1898, and the said The Memphis & Charleston Railroad Company, party of the second part, has caused its corporate seal to be hereunto affixed and attested by its secretary and these presents to be signed on its behalf by its president, as of the third day of March, 1898, and the said The Farmers' Loan & Trust Company, party of the third part, has likewise caused its corporate seal to be hereunto affixed and attested by its secretary, and these presents to be signed

on its behalf by its vice president, as of the third day of March, 1898, and the said parties of the fourth part have hereunto set their hands and seals as of the third day of March, 1898.

Signed, sealed and delivered in presence of:

C. M. McGhee, [Seal.]

Henry Fink, [Seal.]

As Receivers of the Memphis & Charleston Railroad Company.

As to Henry Fink:

Melville E. Ingalls, Jr.

Wm. H. Bruder.

The Memphis & Charleston Railroad Company,

By Samuel Thomas, President.

Signed, sealed and delivered in presence of:

J. A. Hilton.

Wm. H. Bruder.

Attest: A. O. Beebe,

[Seal] Secretary.

The Farmers' Loan & Trust Company,

By E. S. Marston, Vice President.

Signed, sealed and delivered in presence of:

Melville E. Ingalls, Jr.

Wm. H. Bruder.

Attest: Sam Sloan, Jr.,

[Seal.] Secretary.

Signed, sealed and delivered in presence of:

Adrian Iselin, Jr., [Seal.]

Melville E. Ingalls, Jr., [Seal.]

Jno. W. Fewell, [Seal.]

Purchasers.

As to Adrian Iselin, Jr.:

Melville E. Ingalls, Jr.

Wm. H. Bruder.

As to Melville E. Ingalls, Jr.:

Hall Park McCullough.

Wm. H. Bruder.

As to John W. Fewell:

R. A. Fewell.

A. S. Bozeman.

State of New York,
County of New York, ss.

I, Wm. H. Bruder, a notary public in and for the county of New York, in the state of New York, do hereby certify that on this 22d day of March, 1898, in the year 1898, Henry Fink, whose name is signed to the foregoing and hereto annexed deed, bearing date the third day of March, 1898, as one of the receivers of the Memphis & Charleston Railroad Company, with whom I am personally acquainted, and who is to me known and known to me to be one of the above-named grantors and bargainors, personally appeared before me, at my office, in said county, and he, then and there being informed of the contents of the said deed, on this day acknowledged the due execution of the said deed; and further acknowledged that he voluntarily executed, signed, sealed and delivered the said deed on the 22d day of March, 1898, as his free act and deed for the uses and purposes therein mentioned, and for the purposes therein contained.

And I hereby certify that I am a duly appointed notary public in and for the said county and state, and my commission commences on the 31st day of March, 1897, and that my commission as such notary public expires with the 30th day of March, 1899.

In witness whereof I have hereunto set my hand and affixed my official seal as notary public for the county of New York, and state of New York, this 22d day of March, 1898.

[Seal.]

Wm. H. Bruder,

Notary Public, County of New York, State of New York.

(1) The foregoing deed of the receivers of a railroad company, trustee and the purchasers at a judicial sale is copied from the record in the case of *The Farmers' Loan & Trust Co. vs. The Memphis & Charleston*

R. R. Co., pending in the Circuit Court of the United States for the Western District of Tennessee. The Circuit Court of Appeals refused to disturb these proceedings in **Rothschild vs. Memphis & Charleston R. Co.**, 113 Fed. 476.

ANCILLARY PROCEEDINGS.*

No. 877.

Ancillary Bill. In re Receivers for a Manufacturing Company where Receivers were Appointed by a State Court before a Federal Court took Jurisdiction.

[Caption.]

To the Honorable Judge of the District Court for the ——— district of ———, sitting in equity:

A. B., a citizen of the state of ———, and residing in the township of ———, in said state of ———, on behalf of himself and all other creditors and stockholders of the C. D. Company, defendant herein, and who may hereafter become parties to this suit and contribute to the expenses thereof, brings this bill of complaint against the C. D. Company, a corporation organized and existing under the laws of the state of New Jersey and citizen of the said state of New Jersey, and respectfully shows to the court as follows:

First. That plaintiff, A. B., is and was at the date of the commencement of this suit a citizen of the state of ———, residing in the township of ———, and was, at said date, and still is, a shareholder of the C. D. Company, and that the par and also the market value of the capital stock so held by the said party as aforesaid is and was at the date of the commencement of this suit and at all times of greater value than ——— thousand dollars.

That the C. D. Company is a corporation duly incorporated and existing under the laws of the state of New Jersey, and is and at all times has been a citizen of said state of New Jersey, located and carrying on business in said state.

* As to jurisdiction and a discussion of ancillary receiverships. See Foster's Fed. Prac., 5th ed., Sec. 304, pp. 948 to 956.

That said company was duly organized under an act of the legislature of the said state of New Jersey, entitled, "An act concerning corporations," dated April 7, 1875, and the several supplements thereof, and by a certificate of organization bearing date of the — day of —, 1887, and recorded on the — day of —, 1887, in the office of the clerk of the county of —, and afterwards on the same day filed with the secretary of state at Trenton, in said state, and that the principal office of the said corporation is located within the county of —, in said state. That the authorized capital of said corporation as fixed by the said certificate is — dollars, divided into — hundred shares of the par value of — hundred dollars each, and that the said stock was thereafter increased to the sum of — million dollars, of which — million dollars is preferred stock and — million dollars common stock, all of which is now outstanding.

Second. That the objects for which the said corporation was formed are to manufacture and sell [*cordage and binder twine*] and similar commodities, and for the carrying on of such similar business as more fully appears by reference to the certificate of organization, a true copy of which is annexed to this bill and marked "Schedule A," and made a part of this bill of complaint.

That soon after the organization of said corporation it entered upon the manufacture and sale of [*cordage and binder twine*] and such other business as is authorized by said certificate of organization, and has since such time prosecuted the same in the several states of New Jersey, New York, and Ohio, in all of which states it is now operating [*cordage and binder twine*] mills.

That the said corporation has real or personal property in all of the said states, and is now largely engaged in active manufacturing in each of the said states, employing in all a number of persons amounting to — or thereabouts, and operating directly or indirectly a number of cordage mills.

Third. On information and belief, on the — day of —, 1893, the payment of a debt of — dollars, due on

demand, was demanded of the said C. D. Company, and remained unpaid and default existed in the payment thereof, the said corporation not having sufficient funds to pay the same, and other debts aggregating — dollars or thereabouts on the — day of —, 1893, will become due, which said corporation is unable to pay. That the further debts will mature within a few days to the amount of several hundred thousand dollars, and that during the entire month of — debts will mature, aggregating in all — dollars.

That in the months of June, July, August, and September, other large indebtedness on commercial paper and otherwise will mature, exceeding in all — dollars.

That the corporation is without funds to pay the debts maturing at the present time, and will make default in payment of such other debts accruing within a few days, and that in the present situation of affairs it is not possible to pay the same.

That the assets of the corporation, which are valuable, are not available, either for the payment of its debts or for the raising of money to pay the same.

That the corporation is unable to meet its obligations as they mature, and has no prospect at the present time of meeting the same or of resuming its usual business, and that the corporation is insolvent.

Fourth. Plaintiff further says that the assets of the corporation consist of [*cordage*] mills owned or leased in the several states hereinabove mentioned, together with the raw stock in process of manufacture, and manufactured stock, and book accounts and bills receivable the greater part of all of which are scattered through various states, and the same are likely to be attached by creditors without the state of New Jersey on the ground that the corporation is a foreign corporation, and that unless a receiver is appointed for the equal protection and benefit of all creditors, attachments will be issued and preferences obtained by some to the injury of the general creditors of the company, and, moreover,

certain obligations mature in connection with the various mills of the company, which can not now be paid, which properties are necessary to the operations of the company, and which properties otherwise would be lost.

And plaintiff further alleges on information and belief, that on the — day of —, in the year 1893, a certain suit was commenced in the court of chancery in the state of New Jersey, a court of record and having jurisdiction of the parties and the subject-matter, and at the domicile of the corporation; that in said suit J. W. was plaintiff, and the C. D. Company, defendant, and in and by the bill of complaint in said suit, it was averred that the said corporation was insolvent, and it was prayed, among other things, that a receiver might be appointed according to the statutes of the state of New Jersey in such case made and provided, and that the said corporation shall be declared insolvent, and that said receiver so to be appointed should thereupon take possession of the goods, property and chattels of the said C. D. Company, and proceed to realize and dispose of the same, and that said corporation and its officers should be restrained from collecting or receiving such debts or from assigning or transferring the property, to all and singular the allegations in which bill, references are hereby had, as if the same, and each of the allegations were incorporated at length herein.

That thereupon the said bill was duly filed as aforesaid, and application in due form to the chancellor of the state of New Jersey, having jurisdiction for the appointment of a receiver or receivers, and that the said case came on, and was duly heard by his honor, the chancellor, pursuant to the statutes of the state of New Jersey, the said corporation being present in court, and requesting such appointment, and such proceedings were had therein that on the — day of —, 1893, it was duly adjudged, found, decreed, and ordered by the said court of chancery of the state of New Jersey, that the said company had become insolvent, and that an injunction be issued to restrain said company and

its officers from exercising any privileges and franchises and from taking or dealing with the assets of the said company, or from transferring the same, except to the receivers hereinafter named, and that S. M., of Jersey City, in the state of New Jersey and H. C., of the city, county, and state of New York, were in due form of law appointed receivers of the said C. D. Company, with full power and authority to collect, receive, or to take unto their possession, all and singular the property, real and personal, belonging to said company, to dispose of the same, and to deal therewith as in such order is specifically provided, and it was further provided therein that the said receivers should give a bond to the said chancellor for the faithful performance of their several duties, and for the obedience of such orders as he, from time to time, may make, in the sum of — dollars, duly approved as in such order specified by a special master of the said court.

That thereupon the said S. M. and H. C., duly thereafter took the oath of office, as such receivers, as is prescribed by the statute, and each duly thereafter executed his bond as prescribed in such order, in the said sum therein named, which bond was thereafter duly approved in the form required by such order and duly filed as required by law, and that the said receivers entered upon the performance of their duty and are now in the possession of the assets and property of the said C. D. Company, and the said order of the court of chancery is now in full force and effect. A copy of all the proceedings in the said suit hereinabove mentioned is attached hereto, marked "C," to which your orators refer, as if herein specifically stated at length.

Plaintiff further alleges that from the nature of the business and the necessity of intelligent mutual co-operation in the several states, it is highly desirable that the same receiver, if possible, should act in each jurisdiction.

Fifth. Plaintiff further alleges that on the — day of —, 1893, he commenced in the district court of the

United States, for the ——— district of ———, a court of record, and having jurisdiction of the parties and the subject-matter, a suit wherein the C. D. Company was defendant, and wherein substantially the same allegations were made as were made in the New Jersey suit, hereinbefore referred to, and wherein it was stated that such suit had been begun in New Jersey, and S. M. and H. C. had been appointed therein as receivers, and prayed that the same receivers might be appointed in said suit in the district court of the United States for the ——— district of ———. That, thereafter, on the said ——— day of ———, an order was made by the Hon. J. S., district judge, appointing said S. M. and H. C. receivers of said C. D. Company.

A copy of said order and the bill of complaint in said suit, and of the affidavits and exhibits referred to in said order, which exhibits include the bill of complaint in the suit in New Jersey, and an order appointing receivers in said suit, and of the affidavit used therein, is attached hereto marked "A."

Sixth. Plaintiff further shows that on the ——— day of ———, 1894, he commenced a suit in the district court of the United States for the ——— district of ———, against the C. D. Company, making substantially the same allegations in said bill as were made by him in the bill filed in the suit in the district court for the ——— district of ———, and supporting said allegations by substantially the same affidavits, and upon said bill and affidavits the Hon. H. L., district judge, made an order in all respects similar to the order made by the Hon. J. S., above referred to, and in said order appointed the said S. M. and H. C. receivers.

Plaintiff further alleges that from the nature of the business of said C. D. Company, and from the fact that the said S. M. and H. C. have been appointed receivers in three courts, and the necessity of intelligent mutual co-operation in the various states wherein assets of said company are situated, it is highly desirable that the same receivers, if possible, should act in all the jurisdictions.

Seventh. Inasmuch, therefore, as plaintiff has no adequate remedy at law, and can only have relief in equity, he files this bill of complaint on behalf of himself and all others similarly situated, and prays as follows:

1st. That due process of law be issued against the defendant, the C. D. Company, and that it be summoned to appear in this court, and answer this bill of complaint, but without oath, all answers under oath being expressly waived, and to stand and abide by such orders and decrees as the court from time to time may adjudge.

2nd. That the court will administer the assets of the defendant.

3rd. That the court will forthwith confirm the appointments heretofore made of S. M. and H. C. as receivers of all and singular the property of the C. D. Company, and will appoint receivers of the property and assets of the defendant, the C. D. Company, real and personal, together with all the equipment, property, material, supplies, and other assets of every description, wherever situated, together with all leaseholds, rights, and contracts, with authority to maintain and carry on the business under the direction of the court, and that the said C. D. Company, its officers, agents, and employees, be forthwith required and directed to deliver up to such receivers so appointed all and singular each and every part of the said property wherever situated, and that the officers, directors, managers, and agents of the said C. D. Company, and each of them, be enjoined from interfering in any way with the possession and control of the said receivers, and that they be directed forthwith to execute proper transfer and assignments to such receivers so appointed, and all and singular such assets, real and personal, wherever situated.

4th. That each and every of the creditors of said corporation be restrained and enjoined from interfering with the said property and assets of the company.

5th. That the plaintiff may have such other and further relief as the court may deem proper and necessary.

R. X.,
Solicitor for Plaintiff.
S. X.,
of Counsel.

[*Verification.*]

No. 878.

Ancillary Bill for Foreclosure of Railway.

[*Caption.*]

Plaintiff, the A. B. Trust Company, a corporation created by and existing under the laws of the state of —, and a citizen and resident of said state, shows unto your honors that it has already filed in the district court of the United States for the — district of —, the court having jurisdiction of the C. & D. Railway Company, a bill of complaint against said C. & D. Railway Company, a corporation having its principal office in the state of —, and a citizen and resident of said state of —, and against the M. P. Railway Company, a corporation existing under the laws of the state of —, and citizen of said state of —, seeking for the foreclosure of a certain indenture of mortgage or deed of trust, dated —, known as the general consolidated mortgage of the said C. & D. Railway Company. That a portion of the line of railway and property owned by the said C. & D. Railway Company, and subject to the lien of said general consolidated mortgage, is in this district and within the jurisdiction of this court.

Plaintiff respectfully refers to said bill of complaint for a more particular statement of the contents thereof, and for the terms and conditions of the said general consolidated mortgage, and plaintiff files herewith a true copy of said bill of complaint, and prays that your honors will take the

same as a part of this ancillary bill; plaintiff further shows that all the statements contained in said bill are true, as it is informed and verily believes, and it repeats the same herein.

And plaintiff makes the same persons defendants in this case that are named in said bill filed as aforesaid, and prays process against said defendants as in said bill they have already prayed.

And plaintiff prays that your honors will make such orders and decrees preliminary and final as are prayed for in said bill by plaintiff in the district court of the United States for the — district of —, and that your honors will also make all such other and necessary orders, judgments, and decrees as may be required in aid of said bill, and that your honors will take ancillary jurisdiction with the said district court of the United States for the — district of —, and will give plaintiff all the relief which may be necessary to accomplish the purposes of filing said bill.

And plaintiff prays in all respects as in said bill set forth, and prays such other and further relief as the nature of the case may require and to your honors seem meet.

X. & X.,

R. X.,

Solicitors for Plaintiff in said Bill.

F. L.,

of Counsel.

No. 879.

Supplemental(1) Ancillary Bill for Foreclosure of Railway.

[Caption.]

Now comes the A. B. Trust Company, plaintiff in the above-entitled and numbered cause, and brings, with the leave of the court first had and obtained, this, its supplementary ancillary bill to the original ancillary bill filed by it in this cause on the — day of —, and making all the averments and showing unto your honors the same facts which are set forth in said original ancillary bill, further shows and alleges:

That since the filing of said original ancillary bill the Hon. J. S., judge of the district court of the United States for the ——— district of ———, in the ——— circuit, to wit, on the ——— day of ———, made his certain decree in the case of the A. B. Trust Company, trustee, plaintiff, v. C. & D. Railway Company and M. P. Company, defendants, referred to and set forth in said original ancillary bill filed herein, ordering, adjudging, and decreeing that S. M. and H. C. be appointed receivers of the property of the C. & D. Railway Company, covered by the mortgages made by the said defendant, which are sought to be foreclosed in the said original bill of the A. B. Trust Company, plaintiff, with power, among other things, to take possession of all the said mortgaged property, and to operate, and cause to be operated, the said railroad mortgaged as aforesaid, and to preserve and protect all of the said mortgaged property, acting in all things under the order of the said honorable district court of the United States for the ——— district of ———, or of such other courts as may entertain jurisdiction of parts of the said mortgaged property as ancillary to the jurisdiction of said district court of ———; and with leave to the plaintiff and defendants, and each of them, to apply to any other United States district court for such order or orders in aid of the primary jurisdiction vested in said district court of ——— in said cause as may have ancillary jurisdiction therein. A certified copy of which order is attached hereto, and made a part hereof; and plaintiff further shows and alleges that said S. M. and H. C., named as receivers aforesaid, have qualified as such, in the manner required by the terms of said decree of date, ———, and on the ——— day of ———, took possession of the said property, and are now operating and causing to be operated the said railroads, mortgaged as aforesaid, including such property and railroads as are situated within the state of ———.

The plaintiff now renewing its prayer made in said ancillary bill filed on the ——— day of ———, prays that your honors will make such orders and decrees preliminary and final as

are prayed for in said bill by plaintiff in the district court of the United States for the ——— district of ———, and that your honors will also make such other and necessary orders, judgments, and decrees as may be required in aid of said bill, and that your honors will take ancillary jurisdiction with the said district court of the United States for the ——— district of ———, and will give plaintiff all the relief which may be necessary to accomplish the purposes of filing said bill.

And plaintiff prays in all respects as in said bill set forth, and prays such other and further relief as the nature of the case may require, and to your honors seem meet.

X. & X.,

Solicitors for Plaintiff in said Bill.

(1) Equity Rules 34 and 35.

No. 880.

Decree Taking Ancillary Jurisdiction.(1)

[Caption.]

On this ——— day of ———, came on to be heard the original and supplemental ancillary bill filed by plaintiff in this cause, and the court having considered the same, and it appearing to the court that the A. B. Trust Company, trustee, plaintiff herein, has already filed in the district court of the United States for the ——— district of ———, the court having jurisdiction of the C. & D. Railway Company, a corporation having its principal office in the state of ———, a bill of complaint against said C. & D. Railway Company and against the M. P. Railway Company, a corporation existing under the laws of the state of ———, and of said state of ———, asking for the foreclosure of a certain indenture of mortgage, dated ———, known as the general consolidated mortgage of the said C. & D. Railway Company, a true copy of which bill of complaint is now on file in this cause. And it further appearing that in said cause now pending in the said district court of the

United States for the — district of —, the Hon. J. S., United States district judge for the — circuit, including said — district of —, on the — day of —, made his order and decree sustaining plaintiff's application for a receiver, and afterwards, to wit, on the — day of —, made his further order and decree, naming and appointing S. M. and H. C. receivers of the property of the C. & D. Railway Company, covered by the mortgages made by the said company which are sought to be foreclosed in the said original bill of the A. B. Trust Company, plaintiff, with certain powers and under certain instructions, as fully appears in said order, a certified copy of which is attached to the plaintiff's supplemental ancillary bill filed herein; and

It further appearing that a portion of the line of railway and property owned by the said C. & D. Railway Company, and subject to the lien of said general consolidated mortgage, is in this district and within the jurisdiction of this court, and that by the terms of said order of date —, said plaintiff was authorized to apply to any other United States district court of competent jurisdiction for such order or orders in aid of the primary jurisdiction vested in said United States district court for the — district of — as may take ancillary jurisdiction of said cause; and

It further appearing that the said S. M. and H. C. have qualified as such receivers by taking and subscribing the oath of office and executing and filing bond in the manner and according to the terms of the ninth paragraph of said order and decree:

Now, the court being fully advised, and being moved thereto by the solicitors of the plaintiff,

It is ordered, adjudged, and decreed that this court take ancillary jurisdiction with the district court of the United States for the — district of — in said cause now pending in said court, wherein the said A. B. Trust Company, trustee, is plaintiff, and the said C. & D. Railway Company and said M. P. Railway Company are defendants.

It is further ordered, adjudged and decreed that the said order made by the said district court of the United States for the — district of —, of date —, sustaining the application of plaintiff for a receiver, and also the said order and decree of said court made on the — of —, naming and appointing S. M. and H. C. receivers of the property of the C. & D. Railway Company, covered by the mortgages made by the said company, which are sought to be foreclosed in the original bill of the A. B. Trust Company, with certain powers and under certain instructions, be and the same are hereby ratified, approved, and confirmed, and the said S. M. and H. C. are hereby vested with the same powers, rights, and privileges as are conferred by said order of said district court of the United States for the — district of —, of date —, over that portion of the line of railway and property owned by the said C. & D. Railway Company, subject to a lien of the mortgages made by said company sought to be foreclosed as aforesaid, as is in this district and within the jurisdiction of this court. And the said receivers having already taken and subscribed the oath of office, and executed bond in the manner prescribed by the order and decree of said district court of the United States for the — district of —, of date —, they are hereby authorized to take possession of said property and to act as such receivers without taking further oath of office or executing further bond.

It is further ordered and decreed that the plaintiff cause to be filed in this court certified copies of all orders of a general nature in any way affecting the said property situated within the jurisdiction of this court made by the said district court of the United States for the — district of — in said primary cause pending in said court, for the information of the court and all persons who may be interested in said cause.

It is further ordered that the clerk of this court enter on the minutes of the court the copy of the said order of the said district court of the United States for the — district of

—, of date —, immediately following the entry of this order and decree.

A. P.,

District Judge.

Ancillary receivership may be granted on ex parte application. *Platt v. Phila. & R. R. Co.*, 54 Fed. 569. But see *Mercantile Trust Co. v. Kanawha & O. R. R. Co.*, 39 Fed. 337.

No. 881.

Order Appointing Ancillary Receivers for a Railroad Property.

[Caption.]

Upon reading and filing the verified bill of complaint herein, and on motion of counsel for complainant, and after appearance by the defendants and due notice to their solicitors of record, and due deliberation having been had, it is ordered that R. S. and G. P., who have heretofore, in the suit of A. B., against the C. & D. Railroad Company, No. —, in equity, been appointed receivers of the property and assets of the C. & D. Railroad Company, and whose receivership was thereafter, by order dated —, made in a suit in said court, wherein the Central Trust Company of New York was complainant, and the C. & D. Railroad Company was defendant, No. —, in equity, extended to the last named suit, be, and they are hereby, appointed as such receivers in this cause, of the defendant, the C. & D. Railroad Company, and of the property of said defendant as set forth in the order appointing them as made in said cause No. —, in equity, filed therein July 25, —, to which reference is hereby made, with the rights, powers and privileges as in said order set forth, and that said receivership is hereby extended to this cause.

No. 882.

Stipulation as to Answers to Ancillary Bill.

[Caption.]

It is hereby stipulated and agreed on the part of the solicitors for the defendant, the C. & D. Company, to take notice

as of this date of the ancillary proceedings herein in E. & F. without service of subpoena, and that answers therein will be filed on the — day, —, 19—.

Dated New York, December —.

X. & X.,

Solicitors for Complainant.

Y. & Y.,

Solicitors for Defendant, E. & F. Ry. Co.

No. 883.

Appearance of Defendant to Ancillary Bill.

The District Court of the United States for the — District of —.

The A. B. Trust Company, Complainant,

vs.

The C. & D. Railway Company *et al.*, Defendants.

On this — day of —, come the defendant, the E. & F. Railway Company, one of the defendants in the above entitled cause, and enter this, its appearance, in the ancillary bill filed in said cause in this court. Y. & Y.,

Of counsel for E. & F. Railway Company, Defendant.

No. 884.

Answer of Defendant to Ancillary Bill of Foreclosure.

The District Court of the United States for the — District of —.

The A. B. Trust Company, Complainant,

vs.

The C. & D. Railway Company *et al.*, Defendants.

The C. & D. Railway Company, a corporation created by and existing under and by virtue of the laws of the state of

—, now, and at all times hereafter, saving and reserving unto itself all and all manner of benefit of exception which can or may be had or taken to the many errors, uncertainties and imperfections in the said ancillary bill of complaint, for answer unto the said ancillary bill, or unto so much thereof as this defendant is advised it is material or necessary for it to make answer unto, answering saith:

This defendant admits that the complainant, the A. B. Trust Company, is a corporation created by and existing under and by virtue of the laws of the state of —; and that it is a citizen and resident of the said state of —, and that it has heretofore filed in the District Court of the United States for the District of — its bill of complaint against the defendants, the C. & D. Railway Company, and that in and by the said bill of complaint a foreclosure of a certain indenture of mortgage or deed of trust, dated —, and known as the General Consolidated Mortgage of this defendant, is sought to be foreclosed. But for the allegations and averments of the said bill, and for the legal sufficiency and effect thereof, this defendant refers to the said bill when the same shall be produced herein, and denies any and all the averments of the said ancillary bill herein in anywise contrary to or inconsistent therewith.

This defendant, further answering, admits, on information and belief, that a portion of its line of railway and property is in this district and within the jurisdiction of this court, but it neither admits nor denies that the said property, or any part thereof, is covered by or subject to the lien of the said General Consolidated Mortgage, and on this behalf it leaves the complainant to make such proof as it may be advised.

The defendant, further answering, refers to its answer to the said original bill of complaint as heretofore duly filed in the office of the clerk of the District Court of the United States for the District of —, and files herewith a true copy and prays that your honors will take the same as a part of its answer herein. And the defendant further shows that the

statements contained in the said answer were, as it is informed and believes, verily true when the same was verified and filed herein as aforesaid, and it repeats all of the said allegations, and says that the same are now true, except so far as they may have been modified by this litigation, and by circumstances transpiring since said answer was filed. And the defendant claims the same benefit from the said answer as aforesaid as if it had pleaded to all the several matters therein stated or any of them, or as if it had demurred to the said bill or to this ancillary bill.

All of which matter and things the said defendant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

The C. & D. Railway Company,
By K. E., First Vice President.

Attest:

[*Seal.*] H. B., Secretary.

United States of America, }
—— District of ——, } ss.

K. E., being duly sworn, says: That he is the first vice president of the C. & D. Railway Company, defendant herein; that he has read the foregoing answer and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts, are true, and as far as they relate to the acts of others he believes them to be true.

That in regard to all matters and things in the foregoing answer alleged which are not within the personal knowledge of this deponent, the deponent has been fully informed, and he believes that the same are true. K. E.

Sworn to before me this —— day of ——, A. D. ——.

[*Seal.*]

J. N.,

U. S. Commissioner for the —— District of ——.

No. 885.

Order Appointing Special Master in Ancillary Suit.

[Caption.]

It having been represented to the court that claims are arising in — against the receivers appointed and confirmed in this case, growing out of the operations of the railway property in —, for stock killed, personal injuries, damages for short delivery, etc.; and it appearing to the court that such claims will constantly arise during the pendency of the receivership in this case, and that such claims should be adjudicated, settled and paid without requiring the parties interested to seek relief from the District Court of the United States in —, having original jurisdiction:

It is therefore ordered by the court that E. M., Esq., be and he is hereby appointed Special Master in Chancery for this cause; and

It is further ordered that all claims for damages of every kind that may arise against the receivers, growing out of their operation of the C. & D. in —, may be filed and presented to said Special Master, who shall examine and report thereon in due course.

That the Special Master is directed to give reasonable public notice of this order, and is authorized to hold sessions pending examination of claims at such points as he may designate.

He shall report his conclusions to the court from time to time, and such reports shall stand confirmed, unless excepted to within thirty days from the filing thereof, upon proper order entered according to the rules in the chancery order book.

Dated —.

No. 886.**Order to Print the Records in Ancillary Suit.**

The District Court of the United States for the — District
of —.

The A. B. Company, Trustee, Complainant,

vs.

The C. & D. Railway Company, and the
E. & F. Railway Company *et al.*, De-
fendants.

Upon motion of the complainant, it appearing to the court that the bill filed in this cause against the defendants is pending in this court and in divers other courts within this circuit and in the state of —, seeking the same relief; it further appearing that part of the property of the defendant, the C. & D. Railway Company, and other defendants named in the amended bill filed herein, is within the — District of —, it is

Ordered, adjudged and decreed, that upon complainant's filing in this court a copy of the orders made by the District Court of the United States for the District of —, at —, the court having primary jurisdiction in this cause, the filing thereof shall be a sufficient compliance with the orders made heretofore requiring such orders to be filed pending the receivership and the prosecution of this cause. It is further

Ordered, that the clerk of the said court at — be ordered, and he is hereby authorized and directed, to cause to be printed the records in the above entitled cause, including the general orders made herein from time to time, printing the same by successive paging, and in as nearly chronological order as is convenient, and that in printing the same he do not duplicate the orders made by the District Court of the United States for the District of —, which have, by orders of said court, been printed and filed in this court, but that when necessary he refer to them by reference to case No. —, in equity,

pending at —, giving the page in said record of said printed order. It is further

Ordered, that said clerk cause to be sent to the counsel representing the complainant and the defendants in said cause two copies to each firm as the same are printed, and two copies to each of the receivers and their counsel. It is further

Ordered, that the receivers in said cause pay all proper bills for the printing herein ordered as the same may become due from time to time, and they have credit for such disbursements in their accounts.

No. 887.

Petition of Defendant for an Order Authorizing Receivers to Deliver to it the Possession of Railway Property in Their Hands.

The District Court of the United States for the — District of —.

The A. B. Trust Company, Complainant,
vs.

The C. & D. Railway Company *et al.*, Defendants.

The petition of the C. & D. Railway Company, defendant herein, respectfully shows to this court:

First. That this is a cause ancillary to the main suit between the same parties, in the District Court of the United States for the District of —.

Second. That in the said main suit the C. & D. Railway Company hath heretofore, presented its petition praying for an order of the court requiring the receivers of the C. & D. Railway to turn over and deliver possession of the said railway and property to the said C. & D. Railway Company; and that prior to the submission of the petition the receivers filed a report, and that upon the said petition and report the court did, upon the — day of —, enter an order con-

formably to the prayer of the said petition, and that copies of the said petition, and of the said report and order of court, are hereto annexed and marked respectively Exhibits "A," "B" and "C," and made a part hereof.

Wherefore, your petitioner prays that the said order of the court may be spread upon the records in this court, and may be by this court confirmed and approved, and made the order of this court in this ancillary cause so far as the same may be necessary in order to protect all the rights of all the parties in interest as against the property within the jurisdiction of this court.

The C. & D. Railway Company,
By J. W., Third Vice President.

Attest:

[Seal.] H. B., Secretary.

R. & R.,
Solicitors for C. & D. Railway Company.

State of ———,
County of ———, ss.

H. B., being duly sworn, deposes and says: That he is the secretary of the C. & D. Railway Company, petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts, are true, and as far as they relate to the acts of others he believes them to be true.

That in regard to all matters and things in the foregoing petition alleged which are not within the personal knowledge of this deponent, the deponent has been fully informed, and he believes that the same are true.

H. B.

Sworn to before me this ——— day of ———, A. D. ———.

[Seal.] J., Notary Public, ——— County.

No. 888.**Ancillary Decree.**

[Caption.]

It appearing to the court, by certified copy herewith filed, that in the main suit between the same parties in the district court of the United States for the ——— district of ———, to which this cause is ancillary, there was duly entered, on the ——— day of ———, the following decree: [*Set forth decree in full.*]

It is hereby ordered, adjudged, and decreed that the said decree be spread upon the records this court, and that the said decree be and hereby is approved and confirmed, and made the decree of this court in this ancillary cause so far as the same may be necessary to protect all the rights of all the parties in interest as against the property within the jurisdiction of this court.

Dated ———.

A. P.,
District Judge.

No. 889.**Ancillary Order, Confirming and Directing Sale to a
Reorganized Manufacturing Company.**

[Caption.]

On reading and filing the report of S. M. and H. C., receivers of the property and assets of the C. D. Co., duly verified on the ——— day of ———, 1893, with the exhibits as in said report specified, including a copy of all the papers presented to the chancellor of New Jersey, and upon which an order was made by the said chancellor on the ——— day of ———, 1893, and duly entered, whereby the said chancellor at the domicile of the said corporation did order, adjudge, and decree that the sale theretofore made by S. M. and H. C., receivers of the said C. D. Co., of the assets and property of said corporation to G. C., E. T., and G. H. should be ratified, approved, and confirmed, and by which order the said receivers were authorized and directed to carry out the sale; and

whereas it appears that prior to the making of said order by the said chancellor of New Jersey the said receivers presented their report to him bearing the date of the — day of —, 1893, reporting the bid made by the reorganization committee for the property and assets of the C. D. Co., or for the entire property, subject to existing liens and obligations, the sum of — dollars, payable upon confirmation of sale, — dollars in cash, and — dollars in the first mortgage, six per cent. gold bonds of the U. C. Co., being a new corporation formed to acquire said property and carry out the reorganization, and that they had accepted the same for the reasons set forth in their said report, subject to the approval of the court, and that thereupon it was ordered by the said chancellor that notice should be given to each and every stockholder and creditor by delivering or mailing to him a copy of the order to show cause made upon such petition, returnable upon the — day of —, 1893, why the same should not be granted, and that each and every of the said stockholders and creditors had an opportunity of appearing and of being heard thereon, and that upon the return day thereof, after such service duly made, the said chancellor did, after hearing all parties, make the order aforesaid; and whereas it appears to the court that the property of the said C. D. Co. has been sold for the highest price that could be obtained therefor, and that it is for the interest of the creditors and stockholders alike that said sale should be confirmed.

Now, therefore, on motion of Messrs. X. & X., solicitors for and of counsel with the said receivers, on hearing Messrs. Z. & Z., counsel for the receivers, it is ordered by the court that the sale heretofore made by S. M. and H. C., receivers of the C. D. Co., to G. C., E. T., and G. H., be and the same is hereby ratified, approved, and confirmed, and the said receivers are hereby authorized, ordered, and directed to grant, bargain, sell, assign, transfer, convey, set over, and confirm unto the said purchasers, as joint tenants, or to their assigns, all the real estate and personal estate, good will, choses in

action, effects and assets of the said defendant corporation, the C. D. Co., for the consideration aforesaid, and upon the terms set forth in the bid made by said purchasers.

And the said receivers are hereby authorized, ordered, and directed to execute and deliver any and all deeds, bills of sale, conveyances, assignments, transfers, and other instruments whatsoever necessary, proper, or advisable for the vesting of the said property and effects so sold in the said trustees or their assigns.

And it is further ordered, adjudged, and decreed that upon the delivery of deeds and conveyances by the said receivers to the said purchasers, and upon payment of the consideration agreed upon and the performance of the conditions of the sale by said purchasers, that all the right, title, and interest of the C. D. Co. of, in, and to all real estate, personal property, good will of business, choses in action, stock, or other effects or property, or things of value whatsoever, shall be and become fully vested in the said purchasers or their assigns, fully and effectually as the said receivers may, can, or ought to convey the same, and as fully and effectually as this court can authorize or empower them to convey the same.

Dated——.

J. S.,
District Judge.

JUDICIAL SALES.*

No. 890.

Order for Sale.

The United States of America,

— District of —, ss.

The President of the United States of America to the Marshal
of the — District of —.

You are hereby commanded, in pursuance of an order of the district court of the United States, for the — district of — aforesaid, made at the — term thereof, 1894, in the case of A. B. against C. D., to proceed without delay, and cause to be appraised, advertised, and to sell according to law [*here describe property*], and that your proceedings in the premises you make known to our said district court of the United States, within and for the — district of —, according to law, and have you then and there this writ.

[*Add teste according to court issuing the writ.*]

No. 891.

Marshal's Appraisement of Real Estate.

| | |
|-------------------------------|--------------------------|
| The United States of America, | } In the district court. |
| for the | |
| — District of —, ss. | } No. —. |

A. B., plaintiff, against C. D., defendant.

An appraisement taken at the city of —, in the county of —, and state of —, and within the district aforesaid,

* See Simkins, *A Federal Equity Suit*, 3d ed., pp. 594-597; 27 Stat. L. 751, provides for the place of the sale of realty and personalty, under any order or decree of a United States court, and for the manner of publication where realty is to be sold. As to the scope of this statute, see *In re Britannia Min. Co.*, 203 Fed. 450, 121 C. C. A. 395; *Nevada Nickel Syndicate v. National Nickel Co.*, 103 Fed. 399.

on —, the — day of —, 1894, before H. C., marshal of the United States for the — district of —, in obedience to the command of a certain order of sale [*or as may be*] in the above entitled cause issued from the district court of the United States for said — district of —, and to him directed, dated at the city of —, state

Pursuant to said order of sale, the said H. C., marshal of the United States for the — district of — aforesaid, did, on the — day of —, 1894, in compliance therewith, and according to the statute in such case made and provided, summon an inquest of three judicious, disinterested freeholders, resident in said district, to wit: E. F., G. H., and I. J., who are duly sworn and charged to appraise at its true value in money the lands and tenements of the said C. D., defendant, described in the words and figures following, to wit: [*Here describe the property.*]

Whereupon the said appraisers, each of whom doth for himself hereby certify that he is a resident freeholder in said district, say, upon their oaths, that the premises hereinbefore described, upon actual view thereof, are of the value of:

First tract, — dollars.

Second tract, — dollars.

Third tract, — dollars.

As a whole, — dollars.

In testimony whereof, as well I, H. C., marshal of the United States for the — district of —, as the inquest aforesaid, have to this appraisement set our hands and seals on the day and year first above written.

H. C., U. S. Marshal — district of —, [Seal.]

E. F. [Seal.]

G. H. [Seal.]

I. J. [Seal.]

The United States of America,

— District of —, ss.

I do hereby certify that the above named appraisers were

freeholders and residents of said district, and that they were duly summoned and sworn by me, according to law, on the day and year first above written. H. C.,

United States Marshal for the
 ——— district of ———.

No. 832.

Marshal's Report of Sale of Real Estate.

The United States of America,
 ——— District of ———.

Received this writ the ——— day of ———, 1894, and, pursuant to its command, the undersigned did, on the ——— day of ———, 1894, on the premises, near the town of ———, county of ———, state of ———, and within the district aforesaid, by the oaths of E. F., G. H., and I. J., three judicious, disinterested freeholders, resident in said district, cause to be appraised at their true value in money the lands and tenements described in said order, to wit: [*Here set forth a full description of lands and tenements.*]

The report of said appraisers is hereto attached, marked "A," and made part hereof. A copy of said appraisement was, by the undersigned, immediately deposited with the clerk of the district court of the United States for the ——— district of ———, to be by him filed in said cause.

Also, notice of the sale of said premises was by the undersigned given in the ——— [*give name of paper*], a weekly newspaper, published and of general circulation in the county of ———, state of ———, where said lands are situate, for more than thirty days prior to the day of sale, and appeared in said paper weekly on [*set forth the days*], as will more fully appear by reference to the proof of publication herewith filed, marked "B."

Afterwards, to wit: on the ——— day of ———, 1894, at the front door of the court-house, in the town of ———, county of ———, and state of ———, at the hour of one o'clock, solar time,

the time and place named in said advertisement of sale, said lands and tenements were by the undersigned offered for sale at public outcry, in the presence and hearing of a number of persons present and having an opportunity of bidding thereat, when came J. S., who bid to pay therefor the sum of — dollars, and said sum being more than two-thirds the appraised value of said premises, and being the highest and best bid offered for said premises, I therefore publicly struck off and sold to the said J. S. the said lands and tenements for the said sum of — dollars, and the undersigned brings said money into court, and awaits its further order in the premises.

H. C.,

United States Marshal for the
— district of —.

No. 893.

Appointment of Special Masters to Sell Property (1).

[Caption.]

It is further ordered that such sale shall be made without valuation, appraisement, redemption or extension, and shall be made by and under the direction of E. M., of —, and H. C., Esq., of — who are hereby appointed Special Masters for that purpose, and who are directed to make and conduct said sale, and to execute a deed or deeds of conveyance of the property sold, to the purchaser or purchasers thereof, upon an order confirming such sale and upon payment or settlement of the purchase price bid as hereinafter provided. Said sale shall be made at public auction to the highest bidder, at the terminal freight station of the respondent railroad company on — street, in the city of —, in the state of —, on the property to be sold, on a day and at an hour to be fixed by said Special Masters, at the request of the solicitors for the complainant or upon further order of the court, and notice of the time, place and terms of said sale,

describing briefly the property to be sold and referring to this decree, shall be published at least once a week for six successive weeks preceding the date of such sale, in at least one newspaper in each of the following places, to wit, the city of —, in the state of —; the city of —, in the state of —; the city of —, in the state of —, and the city of —, in the state of —. The Special Masters may, at the request of the complainant's solicitors, adjourn or postpone said sale and may, without further notice, proceed with the sale on any day to which the same may thus have been adjourned, or they may give such further notice of sale in addition to the notice above described or of any adjournment thereof, as the complainant's solicitors may request.

(1) This or a similar clause is usually inserted in a decree ordering a sale of property. See Foster's Fed. Prac., 5th ed., Sec. 394, for judicial sales by masters.

No. 894.

Advertisement of Railway Foreclosure Sale.

The District Court of the United States for the — District of —.

Master's Sale under Decree of Foreclosure in the Matter of the C. & D. Railroad Company.

| | |
|--|--------------|
| The A. B. Trust Company, Complainant | } In Equity. |
| <i>vs.</i> | |
| The C. & D. Railroad Company <i>et al.</i> | |
| Defendants. | } No. —. |

Whereas, at a term of the District Court of the United States for the — District of —, held at the city of —, in the state of —, on the — day of —, a decree was entered in the above entitled suit foreclosing the mortgage of said defendant, the C. & D. Railroad Company, mentioned and described in said complainant's bill of complaint; and

Whereas, it is therein ordered, adjudged and decreed that all the corporate property now owned or hereafter to be ac-

quired by the said C. & D. Railroad Company in the state of Kansas and other states, and all its estates, right, title, interest and equity of redemption therein; that is to say, all of its railroad now constructed and in operation and yet to be constructed, including extensions, branches, spurs and sidetracks, and including right of way, roadbed, superstructures, iron, steel, rails, ties, splices, chains, bolts, nuts and spikes, all land and depot grounds, station houses and depots, viaducts, water tanks, bridges, timber materials and property purchased or to be purchased or owned by it, for the construction, equipment or operation of said road, all machine shops, tools, implements and personal property used therein or upon or along said railroad, or at its stations; all engines, tenders, cars and machinery, and all kinds of rolling stock, whether now owned or hereafter purchased by said railroad company, and all other property of said company now owned or hereafter to be acquired, and all its rights and privileges therein or appertaining thereto, and all revenues, tolls and income of said railroad and property, and all franchises and rights of said railroad company, and all property and rights acquired and hereafter to be acquired by virtue and under authority thereof; excepting, however, such lands now owned or hereafter acquired by said railroad company as are not or may not be necessary or used for right of way, depot grounds of said railroad, or in operating the same, be sold under the direction of P. D., the undersigned Special Master, and the proceeds of such sale applied to the satisfaction of said judgment, interests and costs, except such as is otherwise provided for in said decree; and

Whereas, it is further ordered, adjudged and decreed that said Special Master shall sell said property for cash, or for cash and bonds, and as an entirety, and without appraisal and without the benefit of any stay, valuation or redemption laws, at public auction, to the highest bidder therefor, at the city of —, in the state of —; and

Whereas, it is further ordered, adjudged and decreed that notice of the time and place of said sale shall be given by said Special Master by advertising the same at least three times in each week for the term of five weeks preceding the day of sale, in some newspaper published in the city of Boston, in some newspaper published in the city of New York, and in some newspaper published in the city of Topeka, state of Kansas, and also once a week for four weeks in some newspaper published in ——— county, ———; and that such sale shall be had at such time and place as said Special Master shall in said notices of said sale appoint; and

Whereas, it is further ordered, adjudged and decreed that said Special Master shall receive no bid at such sale for a less sum than one million dollars (\$1,000,000), and no bid from any person who shall not first deposit with him as a pledge that such bidder will make good the bid in case of its acceptance, the sum of seventy-five thousand dollars (\$75,000) in money or said bonds secured by said mortgage to the complainant to the amount of two hundred thousand dollars (\$200,000), exclusive of interest; the deposit so received from the successful bidder shall be applied on account of the purchase price; the balance of the purchase price may be paid either in cash, or the purchaser may satisfy the same in whole or in part by paying over and surrendering any of the outstanding and unpaid receiver's certificates, and by properly releasing and discharging any claims which have heretofore, or may be hereafter, adjudged by this court to be valid and prior in right to the lien of said mortgage, and by presenting and surrendering said first mortgage bonds and the overdue and unpaid coupons pertaining thereto. For more particularity, both as to the property to be sold and the terms of the sale, reference is made to the decree of foreclosure entered in the above suit.

Now, therefore, public notice is hereby given that I, P. D., Special Master, in pursuance of the provisions of said decree, will, on Monday, the ——— day of ———, A. D. ———, between

the hours of 11 o'clock a. m. and 2 o'clock p. m. of said day, in the city of —, in the state of —, at the front door of the court-house in said city, sell at public auction to the highest bidder, in accordance with the terms and conditions of said decree, the above described property, lands and premises, and apply the proceeds thereof as is by said decree made and provided.

P. D.,

Special Master, District Court of the United States, District of —.

No. 895.

Advertisement of Sale by Special Master.

[Caption.]

By virtue of a decree of foreclosure and sale made and entered by the district court of the United States for the — division of the — district of —, held at — therein, on —, in the above entitled cause, I, as special master appointed for such purpose by the said decree, will sell at public vendue, to the highest bidder for cash, in bar and free of all right and equity of redemption in said defendants, P. C. and A. C., at the door of the court-house of — county, in the city of —, on the — day of —, between legal hours, the following described lot or parcel of ground described in the bill in said cause and situate in the city of —, county of —, and state of —, to-wit: [*Describe property to be sold.*]

J. N., Special Master.

No. 896.

Report of Special Master of no Sale for Want of Bidders.

[Caption.]

To the Honorable the Judge of the District Court of the United States for the — District of —:

By the decree entered by this honorable court in the above

styled cause on June —, which decree was amended by a supplemental decree entered therein on —, I was appointed Special Master to sell the railroad, franchises and other property of the C. & D. Railroad Company upon the terms and in accordance with the provisions of said decree as amended.

And the said railroad company, and those claiming under it, and all persons having a right to redeem under said decree, having each failed on or before the — day of —, the time limited in said decree as amended to pay the sums adjudged by said decree as amended to be due to the persons by said decree adjudged to have liens upon the property and franchises of said railroad company under the statute of the state of —, entitled "An Act to create a lien on canals, railroads and other public improvements in favor of persons furnishing labor and materials for the construction and improvement thereof," and having failed to pay the sums, with interest, adjudged due to complainant, and the costs of this suit, I proceeded to advertise a sale of said property and franchises for on the — day of —, upon the terms and in accordance with the provisions of said decree as amended, by causing to be inserted once a week for four successive weeks before said day of sale, in each of the following named newspapers, to wit, the — Commercial, a newspaper published in the city of —; the — Sun, a newspaper published in the city of —, and the — Enterprise, a newspaper published in the city of —, the following advertisement, to wit: [*Here insert advertisement in full.*]

On Saturday, the — day of —, I attended at the time and place stated in said advertisement, and then and there proclaimed the terms and conditions of sale, and made public outcry, for sale to the highest bidder, of said railroad, franchises and property of said railroad company, upon said terms and conditions:

And no person offering to bid for said railroad, franchises and property, I thereupon, as authorized by said decree, declared said sale postponed until Monday, the — day of

—, unless this honorable court should enter some additional order in regard to the sale of said railroad franchises and property.

All of which is reported to this honorable court for its information and such action as it may deem proper in the premises.

E. M.,
Special Master.

Costs of advertisement:

| | |
|--------------------|----------|
| — Commercial | \$68 80 |
| — Sun | 20 00 |
| — Enterprise | 20 00 |
| | <hr/> |
| Total | \$108 80 |

No. 897.

Supplemental Report of Special Master to Make Sale, Postponing Sale.

To the Hon. the Judge of the District Court of the United States for the — District of —:

Since my report of offering for sale the railroad, franchises and other property of the C. & D. Railroad Company upon the — day of —, and in accordance with the postponement of said sale then announced, on Monday, the — day of —, I attended at the hour and place stated in the advertisement set forth in said former report, and then and there proclaimed the terms and conditions of sale, and made public outcry for sale to the highest bidder of said railroad, franchises and property of said railroad company upon said terms and conditions set forth in said former report, and no person offering to bid for said railroad, franchises and property, I thereupon, as authorized by the decree herein, declared said sale postponed until the further order of this honorable court.

All of which is reported to this honorable court for its information and such action as may be deemed proper in the premises.

E. M.,
Special Master.

No. 898.

**Report of Special Commissioner to Make Sale of
Postponement.**

To the Hon. the Judge of the District Court of the United States for the ——— District of ———:

By the decree entered by this honorable court in the above styled cause, on the ——— day of ———, which decree was amended by a supplemental decree entered therein on the ——— day of ———, and further amended by a supplemental decree entered on the ——— day of ———, I was appointed Special Master to sell the railroad, franchises and other property of the C. & D. Railroad Company upon the terms and in accordance with the provisions of said decree as amended. And the said railroad company and those claiming under it, and all persons having a right to redeem under said decree, having each failed on or before the ——— day of ———, the time limited in said decree as amended, to pay the sums adjudged by said decree as amended to be due to the persons by said decree adjudged to have liens upon the property and franchises of said railroad company under the statute of the state of ———, entitled "An Act to create a lien on canals, railroads and other public improvements in favor of persons furnishing labor and materials for the construction and improvement thereof," and having failed to pay the sums, with interest, adjudged due to complainant, and the costs of this suit, I proceeded after ———, to advertise a sale of said property and franchises for ———, upon the terms and in accordance with the provisions of said decree as amended by causing to be inserted once a week for four successive weeks before said

day of sale in each of the following named newspapers, to wit: The — Commercial, a newspaper published in the city of —; the — Sun, a newspaper published in the city of —, and the — Enterprise, a newspaper published in the city of —, the following advertisement, to wit: [*Here insert advertisement in full.*]

On Saturday, the — day of —, I attended at the time and place stated in said advertisement, and then and there proclaimed the terms and conditions of sale, and made public outcry for sale to the highest bidder of said railroad, franchises and property of said railroad company, upon said terms and conditions.

And no person offering to bid for said railroad, franchises and property, I thereupon, as authorized by said decree, declared said sale postponed until Saturday, —, unless this honorable court should enter some additional order in regard to the sale of said railroad, franchises and property; and I posted in a public place in the station building on the property of said railroad company at — a notice of said postponement, in words and figures as follows, to wit: [*Here insert notice of postponement in full.*]

I further report that in pursuance to said notice of postponement, on Saturday, the — day of —, I attended at the hour and place stated in said advertisement, and then and there proclaimed the terms and conditions of sale and made public outcry for sale to the highest bidder of said railroad, franchises and property of said railroad company upon said terms and conditions; and no person offering to bid for said railroad, franchises and property, I thereupon, as authorized by said decree, declared said sale postponed until Saturday, the — day of —, unless this honorable court should enter some additional order in regard to the sale of said railroad, franchises and property; and I posted in a public place in the station building on the property of said railroad company at —, a notice of said postponement in words and

figures as follows, to-wit: [*Here insert notice of postponement in full.*]

All of which is reported to this honorable court, for its information and such action as it may deem proper in the premises.

E. M.,
Special Master.

No. 899.

Report of Sale by Special Master.(1)

[*Caption.*]

To the Hon. the Judge of the District Court of the United States for the ——— District of ———:

The undersigned, appointed Special Master in the above styled cause by a decretal order entered therein on ———, and amended ———, to make sale of the property and franchises lately belonging to the C. & D. Railroad Company, respectfully reports:

That having on ——— postponed the sale of said property and franchises, under authority of said decretal order, as reported to the court in my report filed herein on ———, which report is referred to and made a part of this report, I caused the written notice of postponement referred to in said report, which, on ———, I affixed to the depot of said railroad company at ———, upon the property lately belonging to said company, to be published once a week for four successive weeks before ———, the day to which said sale was postponed in the ——— Commercial, a newspaper published in ———, and in the ——— Sun, a newspaper published in ———.

I further report that on the day fixed for said sale, to wit, ———, I proceeded to the city of ———, and then and there at the time and place advertised for said sale, offered for sale to the highest bidder the said railroad property and franchises lately belonging to said railroad company, in accordance with the terms of said decree, of which terms I then and

there made public proclamation; at which time and place G. H., J. K., L. M., N. P. and R. S., having deposited with me the sum of \$—— in cash and certified checks satisfactory to me, bid for said railroad property and franchises the sum of —— dollars, and assumed all of the liabilities of the receiver herein which have accrued since October ——, and undertook to return to the fund in court all sums which may have been, or may be, used out of said fund in repair or betterment of said railroad. Said bid being the only bid made or offered at said sale, I thereupon struck off said railroad property and franchises to said bidders as purchasers.

I further report that in accordance with the terms of said sale, said purchasers having executed and delivered to me their two bonds; the first bearing date ——, payable on or before three months after the date thereof, with interest at 6 per cent. per annum until paid, for the sum of —— (\$——) dollars, and executed by said purchasers, and the second bearing date ——, payable on or before six months after the date thereof, with interest at 6 per cent. per annum until paid, for the sum of —— (\$——) dollars, executed by said purchasers as principals and by the Fidelity & Deposit Company of —— as surety.

Said bonds were executed by said G. H. and J. K., by A. F., their attorney in fact, and by said L. M., N. P. and R. S., by G. W., their attorney in fact; and said six months' bond was executed by the Fidelity & Deposit Company of ——, by W. S., its general agent and attorney in fact.

I further report that on the —— day of ——, under authority of said decree authorizing the purchaser at said sale, to anticipate the payment of either of said bonds, said G. H., J. K. and L. M., paid me upon said six months' bond the sum of —— (\$——) dollars, which sum I have endorsed as a credit upon said six months' bond as of said date.

I return into court herewith, as part hereof, said bonds, together with said powers-of-attorney, excepting the power-of-attorney from the Fidelity & Deposit Company to W. S.,

which is on file in the clerk's office of this court; and offer to pay into court herewith the sum of — (\$—) dollars, being the said cash payment of \$— on said payment of \$— made as aforesaid upon said six months' bond.

All of which is respectfully submitted. E. M.,

Special Master.

(1) Foster's Fed. Prac., 5th ed., Sec. 394, p. 1245; Clark v. Iowa Fruit Co., 185 Fed. 604.

No. 900.

Order Nisi Confirming Sale.(1)

[Caption.]

The report of E. M., heretofore appointed special master to make the sale heretofore ordered and decreed, having been duly filed, and it appearing therefrom that said special master duly struck off and sold as one parcel and as an entirety the whole of the properties of every sort and description of the C. & D. Railway Company, wherever situated and of whatever sort and nature, free and clear of all liens of each and every one of the parties to this cause, but subject to the lien of the mortgage of the E. & F. Railroad Company so far as said lien extends, to R. C., for the sum of — dollars;

It is, on motion of said complainant, the A. B. Trust Company, ordered that said report and sale be confirmed, unless cause to the contrary thereof be shown in eight days after notice, to the parties to the several bills of complaints in this cause, of their solicitors, of the filing of said report.

(1) As to the practice of entering an order nisi confirming a sale. See Pewabic Mining Co. v. Mason, 145 U. S. 363-4; Re Nevada-Utah Mines & Smelters Corporation, 198 Fed. 497.

No. 901.

Decree Denying Motion to Set Aside Sale and Order Absolute Confirming Sale.

[Caption.]

Now came on for hearing the motion of the defendant, the C. & D. Railway Company, to set aside the sale of the railroad

and other property of said defendant, for the reasons in said motion set forth, which motion was filed at the clerk's office of this court on the —— day of ——; and the court having heard the parties by their counsel and being now fully advised in the premises, finds that said motion should not be granted, and it is ordered, adjudged and decreed that the same be overruled and denied.

And thereupon there was submitted to the court the return of H. G., the Master heretofore appointed for that purpose, of his proceedings under the order of sale issued to him in pursuance of the decree of foreclosure and sale heretofore entered herein, and it appearing from said return and the proceedings of said Master that he has in all things complied with the provisions of said decree and order, and has advertised and sold the property in said decree and order described in all respects in accordance therewith, and that R. C. Martin was the highest and best bidder for all of said property, and bid therefor and for each part thereof a sum equal to the sum fixed in said decree for the same and for the whole property a sum greater than the upset price fixed therefor, and has deposited with the Master the sum of \$——, the sum required by said decree, and said Master has deposited the same in the registry of the court, and the purchaser has otherwise complied with the terms of said purchase.

And it appearing that the objections of the defendant railroad company to the confirmation of said sale have, as hereinbefore recited, been filed in its motion to set aside said sale and overruled as hereinbefore provided, and the court now coming to the hearing of complainant's motion to confirm said sale and approve of the report and proceedings of said Master, and being now fully advised in the premises, do find that the same are in all respects regular and legal, and that said proceedings and sale ought to be confirmed.

It is therefore ordered, adjudged and decreed that said proceedings and sale be and the same are hereby in all respects confirmed, and that upon full payment being made by said

purchaser, as provided in said decree, that deeds of conveyance be made by said H. G., Special Master as aforesaid, to said purchaser, R. C., or his assigns, of all the property, rights, privileges and immunities in said decree described, in accordance with the terms and subject to the conditions of said decree.

No. 902.

Petition to Open Sale before Confirmation.

[Caption.]

Your petitioners, D. S., C. M., E. T. and D. A., for themselves and all persons similarly interested and willing to join herein, would respectfully represent unto your honor that the sale made herein on —, should not be confirmed, but on the contrary, should be set aside and a new sale ordered.

Your petitioners represent that the amount of the mechanic's lien claims in this case, without counting interest since the last judgment in favor of your petitioners, amount to about \$——. The amount which the property brought at the sale on October —, was \$——, but the purchaser will have to pay besides that about \$——, making \$——.

The amount of the receiver's certificates and costs to come out of this fund is \$——, leaving only \$—— distributable among the \$—— of mechanic's lien claims. This will yield to these claims only 10½ per cent.

This claim of your petitioners represents labor and material furnished by them in building this road. It is for so large an amount as that ever since it failed of payment your petitioners have been seriously crippled in their business and the loss to them is of most serious consequence.

Your petitioners say that they have exercised all diligence that they knew how or were capable of in endeavoring to have the property bring a fair price. When the sale was advertised through the fall of — your petitioners, at great expense to themselves, and after great labor, procured an

agreement, as they supposed among the lienholders, by which the property could be bought in. The deposit was furnished through your petitioners, and the bonds for the deferred payment arranged for at their expense. They accordingly bought in the property at \$——, which they believed at the time was much less than its value.

It appeared that after they had made their deposit and executed their bonds, a large mechanic lienholder, who they in good faith believed had come into the plan, refused to be bound by it. Without the adherence of this lienholder it was impossible for these petitioners to carry out the plan. They therefore, after a great deal of exertion, arranged a transfer of their bid to X. Y., at \$——. This your petitioners believed to be a very great sacrifice, but to it their lack of capital compelled them.

Upon the failure of the said X. Y. to comply with the terms of payment, the property was again advertised for sale; whereupon these petitioners again endeavored with all diligence, to procure some person to bid for the property or some person to join with them in bidding for the property. When the sale was about to come off, on ——, one of these petitioners came to ——. They had arranged with J. W. to raise the \$—— with which to make the deposit in order to make a bid. In an affidavit accompanying the petition they have fully detailed the circumstances under which they failed to obtain the benefit of this deposit. If they had obtained it they would have bid at least \$—— and could and would have complied with all the terms of sale. They would only have stopped there in the fear that with their diminished resources they might not be able to promptly comply with the terms of sale at a higher price.

On the evening of ——, your petitioners were informed by the counsel for the purchaser, X. Y., that he expected upon the next day, to bid the full amount due by the said X. Y., and that in order to qualify himself to make this bid he expected to receive \$—— from Philadelphia. He further in-

formed your petitioners that the money for the deposit, \$——, was to be deposited in a certain national bank in Philadelphia to the credit of the American National Bank of the city of Louisville; that the Philadelphia bank was to telegraph to the American National Bank the fact of this deposit, and the American National Bank was thereupon to certify a check for \$—— to the said counsel of the said X. Y.; that by some mischance the money had not been offered for deposit in the Philadelphia bank until about five minutes after banking hours; that at that time a cashier's check upon a bank in Camden (which is just across the river from Philadelphia) had been presented for deposit, but the cashier of the Philadelphia bank preferred to wait until the next morning before receiving the deposit as cash and notifying the American National Bank at —— . To avoid all contingencies the said counsel of X. Y. thereupon procured the president of the American National Bank in Louisville to give the counsel of these petitioners a cashier's check for \$——, and instructed the counsel for these petitioners to deliver the said check to the counsel for the said X. Y. at —— (where the sale was to be made) upon telegraphic advice, on the morning of the —— of ——; that the deposit had been duly made in Philadelphia, to the credit of the American National Bank.

The petitioners state that these statements made by the counsel for the said X. Y. were all made in the best faith and were fully believed by him and by these petitioners to be exactly true. Your petitioners therefore felt satisfied that the said counsel for X. Y. would bid at the sale an amount sufficient to cover what was due from X. Y., and would have the \$—— to put up with the Master making the sale, in order to justify the bid.

The petitioners, with their counsel, and with the counsel for the purchaser, went to —— next day, ——, arriving there about 11 o'clock. The sale was advertised to come off between 10 and 2. Inquiry was immediately made as to whether any telegram had come from the American National Bank

No. 903.**Petition to Join in Foregoing Petition to Set Aside a Sale.**

[*Caption.*]

The lienholders whose claims have been adjudged in the decree in their favor, viz.: [*Naming them*], respectfully represent to the court that the application made by D. S. to this honorable court to refuse to confirm the sale made in this suit on the — day of —, and to order a new sale, is clearly beneficial to all the parties to said suit interested in the proceeds of sale, viz.: the laborers and contractors in whose favor liens have been adjudged.

Petitioners further respectfully represent that they are willing that a resale be ordered upon the terms specified in the said petition of D. S., viz.: that the successful bidders at the late sale aforesaid be reimbursed all their expenses out of the proceeds of sale accruing to said lienholders; that the said sale be made upon any short notice or any notice which the court may direct and upon such other terms as the court may consider proper; and they unite in the prayer of said petition of said D. S. and pray as is prayed in said petition.

R. & R.,

Attorneys for Petitioners.

No. 904.**Petitions Consenting to Set Aside a Sale.**

[*Caption.*]

Your petitioners, S. Bridge Company, J. W. and the Carnegie Steel Company, limited, would respectfully join in the petition to set aside the sale which was made on October —, and state that they are willing that the purchaser may have all just allowances, and that the court may resell the property at such short date as may seem to it fit.

Your petitioners will ever pray.

X. & X.,

Attorneys for Petitioners.

No. 905.**Order Setting Aside Sale (1).****[Caption.]**

This cause having come on to be heard upon the application of the purchasers at the sale made herein —, and reported to the court —, to confirm the said sale, and upon the petitions and exceptions of [*naming them*], and upon the proposition of the said X. Y., and the proposition of J. S., trustee, and upon the affidavit of the said purchasers and two affidavits of D. A., one of A. P., and one of S. T., and the court being advised, it is ordered, adjudged and decreed as follows:

First. That the application of the said purchasers to confirm the sale be and it is hereby overruled, that the petitions seeking to set aside the sale are sustained, and the said sale is hereby set aside and held for naught.

Second. That the Special Master, Hon. E. M., shall forthwith proceed to sell the property described in the decree entered herein on the — day of —, as amended —, upon exactly the terms set out in the said decree as amended, and after the same notice and at the same place; but the court having accepted the bid of J. S., trustee, for the purpose of ordering a resale the Master shall start the biddings at said sale with a bid of \$— in the name of J. S., trustee.

Third. The said E. M. shall forthwith pay back to the purchasers the money paid to him by them, being the sum of — dollars, said payment may be made to B. H., Esq., the attorney of record of said purchasers.

Fourth. J. S., trustee, consenting, it is ordered that he pay over to S. M., receiver herein, the one hundred thousand dollars presented by him, the said J. S., trustee, as security, for his compliance with the offer made by him herein, and the said S. M., receiver, now in open court, has had delivered to him the said — dollars. The said S. M., receiver, shall pay into court the sum of — dollars, to be applied as here-

inafter directed. He shall use the balance of said fund, to wit, — dollars in paying that amount of receiver's certificates heretofore issued herein, paying the same to the order of their serial numbers, beginning with the lowest. He shall execute to the said J. S., trustee, a receiver's certificate dated this day in the sum of — dollars, payable whenever the court shall order, bearing 4 per cent. per annum interest from date until paid. He shall retain possession thereof subject to the order of the court. If the said J. S., trustee, becomes the successful bidder, the said receiver's certificate shall be applied upon his bid; if he be not the successful bidder, he shall stand as the owner thereof subject to a priority in favor of the other outstanding receiver's certificates.

Fifth. The twenty-five thousand dollars above mentioned to be paid into court by the said S. M., receiver, is so paid into the end that it may be applied to such allowances as the court may make to said purchasers. They shall be forthwith entitled to such an amount thereof as represents the interest upon the money paid by them to the Hon. E. M., Special Master, from the date it was so paid until this date, and the further sum of — dollars disbursed by them in securing the Fidelity & Deposit Company of — to become surety upon their bond.

Leave is given the said purchasers to present their petition herein setting forth what other items of allowance they are justly entitled to.

Sixth. All questions as to how far the allowances made to the purchasers herein shall be paid by J. S., trustee, and how far they shall be charged upon the fund realized from the sale, and how far they shall be charged against X. Y., the former purchaser herein, are reserved for further consideration.

Seventh. X. Y. and the Guarantors' Finance Company of Philadelphia, by D. W., their attorney, consent to the entry of this order, and this cause is retained for the purpose of making such further orders as may be necessary to exact from the said X. Y. and the Guarantors' Finance Company of

Philadelphia any deficiency that may be due upon their bonds after the sale is made herein.

Eighth. The receiver shall report to the court his action under this order, within ten days from this date, and accompany the same with the receiver's certificates paid by him, properly canceled, and he shall cause the new certificate issued by him herein to be registered by the clerk of this court, the form thereof shall be the similar to the ones heretofore issued, except that it shall show upon its face that it is inferior to the other outstanding certificates issued prior to this date.

Ninth. The purchasers of the property at sale of —, object to the entering of this decree and all parts thereof and except to the several rulings of the court.

(1) This order was entered in *Magann vs. Segal*, 92 Fed. Rep. 252, 34 C. C. A. 323, where the circumstances under which a sale may be set aside are fully considered and the cases reviewed. See also *Pewabic Mining Co. v. Mason*, 145 U. S. 356; *Foster's Fed. Prac.*, 5th ed., Sec. 394, pp. 1249 to 1252; *Cowden v. Wild Goose Mining & Trading Co.*, 199 Fed. 561; *Louisville Trust Co. v. Louisville, etc., Ry. Co.*, 174 U. S. 674, 43 L. Ed. 1130.

No. 906.

Decree Confirming Sale of R. R. Property (1).

[*Caption.*]

Now, on the 17th day of April, 1900, come again the parties by their respective solicitors, and come also the purchasers, Morton S. Paton and Richard B. Hartshorne, by their counsel, and the motion of the complainant, Continental Trust Company of the city of New York, that the report of Frank H. Shaffer and Merrill Moores, the Special Masters, filed herein on the 2d day of April, 1900, should be approved and confirmed, and that the sale of the mortgaged railroad, equipment, franchises and property of the respondent, Toledo, St. Louis & Kansas City Railroad Company, should be confirmed and made absolute, came on to be heard.

And it appearing by the report of said Special Masters that said Special Masters have fully complied with the directions of the decree dated the 1st day of April, 1898, entered in this cause, and of the decree entered in this cause, dated November 11, 1899, modifying said decree of April 1, 1898, and of the decretal order entered in this cause on January 19, 1900, and of the decree entered in this cause on said January 19, 1900, re-entering and confirming said decree dated November 11, 1899, as to the sale of said railroad, equipment, franchises and property; that said railroad, equipment, franchises and property have been duly advertised, offered for sale and sold to said purchasers; that said purchasers have made the deposit and payment required by said decrees and by the terms of sale, and that said sale ought to be confirmed.

It is therefore ordered, adjudged and decreed, that the said report of said Special Masters be, and the same hereby is, in all things approved and confirmed, and that said sale to said Morton S. Paton and Richard B. Hartshorne, as joint tenants and not as tenants in common, as an entirety, without valuation, appraisement, redemption or extension, of all and singular the railroad, equipment, franchises and property of the respondent, Toledo, St. Louis & Kansas City Railroad Company, described in and by said decree entered in this cause, and dated the 1st day of April, 1898, and, by said decree, adjudged to be subject to the lien of the first mortgage of said respondent railroad company, at and for the sum of twelve million two hundred thousand dollars by them bid, be, and the same hereby is, in all things ratified, approved, confirmed and made absolute.

And the said purchasers having deposited with the complainant, Continental Trust Company of the city of New York, for the purpose of paying, satisfying and making good the bid of such purchasers for said mortgaged railroad, equipment, franchises and property, first mortgage bonds of said respondent, Toledo, St. Louis & Kansas City Railroad Company, issued under said first mortgage of said respondent rail-

road company, dated June 19, 1886, to the amount at par of \$8,814,000, bearing the coupon maturing June 1, 1893, and all subsequent coupons and producing the certificate or certificates of said trust company that it so holds the same subject to the order of said Special Master, it is

Ordered, adjudged and decreed, that such provision for the payment of the residue of said bid of said purchasers, is satisfactory to this court, and is hereby approved by this court.

It is further ordered, adjudged and decreed, that upon the delivery by said purchasers to said Special Masters of said certificate or certificates of deposit of said trust company, the Special Masters sign, seal, execute, acknowledge and deliver a deed or deeds of conveyance to said purchasers, as joint tenants and not as tenants in common, or to the persons or corporations to whom they may assign their rights, of all and singular the railroad, equipment, franchises and property so sold as aforesaid; that the respondent, Toledo, St. Louis & Kansas City Railroad Company, the complainant, Continental Trust Company of the city of New York, as surviving trustee under said first mortgage of said Toledo, St. Louis & Kansas City Railroad Company, and the receiver in this cause respectively, and all other parties to this cause, join in said deed or deeds of said Special Master, or execute and deliver separate conveyances of their property embraced therein on demand of said purchasers, their successors or their assigns, and that in default of such deed or deeds by any of the parties hereto, this decree shall have the force and effect of such deed or deeds, conveying, all its, their or his interest in said railroad, equipment, franchises and property so sold as aforesaid; that said purchasers shall have the right to assign their interest as an entirety or in parcels as said purchasers may determine; that upon filing such assignments with said Special Masters, said Special Masters and said parties shall make deed or deeds of conveyance accordingly, and that, in the event of any assignment by said purchasers of their said bid or interest, or any conveyance by them of said railroad,

equipment, franchises and property, may be transferred to and by said purchasers on account of the purchase of said railroad, equipment, franchises and property, may be transferred in and assumed by such transferee or transferees, grantee or grantees, and thereupon said purchasers shall individually be discharged from all such obligations and liability.

It is further ordered and decreed that upon the delivery to said purchasers or to their successors or their assigns of said deed or deeds of conveyance to be made by said Special Masters, the grantee or grantees therein shall fully possess and be invested with said railroad, equipment, franchises and property so sold and so conveyed as the absolute owners thereof; that on the exhibition to him of said deed or deeds, the receiver of this court who, until such exhibition thereof to him shall continue as heretofore, the operation of the mortgaged premises, is authorized and directed, and is required, to let said grantee or grantees into possession of the premises conveyed; that the receiver or any party to this cause having possession of the same, deliver to said grantee or grantees all property embraced in said Special Masters' deed or deeds, together with and including any property and income in the hands of the receiver at any time acquired or received by him in the management of the mortgaged premises down to the time of such delivery of possession, subject, nevertheless, as hereinafter set forth and that said purchasers, their successors or their assigns on receiving said conveyance or conveyances, shall be and are hereby, subrogated to all and singular the rights of all parties to this action with respect to the railroad, equipment, franchises and property sold as aforesaid, with the right to prosecute and defend all issued in this suit and all suits, actions and proceedings involving the same, whether in the name of any of the parties hereto, or of said receiver, or otherwise, including the right to prosecute proceedings in error or on appeal.

It is further ordered and decreed that said first mortgage bonds and coupons deposited with the complainant Continen-

tal Trust Company of the city of New York, and forming the subject of its certificates of deposit which may be delivered to said Special Masters, remain on deposit with said complainant trust company to abide the further order of the court herein.

It is further ordered and decreed, that, upon making in accordance with said decree of April 1, 1898, payment of the amounts by said decree directed to be paid in priority to the first mortgage bonds and the interest thereon, any residue of the fund realized from said sale, shall be applied, in accordance with said decree and as therein directed, toward the payment of the amount by said decree adjudged to be due at the date thereof, in respect of said first mortgage bonds, to wit, the sum of \$12,028,500, with interest on said amount from the date of said decree to the date of payment; that the distribution of the proceeds of sale, and all allowances and compensation are reserved for future order, and that the delivery of said deed or deeds of conveyance and of the possession of said railroad, equipment, franchises and property sold as aforesaid, shall be subject to the right of the court to require such further payment or payments to be made in cash on account of said purchase price bid in order to meet claims which, under said decree, are or may become payable out of the proceeds of sale in priority to the said amount due on said first mortgage bonds as the court may from time to time direct, and the court reserves the right in case such purchasers, their successors or their assigns, shall fail or neglect to make any payment in cash on account of any unpaid balance of the purchase price bid within thirty days after the entry of an order requiring such payment and service of a copy of said order upon said purchasers, their successors or their assigns, to retake and resell the mortgaged railroad, equipment, franchises and property, and jurisdiction of this cause is retained for that purpose.

(1) This decree was entered in the case of Continental Trust Co. *vs.*

Toledo, St Louis & Kansas City R. R., pending in circuit court of United States for the northern district of Ohio.

Where order of confirmation may be made by judge in vacation. See Central Trust Co. v. Sheffield, etc., Ry., 60 Fed. 9.

No. 907.

Special Master's Deed.(1)

**The District Court of the United States
for the Western District of Tennessee.**

| | |
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| The Farmers' Loan & Trust Company | } In Equity. |
| <i>vs.</i> | |
| The Memphis & Charleston Railroad Company, the Central Trust Com- pany of New York and Samuel Thomas. | |
| | |

An indenture, made the 26th day of February, 1898, by and between

Louis B. McFarland, special master, duly appointed in the suits in equity hereinafter mentioned, party of the first part, and

Southern Railway Company and Adrian Iselin, Jr., Melville E. Ingalls, Jr., and John W. Fewell (the said Iselin, Ingalls and Fewell receiving this conveyance as joint tenants and not as tenants in common, and hereinafter being called the "Purchasers"), parties of the second part;

Witnesseth:

Whereas, on or about the 2d day of August, 1895, the Farmers' Loan & Trust Company, trustee, as complainant, filed its bill of complaint, in equity, in the district court of the United States of America for the western district of Tennessee, western division, against the Memphis & Charleston Railroad Company, a corporation, created by or existing under the laws of the states of Tennessee, Alabama and Mississippi, and the Central Trust Company of New York and Samuel

Thomas, as defendants, in which suit in equity it was sought to foreclose the Memphis & Charleston Railroad Company's consolidated first mortgage, dated the 20th day of August, in the year 1877, and upon or about that day duly executed, acknowledged and delivered by said railroad corporation to said the Farmers' Loan & Trust Company, in which suit it was proposed to sell the whole of the mortgaged property and premises, being the railroads, property, privileges and franchises of said the Memphis & Charleston Railroad Company, as more specifically described in said consolidated first mortgage; and

Whereas, such proceedings were had in the said cause that on the 2d day of March, 1897, a decree of foreclosure and sale was entered therein by the said district court of the United States for the western district of Tennessee, western division, at Memphis, Tennessee, and upon November 24, 1897, a decree supplemental thereto was also entered by said court pursuant to the mandate of the circuit court of appeals for the sixth circuit; and

Whereas, similar decrees foreclosing such mortgage ancillary to said decree of said district court of the United States for the western district of Tennessee, western division, made on March 2, 1897, were subsequently entered on or about the 5th day of April, 1897, in similar suits brought by the Farmers' Loan & Trust Company, complainant, against the said the Memphis & Charleston Railroad Company, the Central Trust Company of New York and Samuel Thomas, as defendants, in the district court of the United States for the several districts hereinafter mentioned; that is to say, the eastern district of Tennessee, southern division; the northern district of Alabama, northern division, and the northern district of Mississippi, eastern division; and

Whereas, in and by the said decrees the said Louis B. McFarland, party of the first part, was appointed special master to execute the said foreclosure decrees and to make the sale of property therein provided for and directed; and

Whereas, in pursuance of such appointment the said Special Master afterwards, to wit, on the 26th day of February, 1898, after due advertisement and notice of sale, as prescribed in the said decrees, and in said supplemental decree, at public auction at the railroad station upon the railroad of the Memphis & Charleston Railroad Company, in the city of Memphis and state of Tennessee, on the day and at the hour fixed by said Special Master in his advertisement of sale, in accordance with the request of the solicitors for the complainant, and in the manner specified and directed in the said decrees and in the said supplemental decree, did sell all and singular the railroad, equipment, property and premises, rights, assets, privileges and franchises, which the said Special Master was directed by the said decrees and supplemental decree to sell, upon the terms and conditions in said decrees and said supplemental decree fully and at large set forth, to which decrees reference is hereby specially and expressly made; and

Whereas, at such sale the said Adrian Iselin, Jr., Melville E. Ingalls, Jr., and John W. Fewell became the purchasers of all such railroad and property and franchises, offered and sold as a single parcel, for the sum of two million five hundred thousand dollars (\$2,500,000), the said purchasers having made such purchase as joint tenants and not as tenants in common, for the purpose and with the intent of having the title of all the said railroad, property, rights, assets and franchises, vested in and held by the Southern Railway Company, a corporation created and existing under the laws of the state of Virginia, by an Act of Assembly, approved February 20, 1894, as to all said railroad, real estate and franchises, within the states of Tennessee and Alabama, and, also, as to all equipment, chattels and choses in action sold, wherever situate, said corporation having complied with all conditions of law precedent to the transaction of business within the said states; and vested in and held by the Memphis & Charleston Railway Company, a corporation to be organized by that

name in the state of Mississippi, as to all of the railroad, real estate and franchises, within the state of Mississippi; and

Whereas, the said purchasers, in part discharge of their said bid, have paid to the said Special Master the sum of fifty thousand dollars (\$50,000) in a certified check upon the National Union Bank of New York City, and have also delivered to him the certificate of the Guaranty Trust Company of New York that it holds, subject to his order, and entitling him, or his successor, on surrender thereof to receive the same, 2,257 of the consolidated first mortgage bonds of the Memphis & Charleston Railroad Company for the principal sum of \$1,000 each with all unpaid coupons attached to said bonds, out of a total issue of 2,264 of such consolidated first mortgage bonds, to be canceled or credited, as provided in said foreclosure decree, and in said supplemental decree; and

Whereas, on the 26th day of February, 1898, the said Special Master did duly make his report of said sale to the said District Court of the United States for the western district of Tennessee, western division, that being the court exercising original jurisdiction in said suit, which said report, and the said sale, were by decree of said court, entered of record, duly approved and confirmed, subject to the compliance by the purchasers with all the terms and conditions of said foreclosure decrees and sale, and the said decree of confirmation; and

Whereas, an order has been made in and by said District Court of the United States for the western district of Tennessee, western division, authorizing and directing the said Louis B. McFarland, party of the first part, as Special Master, upon the terms and conditions set out in said decree of confirmation, to sign, seal, execute, acknowledge and deliver a conveyance of all and singular the railroad, property, premises, rights, assets, privileges and franchises so sold to the said purchasers thereof, subject, however, as recited in said decree of foreclosure and said supplemental decree, to a certain statutory lien in favor of the state of Tennessee and to the

mortgages, as set forth in said decree of foreclosure and said supplemental decree, and upon the condition that to the extent that the assets, or the proceeds of assets, in the receivers' hands should be insufficient, such purchasers, their successors or assigns, should pay, satisfy and discharge (a) any unpaid compensation which should be allowed by the court to the receivers; (b) any unpaid indebtedness and obligations or liabilities which were duly contracted or incurred by the receivers before delivery of possession of the property sold; and (c) also any unpaid indebtedness or liability contracted or incurred by said the Memphis & Charleston Railroad Company in the operation of its railroad, which is prior in lien or superior in equity to such consolidated first mortgage of August 20, 1877, except such as had been paid and satisfied out of the income of the property in the hands of the receivers, or out of such other assets upon the court adjudging the same to be prior in lien or superior in equity to said mortgage, and directing the payment thereof, no obligation, nevertheless, being imposed upon, or being required to be assumed by, the purchasers to pay or discharge either the statutory lien in favor of the state of Tennessee, or the said first mortgage bonds, or the said second mortgage bonds of the Memphis & Charleston Railroad Company, mentioned and described in said decrees and in said supplemental decree, and subject to which the property was sold; and subject, also to all and singular the terms and conditions in said decree of foreclosure and said supplemental decree set forth, and subject, also, to pay into the registry of the District Court of the United States for the western district of Tennessee, western division, all such sums as had been, or might be, ordered by said court for the payment of such claims and liabilities, which are entitled to preference in payment out of the proceeds of sale prior to the bonds secured by said mortgage of the Memphis & Charleston Railroad Company, and subject, also, to all other claims filed in the said cause, but only when and as the said District Court of the United States for the western district of Tennessee,

western division, should allow such claims and adjudge the same to be prior in lien to mortgage foreclosed in said cause, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto; and

Whereas, at the time of said order of the said District Court of the United States for the Western District of Tennessee, western division, this indenture and the form thereof was submitted to, approved by, and filed with, said court; and

Whereas, the said purchasers have complied with and fulfilled all the terms and conditions of the said order and decrees, so far as the same are now ripe for performance; and are entitled to a conveyance of the property so purchased by and confirmed to them:

Now, therefore, this indenture witnesseth: That the said party of the first part, to wit:

Louis B. McFarland, as such Special Master as aforesaid, for and in consideration of the premises and of the sum of two million and five hundred thousand dollars (\$2,500,000), paid and to be paid in accordance with the terms of the said decrees, and in consideration that the said parties of the second part, their successors or assigns, will in all respects comply with the conditions of said decrees of foreclosure and sale;

Has granted, bargained, transferred, sold and conveyed, and by these presents does hereby grant, bargain, transfer, sell and convey:

First. Unto the said Southern Railway Company, its successors and assigns, forever, the said railroad, real estate and franchises, within the states of Tennessee and Alabama, and also all estate, equipment, personal property and choses in action wherever situate; including also all income, proceeds of income, bills and accounts receivable, cash and other property received by the said receivers, and all causes of action, and judgments, by them acquired or obtained in the management or operation of the said mortgaged premises, to be embraced in the conveyance thereof or pertaining thereto; and also any

and all property of the said railroad company, appurtenant to the premises, and required for use in connection with or for the purpose of said railroad or the business of said railroad company and vested in or standing in the name of the said receivers, or to which the said receivers in any manner have acquired title; (not including, however, the said railroad, real estate, and franchises, within the state of Mississippi, which hereinafter are conveyed to the said purchasers, or to their successors, the Memphis & Charleston Railway Company, their or its successors or assigns), the said property conveyed to the said Southern Railway Company being more particularly described as follows, that is to say:

All and singular the rights, privileges, interests, franchises, lands, tenements, hereditaments, appurtenances and property, of every description, whether real, personal or mixed, embraced or included in the said decrees of sale and the sale pursuant hereto, that is to say:

The following railroads of the Memphis & Charleston Railroad Company in the states of Tennessee and Alabama.

All and singular the main line of railroad, formerly of the said the Memphis & Charleston Railroad Company, extending from the point of commencement thereof in the city of Memphis, in the state of Tennessee, *via* Corinth, in the state of Mississippi, and Huntsville, in the state of Alabama, to the terminus thereof in Stevenson, in the said state of Alabama, connecting there with the Nashville & Chattanooga railroad, being a distance of two hundred and seventy-two miles, be the same more or less (excepting the portion of said railroad which lies in the state of Mississippi); and also the branch of said railroad, situate in the state of Tennessee, known as the Somerville & Moscow branch, extending from Moscow, on the main line, to Somerville, a distance of about fourteen miles, be the same more or less; and also the branch of said railroad, situate in the state of Alabama, extending from Tuscumbia, on the main line, to Florence, a distance of about five miles, be the same more or less, and including the bridge

across the Tennessee river, near Florence; and also the Washington street branch, so-called, of said railroad, extending from the depot of said main line in the city of Memphis, through Washington street and Centre Landing, to the Mississippi river, and the depot grounds and wharves on said river, and all the rights and privileges of said railroad company in respect of the use of the streets and wharves and levee on the Mississippi river; and, also, all and singular the right of transportation of the passenger cars and freight cars of the said the Memphis & Charleston Railroad Company on and over the railroad between Stevenson in Alabama and Chattanooga in Tennessee, which said the Memphis & Charleston Railroad Company, at the date of the execution of said mortgage — namely, August 20, 1877, had or was entitled to, or could then, or since then, claim under or in virtue of the contract of the date of June 23 and July 26, 1858, made between the Memphis & Charleston Railroad Company and the Nashville & Chattanooga Railroad Company, and all the rights and privileges whatsoever, for or in respect to the use of, or transportation over, the line of railroad between Stevenson and Chattanooga, now belonging to the Nashville, Chattanooga and St. Louis railway, which the said the Memphis & Charleston Railroad Company holds or is in any wise entitled unto, or could, at the date of execution of said mortgage — namely, August 20, 1877 — or at any time since then, claim, either under or in virtue of the before-mentioned contract of June and July, eighteen hundred and fifty-eight, or otherwise, howsoever, together with all and singular the roadway or track of the aforesaid main line of railroad extending from Memphis to Stevenson (except the portion thereof in Mississippi) and of the said several branches respectively, and the superstructure and rails laid or to be laid thereon respectively, and all the appurtenances thereof, and all the sidings, turnouts, bridges, wharves, viaducts, culverts, walls, fences, ways and rights of way, depots, station houses, engine houses, car houses, freight houses, wood houses, depot grounds and

lands procured, provided, or intended for use for that purpose; building and repair shops, machine shops, and lands used or procured, or intended for sites thereof, and other buildings, structures, lands and improvements whatsoever, leases and leasehold interests, contracts, easements and privileges belonging or appertaining to, or used or procured, or designed to be used for, the purposes of or in connection with the said main line of railroad and branches, respectively, or the maintenance or operation thereof, or of any part thereof, at the date of the execution of said mortgage — namely, on the 20th day of August, 1877, or at any time thereafter; and also all the locomotives, tenders, passenger cars, baggage cars, freight cars and other cars, and all other rolling stock or equipment, and all machinery, tools and implements, rails, chairs and spikes and other materials whatsoever, owned or possessed by the said the Memphis and Charleston Railroad Company, at the date of the execution of said mortgage — namely, on the 20th day of August, 1877 — or at any time thereafter, for the uses or purposes of, or designed for use in connection with, or for the operation, maintenance or reparation of, the said main line of railroad and branches respectively, or the equipment or appurtenances thereof, any, all the engines, cars and rolling stock or equipment of any kind, machinery, tools, implements, rails and other materials, which now belong or appertain to or are in use or on hand, designed for use for the purposes of said main line of railroad and branches, respectively, or any part thereof, or have belonged or appertained to or been in use or on hand, designed for use for the purposes of said main line of railroad and branches, respectively, or any part thereof, at any time or times after the date of the execution of said mortgage — namely, August 20, 1877 — and all the lands and real estate whatsoever, of any and every kind whatsoever, and all improvements thereon, situate in the states of Tennessee or Alabama, respectively, which were owned or possessed by, or which belonged to, the said the Memphis & Charleston Railroad Company at the date

of the execution of said mortgage — namely, August 20, 1877 — and also all and singular the rights, privileges and franchises whatsoever, which the said the Memphis & Charleston Railroad Company has acquired or become possessed of or entitled unto, since the said date of the execution of said mortgage, for or in respect of, or for the uses or purposes of, the said main line of railroad and branches respectively, or the operation or maintenance thereof, and also all the tolls and income of the said main line of railroad and branches respectively, together with all and singular the tenements, hereditaments and appurtenances unto the premises aforesaid, or any of them, or any part thereof belonging or in any wise appertaining; and the reversion or reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the said the Memphis & Charleston Railroad Company, of, in and to the same, and every part and parcel thereof, with the appurtenances.

Subject, however, to a certain statutory lien in the nature of a mortgage, originally created and existing in favor of the state of Tennessee, and mentioned and described in the said mortgage of August 20, 1877; and also subject to the lien of a certain first mortgage or deed of trust dated May 1, 1854, executed by said the Memphis & Charleston Railroad Company to James Punnett, G. B. Lamar and Thomas Fearn, as trustees, and also subject to the lien of a certain second mortgage or deed of trust dated January 1, 1867, made by said the Memphis & Charleston Railroad Company to Gustavus L. Masten, George W. Neal and William C. Rehren, as trustees, said first mortgage and said second mortgage having been extended by certain indentures, both dated September 7, 1880, and being more particularly described in said decrees.

Together with all the corporate estate, equity of redemption, rights, privileges, immunities and franchises of said the Memphis & Charleston Railroad Company, and all the tolls, fares, freights, rents, incomes, issues and profits of the said

railroads, and all interest and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, including all the said mortgaged premises and property, in said decrees directed to be sold, at any time owned or acquired by and now in the possession of said the Memphis & Charleston Railroad Company, or the receivers thereof, and including also all income, proceeds of income, bills and accounts receivable, cash and other property received by the receivers, and all causes of action, and judgments, by them acquired or obtained in the management or operation of the mortgaged premises embraced in this conveyance or pertaining thereto, and also any and all property of the said railroad company appurtenant to the premises and required for use in connection with or for the purposes of said railroad, or the business of said railroad company, and vested in or standing in the name of the said receivers, or to which the said receivers in any manner have acquired title; excepting, however, all such leases and contracts sold with the said property as the parties of the second part shall within ninety days after the delivery of this deed elect not to assume and adopt; and

Second. Unto the purchasers and to their successor, the Memphis & Charleston Railway Company, when organized, their or its successors and assigns:

All and singular the railroad, formerly of the said the Memphis & Charleston Railroad Company, in the state of Mississippi, beginning at a point on the Mississippi state line, near Wenasoga, a point in Alcorn county, upon the northern boundary of Mississippi, and thence running easterly, through Alcorn county and Tishomingo county, to a point upon the eastern boundary of Mississippi, between Iuka, in said last-mentioned county, and Margerum, in the state of Alabama, being in all about thirty-five miles in length within the said state of Mississippi; being part of the same railroad referred to in an Act of the Legislature of the state of Mississippi, entitled "An Act to grant the right of way to the Mem-

phis & Charleston Railroad Company, and for other purposes," approved March 1, 1854;

A more full and particular description of the property intended to be conveyed by this instrument being contained in said decree of the 2d of March, 1897, and in the supplemental decree of November 24, 1897, respectively, to which reference is hereby made.

To have and to hold, all and singular, the above-mentioned railroads, premises, rights, privileges, interests, franchises, lands, tenements, hereditaments, appurtenances and property, of every description, whether real, personal or mixed, herein conveyed or intended to be conveyed, unto the said Southern Railway Company, its successors and assigns, as to all the railroad, real estate and franchises, within the states of Tennessee and Alabama, and as to all the equipment, chattels and choses in action, wherever situate; and unto the said purchasers, and their successor, the Memphis & Charleston Railway Company, when organized, their or its successors and assigns, as to all of the railroad, real estate and franchises, within the state of Mississippi; and the said Southern Railway Company is, and the said Memphis & Charleston Railway Company, when organized, shall be, hereby invested with the same (the said Southern Railway Company, as to all said railroad, real estate and franchises, within the states of Tennessee and Alabama, and as to all said equipment chattels and choses in action, wherever situate; and the said purchasers, or their successor, the Memphis & Charleston Railway Company, as to all the railroad, real estate and franchises, within the state of Mississippi) as fully and completely as said the Memphis & Charleston Railroad Company, one of the defendants in said suit in equity, or said receivers, held or enjoyed, or were, respectively, entitled to hold or enjoy, or were seized of or entitled to, at the time of the entry of the said decree, or at the time of the commencement of said suits, or which said receivers or either of them have since acquired; freed and discharged from the lien and encumbrance of the said mortgage

or deed of trust foreclosed or barred by the said decrees, and freed from all equity of redemption of said mortgagor, the Memphis & Charleston Railroad Company, and of all equity of redemption and of all other claims of all persons whomsoever, claiming or to claim by, under or through, the said company, except as mentioned and reserved in said decree, as fully and absolutely as the said Louis B. McFarland, as Special Master, may or ought, by virtue of said decrees, to bargain, sell, release, assign or convey, subject, however, to the said statutory lien in favor of the state of Tennessee and to the said two mortgages, as set forth in said decree of foreclosure, and said supplemental decree, and upon the condition that, to the extent that the assets, or the proceeds of assets in the receivers' hands should be insufficient, the said Southern Railway Company and the said purchasers, its or their successors or assigns, should pay, satisfy and discharge (a) any unpaid compensation which should be allowed by the court to the receivers; (b) any unpaid indebtedness and obligations or liabilities which were duly contracted or incurred by the receivers before delivery of possession of the property sold; and (c) also any unpaid indebtedness or liability contracted or incurred by said the Memphis & Charleston Railroad Company in the operation of its railroad, which is prior in lien or superior in equity to the consolidated first mortgage of August 20, 1877, except such as has been paid and satisfied out of the income of the property in the hands of the receivers, or out of such other assets upon the court adjudging the same to be prior in lien or superior in equity to said mortgage, and directing the payment thereof, all payments for any such purpose made by the parties of the second part, their successors or assigns, in advance of the accounting and discharge of the receivers, to be treated as advances, and subject to final adjustment upon such accounting; no obligation, nevertheless, being imposed upon, or being required to be assumed by, the Southern Railway Company, or by the purchasers or their successor, the Memphis & Charleston Rail-

way Company, its or their successors or assigns, to pay or discharge either the said statutory lien, or the said first mortgage bonds, or the said second mortgage bonds, of the Memphis & Charleston Railroad Company, hereinbefore referred to, and subject to which the property was sold, and subject also to all and singular the terms, conditions, reservations and obligations in said decree of foreclosure, and said supplemental decree and said decree of confirmation, set forth; and the grantees, parties hereto of the second part agreeing to take the property so sold as aforesaid, subject to the performance by them, or by their successors or assigns, of all pending contracts in respect thereof, theretofore lawfully made by the receivers, the said grantees, and their successors or assigns, having, nevertheless, the right, within ninety days after the completion of the sale and delivery of this deed, to elect whether or not to assume or adopt any lease or contract sold with the railroad and other property and franchises, neither they, nor their successors nor assigns, to be held to have assumed any of said contracts or leases, which they shall so elect not to assume; provided, however, that upon publication by the Special Master, when ordered by the court, as provided in said decree, of a notice, requiring holders of any claims to present the same for allowance, any such claims which shall not be so presented or filed within the period of six months after the first publication of such notice, shall not be enforceable against the property sold, or against the said grantees, or their successors or assigns; and subject, also, to the payment by said grantees, their successors or assigns, of all such sums in cash as may be required in order to pay all costs and expenses of the sale, the compensation of the special master, and all charges, compensations, allowances and disbursements, payable out of the purchase price bid for the premises, as the same shall be fixed and allowed hereafter by the court:

And subject also to all the conditions and reservations of said decree of sale, and of said supplemental decree, and of said decree confirming said sale, entered in said District Court

of the United States for the western district of Tennessee, western division, that being the court exercising original jurisdiction of said foreclosure suit, including the reservation to said court of the power to retake and to resell the premises conveyed, or any parcel thereof, in case the said parties of the second part, their successors or assigns, shall fail to pay any sum required to be paid by them under said decrees within the time specified in said decrees, respectively, after the entry of an order requiring such payment.

It is hereby understood and agreed that no personal covenant or liability is to be implied from this deed against the said party of the first part as Special Master, except that he has not in his official capacity made any prior conveyance of the property herein mentioned or of any part thereof.

And whereas, in order to expedite the recording of this deed, eight counterparts thereof are, by order of the District Court of the United States for the western district of Tennessee, western division, simultaneously executed, acknowledged and delivered by the party of the first part to the parties of the second part.

Now, therefore, this indenture further witnesseth, that although eight counterparts are simultaneously executed, acknowledged and delivered by the party of the first part to the parties of the second part, to the end that all or any one or more thereof may be recorded, any one or more of such counterparts, when executed, acknowledged and delivered, shall severally or collectively be deemed to be an original, and for all intents and purposes be one instrument.

In witness whereof, the party of the first part hereto has hereunto set his hand and seal the day and year first above written.

Words "payment" to "and," inclusive, in lines 20, 21 and 22 on p. 4, and also in lines 30, 31 and 32 on p. 11, stricken out before execution.

[Seal.]

L. B. McFarland,
Special Master.

Signed, sealed and delivered in presence of

Francis Lynde Stetson.

W. A. Henderson.

[*Official Seal.*]

H. S. Hayley,

Notary Public for the County of

Shelby, State of Tennessee.

State of Tennessee,

Shelby County, ss.

Personally appeared before me, H. S. Hayley, a notary public of the said county of Shelby, in this state of Tennessee, duly and legally appointed, commissioned and qualified within my said county, Louis B. McFarland, the within-named grantor and bargainor, with whom I am personally acquainted, being the same person described in and who executed the foregoing instrument, and he then and there being informed of the contents of the conveyance, acknowledged before me that he voluntarily signed, executed and delivered the within and foregoing instrument on the day the same bears date for the purposes therein contained; and I, at the same time, at his request, witnessed his execution, signature and delivery of said conveyance and signed my name as one of the attesting witnesses thereto.

And I hereby certify that I am a duly appointed notary public in and for said county and state; that I was appointed on the 26th day of October, 1894, and that my commission as such notary public expires with the 26th day of October, 1898.

Witness my hand and official seal, at office, this 26th day of February, 1898.

H. S. Hayley,

[*Official Seal.*]

Notary Public, Shelby County,
Tennessee.

(1) The foregoing masters' deed is copied from the record in the case of *The Farmers' Loan & Trust Co. vs. The Memphis & Charleston R. R. Co.*, pending in the Circuit Court of the United States for the Western District of Tennessee, and constitutes a part of the reorganization proceedings, whereby the Southern Ry. acquired the Memphis & Charleston R. R. See *Rothschild vs. Memphis & Charleston R. R. Co.*, 113 Fed. 476.

NE EXEAT.**No. 908.****Motion for Writ of Ne Exeat.(1)**

[Caption.]

Now comes the plaintiff in the above entitled cause, by R. X., his attorney, and moves this honorable court to grant a writ of *ne exeat* in accordance with the prayer of the bill in this cause.

R. X.,

Attorney for Plaintiff.

(1) This motion may be without notice and the writ granted ex parte. Dan, Chan. Practice (6th Am. ed.) 1706; 1 Smith Chan. Prac. 580; Bates' Fed. Eq., Sec. 573; Foster's Fed. Prac., 5th ed., pp. 1045 to 1051. •

No. 909.**Affidavit to Obtain a Ne Exeat.(1)**

[Caption.]

State of ———,
County of ———, ss.

I, W. B., one of the above-named plaintiffs, being duly sworn, deposes and says that the above defendant is actually and justly indebted to the said plaintiffs in the sum of ——— dollars, for [*here state the ground and circumstances of indebtedment*]; for the recovery of which the said plaintiffs did, on the ——— day of ———, file their bill of complaint herein against the said defendant; to which said bill the said defendant has not yet answered; and, being so indebted, the said defendant has lately declared in the presence of each of the plaintiffs, and informed them, and this deponent verily be-

lieves, that he will without delay leave the United States and go to live and reside in parts beyond the seas without these United States and out of the jurisdiction of this court. And this deponent has no doubt, but verily believes, that if the said defendant should be allowed to depart out of this district, the plaintiffs' debt will either be entirely lost to them, or the recovery thereof greatly endangered.

Sworn, etc.

W. B.

[*Certificate of allowance.*]

(1) It is well established that the writ will not issue without a positive affidavit and that an affidavit as to information and belief only will not be sufficient. *Gernon v. Boecaline*, No. 5637 Fed. Cas., 2 Wash. C. C. 130; *Danl. Ch. Prac.* (6th Am. ed.) 1706; *McDonough v. Gaynor*, 18 N. J. Eq. 249; R. S. Sec. 717; *Foster's Fed. Prac.*, 5th ed., Sec. 328.

No. 910.

Order for Writ of Ne Exeat to Issue.(1)

Upon motion, etc., and upon reading an affidavit of, etc., filed, etc. [*if before appearance*, and the clerk's certificate of the filing of the plaintiff's bill in this cause on the — day of —]; and the plaintiff by his counsel undertaking, etc. [*as to damages*]: This court orders that a writ [*or*, one more writ, *or*, writs] of *ne exeat republica* do issue against the said defendant, A. B., until this court make another order to the contrary; and the said writ [*or*, writs] is [*or*, are] to be marked for security in the sum of — dollars.

(1) The writ may be issued by the supreme court or a district court or a justice or district judge. *Judicial Code*, Sec. 261; as to power of a court sitting in bankruptcy to issue a writ to restrain the bankrupt within the district. See *In re Berkowitz*, 173 Fed. 1012; *In re Cohen*, 136 Fed. 999; *Lewis v. Shainwald*, 48 Fed. 492. This writ does not contravene state statutes prohibiting imprisonment for debt. *Gooding v. Reed*, 177 Fed. 684, 101 C. C. A. 310.

No. 911.**Writ of Ne Exeat Republica.(1)**

The United States of America,
—— District of ——, ss.

The President of the United States of America to the Marshal
of the —— District of ——, Greeting:

Whereas, it is represented to us in our district court of the United States for the —— district of ——, in equity, on the part of A. B., plaintiff, against C. D., defendant (among other things), that he, the said defendant, is greatly indebted to the said plaintiff, and designs quickly to go into parts without the United States (as by oath made on that behalf appears), which tends to the great prejudice and damage of the said plaintiff;

Therefore, in order to prevent this injustice, we do hereby command you that you do, without delay, cause the said C. D. personally to appear before you, and give sufficient bail or security in the sum of —— dollars that the said C. D. will not go or attempt to go into parts without the United States without leave of our said court; and in case the said C. D. shall refuse to give such bail or security, then you are to commit the said C. D. to our next prison, there to be kept in safe custody until he shall do it of his own accord; and when you shall have taken such security you are forthwith to make and return a certificate thereof to us in our said district court of the United States for the —— district of —— distinctly and plainly under your hand, together with this writ.

[*Add teste.*]

(1) See Foster's Fed. Prac., 5th ed., pp. 1045 to 1051, Secs. 326, 327, 328; Desty's Fed. Proc., Sec. 237; R. S., Sec. 717. See also Beach's Modern Eq. Prac., chapter on ne exeat. Generally, on this subject. See Lewis v. Shainwald, 46 Fed. 839, 48 Fed. 892, 69 Fed. 487; Griswold v. Hazard, 141 U. S. 263, 35 L. Ed. 681.

No. 912.**Bond to Marshal upon a Ne Exeat.**

Know all men by these presents that we, C. D., of the city of —, and E. F. and G. H., of the same place, are held and firmly bound unto H. C., United States marshal for the — district of —, in the penal sum of — dollars, to be paid to the said H. C., United States marshal for the — district of —, as aforesaid, or his assigns. For which payment well and truly to be made we bind ourselves jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated the — day of —, 18—.

Whereas, the above-named C. D. has been arrested upon a writ of *ne exeat* issuing out of and under the seal of the district court of the United States for the — district of —, in a certain cause therein pending, wherein A. B. is plaintiff, and the said C. D. is defendant, and is now in custody of the said H. C., marshal as aforesaid, by virtue thereof:

Now, the condition of this obligation is such that if the said C. D. shall not depart from or leave this — district of — without the permission of the said court, then this obligation to be void; otherwise to be and remain in full force and virtue.

C. D. [Seal.]

E. F. [Seal.]

G. H. [Seal.]

[Add acknowledgment and justification of sureties.]

No. 913.**Notice of Motion for the Discharge of Ne Exeat.**

[Caption.]

Take notice that this honorable court will be moved before [name judge and court], on —, the — day of —, instant [or, next], at — o'clock in the —noon, on the

part of the defendant, C. D., that the writ of *ne exeat republica* issued against him pursuant to the order dated the — day of —, 1894, and the said order, may be discharged with costs, including the costs of this application; and that the plaintiff may be ordered to pay such costs to the said defendant,—*If so*; and that the bond given by the said defendant to the — of —, pursuant to the said order and writ, may be delivered up to be canceled. And that an inquiry may be made what damages have been sustained by the said defendant by reason of the said order having been made. And that the plaintiff may be ordered, pursuant to his undertaking, contained in the said order, to pay to the said defendant, within (one month) after the date of the master's certificate of the result of such inquiry, what shall be thereby certified in respect of such damages.

No. 914.

Motion to Discharge Writ of Ne Exeat (1).

[Caption.]

Now comes the defendant C. D. and moves this honorable court:

First. That the writ of *ne exeat republica* issued against him pursuant to the order dated the — day of — and the said order may be discharged with costs including the costs of this application:

Second. And that the inquiry made by him what damages have been sustained by the defendant C. D. by reason of the said order having been made, and that the plaintiff A. B. may be ordered pursuant to his undertaking contained in the said order, to pay to the defendant C. D., within one month from the date of the Master's certificate of the result of the said inquiry, what shall be thereby certified in respect of such damages.

(1) As to the discharge of a writ of *ne exeat*. See Bates' Fed. Eq., Sec. 575; Daniels' Chan. Prac. (6th Am. ed.) 1712; Foster's Fed. Prac., 5th ed., Sec. 328.

No. 915.**Order that Writ of Ne Exeat be Discharged on Defendant Giving Security.**

[Caption.]

Upon motion to discharge writ of *ne exeat* and for leave to go out of the jurisdiction for — months, the defendant undertaking then to return, it is ordered that upon the defendant C. D. giving security in the amount of \$——, with two sureties, such security to be approved by the court, to answer in such sum as may be found due from him in such cause, the writ of *ne exeat republica* issued in this cause be discharged; and it is ordered that the order of the — day of — be also discharged except so much thereof as ordered that the defendant C. D. pay to the plaintiff as costs of that application.

No. 916.**Order that Writ of Ne Exeat be Discharged with Inquiry as to Defendant's Damages.**

[Caption.]

It is hereby ordered by the court that the writ of *ne exeat republica* issued against the defendant C. D. pursuant to the order of the — day of — and the said order be respectively discharged with costs including the costs of this application, and that it be referred to B. R., Special Master, to inquire and report what damages have been sustained by the said defendant C. D. by reason of the said order dated the — day of — having been made; and that the plaintiff A. B. pursuant to his undertaking contained in the said order one month after the date of the Special Master's report of the result of the said inquiry, pay what shall be certified in respect to said damages to the defendant C. D.

INJUNCTIONS.***No. 917.****Notice of Motion for Preliminary Injunction.(1)****[Caption.]**

To R. Y.,

Counsel for Defendant:

Please take notice that on the — day of —, 1893, at ten o'clock a. m., or as soon thereafter as counsel can be heard, I will move for a preliminary injunction, as prayed in the bill of complaint herein, based on the decisions of the courts in former suits under letters patent No. —, on which this suit is brought, and the affidavits of E. F., G. H. and J. K., and the exhibits referred to in said affidavits, a true copy of which is herewith served upon you.

R. X.,

Counsel for Plaintiff.

Service accepted this — day of —, 1894.

Y. & Y.,

Counsel for Defendant.

(1) Notice must be served on opposing party or his counsel. See Equity Rule 73; 38 Stat. L. 737, Sec. 17 (the "Clayton" Act).

No. 918.**Affidavit of Service.**

[If counsel fail to accept the service, the following affidavit of service may be attached to a copy of the notice served.]

State of —,

County of —, ss.

J. R. makes oath, and says that he served notice, of which the above is a true copy, together with a copy of the bill of

* See Foster's Fed. Prac., 5th ed., Secs. 262 to 300; Simkins, A Federal Equity Suit, 3d ed., pp. 470 to 480; Judicial Code, Secs. 264, 265, 266, and 208; Clayton Act, Secs. 17, 18, 19 and 20, 38 Stat. L. 737, which repeals Judicial Code Sec. 263 expressly, the latter having been a re-enactment of R. S. U. S., Sec. 718.

complaint and the accompanying affidavits, hereto annexed, on C. D., one of the defendants herein named [*or*, on counsel for the defendant, *as the case may be*], in the city of —, on the — day of —, 1894. J. R.

Subscribed and sworn to before me this — day of —, 1894. J. N.,

[*Seal.*]

[*Official Title.*]

No. 919.

Motion for a Preliminary Injunction.

[*Caption.*]

Now comes the complainant in the above entitled suit, the 'A. B. Company, by X. & X., complainant's solicitors, and moves this honorable court to grant a writ of injunction against said defendants and each of them, their agents, attorneys, clerks, servants and employes, pending this suit, and until the further order of the court, conformable to the prayer of the bill in said case filed. X. & X.,

Solicitors for Complainant.

No. 920.

Order Overruling Motion.

[*Caption.*]

This cause coming on to be heard upon motion of plaintiff for a preliminary injunction, and affidavits in behalf of the plaintiff, as well as in behalf of the defendant, and counsel for the respective parties having been heard, and the same having been duly considered by the court, it is hereby ordered, adjudged and decreed that the said motion be and the same is hereby overruled at the plaintiff's cost.

No. 921.**Motion for Temporary Injunction and for Restraining Order
Without Notice.**

[Caption.]

Now comes the above-named plaintiff and, upon the verified bill of complaint and the affidavits filed therewith, moves the court for a temporary injunction restraining the above-named defendants, Charles A. Reynolds, Frank R. Spinning and Arthur A. Lewis, constituting the public service commission of the state of Washington, and W. V. Tanner, attorney general of the state of Washington, and each of them during the pendency of the above entitled action, from enforcing and from taking any steps to enforce the order of the public service commission of the state of Washington made on the 24th day of March, 1915, in that certain proceeding entitled "The Public Service Commission of Washington, Complainant, vs. Puget Sound Traction, Light & Power Company, Respondent, No. 1832," which order is as follows:

"It is therefore ordered:

"1. That the defendant company continue the operation of through service on the Ballard Beach line.

"2. That the Alki Point and Fauntleroy Park lines be operated through the city of Seattle on First or Second avenues as far north, at least, as Virginia street.

"3. That the defendant company furnish sufficient cars to provide seats for substantially all persons using the Alki Point and Fauntleroy Park lines.

"It is understood that a substantial compliance shall be considered a sufficient compliance with this order directing the furnishing of seats for passengers on the Alki Point and Fauntleroy Park lines, the company not being required to provide for emergency crowds that might apply for seats, but shall provide seats at all times for the usual patronage of said lines, and shall so operate the said lines at all times with sufficient cars to provide seats for all passengers except on extraordinary and unusual occasions."

The plaintiff further moves the court for a temporary restraining order without notice restraining the above-named defendants from doing any of said acts until the application of the plaintiff for a temporary injunction can be heard, on the ground that the order of the commission hereinbefore mentioned will take effect and be in force before the plaintiff can give notice of an application for such temporary restraining order and before the application for an injunction can be heard, because said order will take effect twenty days from the 24th day of March, 1915, and immediate and irreparable injury, loss and damage will result to plaintiff before notice can be served and a hearing had thereon.

JAMES B. HOWE,
Solicitor for Plaintiff.

No. 922.

**Restraining Order Granted Prior to Application for
Injunction.(1)**

[*Caption.*]

Whereas, in the above cause, a motion for the issuance of a preliminary writ of injunction has been duly filed, for the hearing being fixed for one o'clock p. m. on the — day of —, in the city of —, in the custom-house building, district court room; and it having been made to appear that there is danger of irreparable injury being caused to complainant, before the hearing of said application for the writ of injunction, unless the said defendants are, pending such hearing, restrained as herein set forth;

Now, therefore, take notice that you, J. C. and the People's Telephone Company, defendants herein, your agents, servants and attorneys, and each of you, are hereby specially restrained and enjoined from making any further double connection, directly or indirectly, with the property of the complainants by wires or otherwise until further order of this court in the premises.

The question of making the injunction operate against the use of connections already made is reserved until the hearing

on the application, when it will be determined whether any injunction should issue. The present order operates against making any more connections.

Done at chambers, —, — p. m., —.

(1) See 38 Stat. L. 737. The issue of a restraining order, which may be granted ex parte, is by the express language of this section made dependent upon the existence of two conditions—the giving of notice of a motion for an injunction, and an apparent danger of irreparable injury from delay. Equity Rule 73.

As to the practice of granting a restraining order pending an application for a preliminary injunction. See *Central Trust Co. v. Wabash, etc., Ry. Co.*, 25 Fed. 1.

No. 923.

Order Denying Restraining Order and Setting Down for Hearing on Motion for Preliminary Injunction.(1)

[Caption.]

This cause came on this day to be heard in vacation, before Honorable H. C. Niles, judge of the United States district court for the Jackson division of the southern district of the state of Mississippi, on the application of the complainant for a temporary restraining order against the defendants as railroad commissioners from the execution of an order of the said railroad commissioners of July 23, 1913, and it appearing to the court that it is right and proper that the prayer for the temporary restraining order be not granted as prayed for in the original bill of complaint herein;

It is therefore ordered, adjudged and decreed that the hearing of this cause on the application for a preliminary injunction shall be held at Birmingham, Alabama, on the 3rd day of October, 1913, and the judge of this court hereby requests the Honorable David D. Shelby, of Huntsville, Alabama, a judge of the circuit court of appeals, and W. I. Grubb, of Birmingham, Alabama, a judge of the district court within this circuit, to sit with him at the said hearing.

It is further ordered that the clerk of this court shall mail a copy of this order to the attorney general of the state of Mis-

Mississippi, and a copy of this order to the governor of the state of Mississippi, and to each of the defendants named herein.

Ordered, adjudged and decreed in vacation, this the 19th day of September, 1913. H. C. NILES, Judge.

(1) The temporary restraining order is an injunction intended to preserve the status quo until the hearing and decision on the motion for preliminary injunction. *Joseph Dry Goods Co. v. Hecht*, 120 Fed. 760, 57 C. C. A. 64; *Wabash Ry. Co. v. Hannahan*, 121 Fed. 563; *Pack v. Carter*, 223 Fed. 638, 139 C. C. A. 184.

No. 924.

Order Restraining Certification of Values to Comptroller for Taxation.(1)

[Caption.]

The matter being urgent and not admitting of notice of a motion for preliminary injunction or such argument or consideration as the importance of the question demands, I allow a restraining order commanding and restraining the defendants from certifying or delivering to the comptroller of the state of Tennessee the assessments of complainants' properties mentioned and described and affirmed by them and from certifying or delivering in any way to said comptroller the results of their action in respect to the assessments complained of for the years — and —. This order will stand until an application can be made to Judge X., or any other judge authorized to hold the district court for the — district of —, for a temporary injunction and granted or refused. But notice will be given and application will be made within ten days from this date, and if not made within that time this restraining order will stand dissolved; but if so made within said time, this order will continue until the application thus made shall be disposed of.

Done at chambers at —, this — day of —.

(1) See note to preceding form.

No. 925.**Order Restraining the Construction of a Telephone Line in a Municipality.**

[Caption.]

On reading the bill of complaint herein, it is considered by the court and is now so adjudged and ordered that the defendant, J. J., be and he is hereby enjoined and restrained from erecting poles through the streets of —, or stringing any wires thereon, or taking any steps to establish a telephone system within the said city, or endeavoring to induce persons therein who are now or may become patrons of the complainant, to become his patrons, or interfering in any way with the franchise of the complainant or with its profitable use of the same, and from usurping to himself the franchise or using the streets and highways of the city of — for the purpose of erecting poles or stringing wires or conducting over said wires the business of a telephone company, or in any way acting under the ordinance of the town of — passed February —, a copy of which is attached to the bill of complaint, and from endeavoring to assign or transfer the same to any other person or persons or corporation.

This restraining order shall continue in force until a motion can be entered and heard for a temporary injunction and until the further order of the court, and this cause is now set down upon motion of the complainant to grant a temporary injunction in the terms of this restraining order and in the terms of the prayer in the bill of complaint, for the — day of —, at —.

And the service of a copy of this order upon the said J. J. shall be sufficient notice thereof.

No. 926.**Restraining Order Against Municipality from Interfering with Construction of Telephone Lines.**

[Caption.]

Whereas, in the above cause, a motion for the issuance of a preliminary writ of injunction has been duly filed and the hear-

ing thereof being fixed for the —— day of ——, at the United States court room, at —— o'clock a. m., at ——. And it having been made to appear that there is danger of irreparable injury being caused to complainant before the hearing of said application for the writ of injunction unless the said defendants are, pending such hearing, restrained as herein set forth, therefore complainant's application for such restraining order is granted upon its giving good security in the sum of \$500 for making good to the defendants the damages and costs that may be awarded them by reason of the granting of this order;

Now, therefore, take notice, that you, the mayor and aldermen of the city of ——, defendants herein, your agents, servants, policemen, marshals and attorneys and recorder, and each of you, are hereby specially restrained and enjoined from interfering in any way or manner with the construction and operation of the complainant's lines or placing its phones and poles or the stringing of its wires or the further prosecution or arrest of the complainant's laborers [*naming them*]: until the hearing upon the said application for a writ of injunction and the further order of the court in the premises.

Done at chambers, ——, at —— o'clock p. m.

No. 927.

Restraining Order Against a Strike Leader.

[Caption.]

Whereas, in the above entitled cause, a motion for the issuance of a preliminary writ of injunction has been duly filed, the hearing thereof being fixed for the —— day of ——; and it having been made to appear that there is danger of irreparable injury being caused to complainant before the hearing of said application for a writ of injunction unless the said defendant is, pending such hearing, restrained as herein set forth, therefore complainant's application for such restraining order is granted;

Now therefore, take notice that you, F. P., defendant herein, are hereby restrained individually or in combination with others from inciting, encouraging, ordering, or in any manner causing the employes of the receiver herein, to leave his employ, with intent to interfere with and obstruct the operation of the railroad in his charge for the purpose of compelling said receiver to break his contracts with the Pullman Car Company and not to carry said cars in his trains.

Dated ———.

No. 928.

Order Modifying Restraining Order.

[Caption.]

This cause coming on to be heard upon the motion of defendants to modify the temporary restraining order heretofore granted in the above entitled cause, and being argued by counsel, and the court being advised thereon, doth find that said motion is in part well taken.

Wherefore it is ordered that the first clause of said order be and the same hereby is modified so as to read as follows:

From in any manner interfering with the persons in the employ of complainant and from in any manner interfering with any person who may desire to enter or to remain in the employment of complainant, whether under the pretense of persuasion or by way of threats, violence, insults, intimidation or other means calculated or intended to prevent such persons from entering into or continuing in the employment of complainant, or to influence or induce such persons not to enter into or leave its employment.

And it is further ordered that said temporary restraining order as modified hereby continue in force until the further order of the court in that regard.

No. 929.**Order of Reference to Master of Motion for Injunction to
Report Facts.**

[*Caption.*]

This case was heard at chambers in the city of —, on the — day of —, before C. D., United States district judge, upon the bill, demur and answer, and upon plaintiff's application for injunction upon consideration of which upon which grounds, which seem to the court sufficient, the application for injunction is continued until the second Monday in —, next, being the — day of —, at the United States court-room in the city of —. Pending said application it is ordered that the preparation of the case for hearing proceed with all possible speed, and to that end it is further ordered that J. N., because of special fitness and qualification to deal with matters of this character, is appointed special examiner and master, and is directed to inquire, hear proof and report whether or not the present location and construction of complainant's improvements obstruct the streets of the defendant city in their primary use for the purpose of travel, and if so, what modification should be made in the restraining order permitting the city to regulate the manner of such construction and improvements, and will also inquire upon proof and report whether the mayor and aldermen of the city of —, as a body, and regularly acting as such, object to the use of the streets for the purposes of constructing and operating a telephone within the defendant city as the complainant proposes to do. For the purpose of such inquiry, said examiner and master will go to the defendant city at a time and place fixed by him, of which notice shall be given, and will hear such proof as may be offered, provided that the time fixed and within which proof must be taken shall be such as to allow the report on the matters herein on or before the second Monday of September. Until the coming in of said report, and until the further hearing of the application for injunction, all questions are reserved, and the restraining order hereto allowed is continued until modified or until the date above set for the hearing of the application for injunction.

No. 930.**Report of Special Master on Motion for Injunction Being
Referred.**

[Caption.]

To the Honorable Judge of said Court:

The undersigned special master was by an order made on the — day of —, directed "to inquire, hear proof and report whether or not the present location and construction of complainant's improvements obstruct the streets of the defendant city in their primary use for the purpose of travel, and, if so, what modification should be made in the restraining order permitting the city to regulate the manner of such construction and improvements, and will also inquire upon proof, and report whether the mayor and aldermen of the city of —, as a body, and regularly acting as such, object to the use of the streets for the purposes of constructing and operating a telephone within the defendant city as the complainant proposes to do. For the purpose of such inquiry, said examiner and master will go to the defendant city at a time and place fixed by him, of which notice shall be given, and will hear such proof as may be offered, provided that the time fixed and within which proof must be taken shall be such as to allow the report on the matters herein on or before the second Monday of September," and pursuant to said order of reference he arranged with the parties for a date upon which to take proof at —, and upon that date proceeded to said city of —, and in the presence of solicitor for complainant and solicitors for defendant proceeded to take proof, and said depositions so taken were left at — in order that defendant might prepare some exhibits called for in the depositions and the same was to be forwarded to the undersigned, but in some way the depositions have been lost or misplaced, except that of T. S., which is herewith filed. However, I do not think the loss is material in the view I take of the matter referred to me. I find and report that the present construction or location of complainant's improvements are in the main as convenient as

could be expected. Defendant offered to introduce proof that certain poles in the suburbs, or rather near the outskirts of the city, were badly located for the convenience of the public, and assuming this to be true the complainant then and there agreed that it would change the location of any of its poles on the request and under the direction of the city authorities, limiting them, however, so that they might not be compelled to put their lines on another street or streets, and regarding this as binding on the complainant this branch of the inquiry was not further pursued. The undersigned does not think that complainant has intentionally or willfully placed its poles so as to inconvenience the traveling public.

I further find and report that the city of — did regularly employ counsel to contest the right of complainant to build its lines upon the streets of said city. The proof showed that there had been a contested election for mayor in the city of — and the matter is still in litigation, but it is further shown that counsel was employed by the city and board of the city of — before the inauguration of the new board of mayor and aldermen and no contrary action having been taken, there remains no sort of doubt of the regularity and legality of Messrs. X. & X. and Messrs. Y. & Y. representing the board of mayor and aldermen of the city of —.

All of which is respectfully submitted this — day of —.

J. N.,

Special Master and Examiner.

No. 931.

Order Refusing Injunction and Vacating Preliminary Restraining Order.

[Caption.]

This cause came on to be heard on the application of the complainant for an injunction and upon the bill of complaint, the affidavits of complainant and defendants and the arguments of counsel. And the court being fully advised in the premises, finds that the complainant is not entitled to the relief

prayed for in its bill, and that the preliminary restraining order heretofore issued should be vacated.

It is therefore ordered and decreed that the application of complainant for an injunction herein be and the same is hereby refused, and the preliminary restraining order heretofore issued herein be and the same is hereby vacated.

No. 932.

**Order Granting Temporary Injunction Against Postmaster,
Requiring Him to Transmit Matter Through the Mails.**

(1)

[Caption.]

This cause came duly on to be heard this term upon motion duly made for a temporary injunction herein upon the bill of complaint duly verified and filed, and upon the affidavits of Max Eastman and Merrill Rogers, each duly verified and filed herein on behalf of complainant, and the affidavits of the Hon. A. S. Burleson and the Hon. William H. Lamar, on behalf of the defendant, and Gilbert E. Roe, Esq., appearing as counsel for the complainant in support of said motion, and Earl B. Barnes, Esq., assistant United States district attorney, appearing on behalf of the defendant, and after due deliberation, it is

Ordered, adjudged and decreed that the motion for the temporary injunction herein be and the same hereby is granted, and the said defendant, his agents, servants and employes, is hereby restrained and enjoined from treating the August, 1917, issue of said magazine known as "The Masses" as non-mailable matter, and the said defendant, his agents, servants and employes hereby are commanded forthwith to transmit said issue of said magazine known as "The Masses" through the mails from the New York post-office in the usual way, without further delay.

Further ordered, that the complainant's bond herein (under the Clayton act) be and hereby is fixed at two hundred and fifty dollars.

A. B., Judge.

(1) Equity Rule 73 provides for notice and procedure in case of application for temporary injunction or a restraining order.

Section 264 of the Judicial Code authorizes a temporary restraining order and Sec. 265 authorizes the granting of writs in injunction by certain courts and judges. These sections are general, whereas Sec. 266 is special as below pointed out.

Section 263 has been repealed and displaced by the Clayton Act, 38 Stat. L. 737, Secs. 17, 18, 19, 20, which deal with injunctions and temporary restraining orders. See 5 Fed. Stat. Ann., 2d ed., p. 951 (notes under Sec. 263) and 6 Fed. Stat. Ann., 2d ed., pp. 139, 140, 141.

No. 933.

**Order to Show Cause Why Temporary Injunction Should Not
be Issued Against the Receiver of a Railroad.**

The complainants, having filed their verified bill of complaint in this court against the defendants above named, praying for a temporary and permanent injunction, and in the meantime for a restraining order, and this court having duly read and considered said bill of complaint,

It is ordered that Jacob M. Dickinson and Henry U. Mudge, receivers of the Chicago, Rock Island & Pacific Railway Company, and said Chicago, Rock Island & Pacific Railway Company, show cause before this court, in the court-room usually occupied by the undersigned judge, in the federal building at Chicago, Illinois, on Tuesday, the 21st day of September, A. D. 1915, at 10 o'clock in the forenoon of that day, why a temporary injunction should not issue in accordance with the prayer in said bill of complaint contained, to-wit: that the defendants and each of them be restrained from refusing or failing to accept, receive, transport, carry or deliver beer and other fermented malt liquors sold at their places of business, including the city of Rock Island, Illinois, by either of the plaintiffs to persons residing in Iowa who have heretofore purchased or who may hereafter purchase such beer and fermented malt liquors for their personal use and private consumption, and who shall direct that the same be transported to their respective places of residence in Iowa for delivery therein at the places where they reside, including such shipments of beer and fermented malt liquors in respect to which the purchasers and consignees may authorize and direct, upon their written

order in each instance, the delivery of the same to some specific person or drayman for completion of carriage and delivery to them at their respective places of residence, and that the said defendant railway company and its receivers, officers, agents and servants be commanded to accept, receive, transport and deliver all of such shipments of beer and malt liquors upon reasonable terms and lawful conditions. Let a copy of this order and of the bill of complaint be forthwith served upon the receivers herein named, as well as upon the defendant railway company, and also that a copy hereof, together with a copy of the bill of complaint, be forthwith mailed to George Cosson, attorney general of the state of Iowa, at Des Moines, Iowa.

Enter:

CARPENTER, Judge.

No. 934.

Order Granting Temporary Injunction Against Receivers of a Railroad.

[Caption.]

This cause coming on to be heard on the 21st day of September, 1915, upon application on the part of the plaintiffs for a temporary injunction pending the final hearing of said cause, and it appearing that a copy of the order setting the date of the hearing for the temporary injunction, together with a copy of plaintiffs' bill of complaint, was duly mailed to George Cosson, attorney general of the state of Iowa, on the 15th of September, 1915, and Mr. Frederick W. Zollman and E. B. Cresap, appearing for the plaintiffs, and M. L. Bell appearing for Jacob M. Dickinson and Henry U. Mudge, receivers of the Chicago, Rock Island & Pacific Railway Company, and A. B. Enoch appearing for the defendant railway company, and C. A. Robbins, assistant attorney general of the state of Iowa, appearing on behalf of said state, and after hearing argument and on due consideration of the same, it is, on motion of the solicitors for the plaintiffs,

Ordered that defendants, Jacob M. Dickinson and Henry U. Mudge, receivers for the said Chicago, Rock Island & Pacific

Railway Company, be and they hereby are restrained and enjoined, pending the final hearing of this cause, from refusing or failing to accept, receive, transport, carry and deliver beer or other fermented malt liquors sold in Minnesota, Wisconsin and Illinois by the plaintiffs, or any of them, or by other persons or corporations similarly situated, to persons residing in Iowa who purchase the same for their own lawful purposes or private consumption, whenever the *bona fide* consignee shall, in each instance, in writing authorize the delivery of the same to some designated drayman, or other person for the purpose of carrying the same from defendant's railway stations to the residences of such *bona fide* consignees, in which said writing the consignee shall also certify that said beer and fermented malt liquors are for his own lawful purposes or private consumption, and said receivers are hereby commanded, pending the final hearing of this cause, and until the further order of the court herein, to accept, receive, transport and deliver all of such shipments upon said terms, provided each shipment of such beer or other fermented malt liquors be, before delivery to said defendants for transportation as aforesaid, plainly marked or branded, "Intended for personal use and private consumption."

Upon the filing of a bond approved by the court in the sum of one thousand dollars (\$1,000), let writ of injunction issue in accordance therewith.

Further ordered that leave be and is granted to the state of Iowa to intervene in this suit at any time before final hearing.

Enter: CARPENTER,
Judge.

Taken from Hamm Brewing Co. v. C., R. I. & P. Ry., 7th Cir., No. 2369, Oct. Term, 1915.

No. 935.

Decree Granting Preliminary Injunction in Case of Trademark, Label, etc.

[Caption.]

This case having heretofore come on for trial on the rule nisi for preliminary injunction and having been heard and submitted to the court, and the law and the evidence being in favor

of the complainant and against the defendant, Louis E. Jung:

It is ordered, adjudged and decreed that the rule *nisi* issued herein be and the same is hereby made absolute as to the defendant, Louis E. Jung, and as to the other defendants said rule be dismissed.

And it is further ordered, adjudged and decreed that preliminary injunction issue herein against the said defendant, Louis E. Jung, enjoining the said Louis E. Jung and each of his attorneys, officers, clerks, servants, employes, workmen and representatives, heirs and assigns, and all persons or parties claiming through or from or holding through or under him, under the pain and penalties which may fall upon him in case of disobedience, to forthwith desist from placing or causing to be placed upon liquor the said designation as being distilled with "Carduus Benedictus Herb" or any imitation of complainant's trade-marks, names and labels, and from selling any liquor, other than complainant's liquor, as and for "Benedictine" in any form or by any name or designation in imitation thereof, or in any manner that may simulate the liqueur of complainant or resemble complainant's said name and trade-marks and labels.

And it is further ordered, adjudged and decreed that said Louis E. Jung remain so inhibited and enjoined until the further order of this court in the premises.

Dated at New Orleans, La., this 3rd day of May, 1916.

(Signed) RUFUS E. FOSTER,
Judge.

Taken from *Jung v. Societe, etc.*, 242 Fed. 267.

No. 935a.

Preliminary Injunction.

[Caption.]

The President of the United States of America to Louis E. Jung, Greeting:

Whereas, it has been represented to us in our district court for the eastern district of Louisiana, in the fifth circuit, on the part of Societe Anonyme de la Distillerie de la Liqueur Benedictine de L'Abbaye de Fecamp, complainant, that it has lately

exhibited its bill of complaint in our said district court for the eastern district of Louisiana against you, Louis E. Jung, to be relieved touching matters therein complained of, in which it is stated, among other things, that you are selling a liquor which you designate as being distilled with "Carduus Benedictus Herb" and other herbs, roots and seeds, and which you sell as such in bottles colored and shaped like unto complainant's bottles, bearing labels and seals in imitation of complainant's labels, seals and trade-marks, and that your actings and doings in the premises are contrary to equity and good conscience; and,

Whereas, it has been further represented to us in our said district court that the complainant herein duly registered in the United States patent office at Washington, D. C., in the years 1883 and 1914, its certain trade-marks theretofore adopted, and that you, Louis E. Jung, have infringed the rights secured by the aforesaid registration by offering for sale and selling to others an imitation liquor in simulation of the liquor called "Benedictine," manufactured and sold by the complainant, which said imitation liquor you have sold and offered for sale, designated as being distilled with "Carduus Benedictus Herb" and other herbs, roots and seeds, in bottles colored and shaped like unto complainant's bottles, bearing certain labels and seals in imitation of complainant's labels, seals and trade-marks, contrary to the form of the statute in such cases made and provided;

Now, therefore, in consideration thereof, and of the particular matters in said bills set forth, we do strictly command and enjoin you, said Louis E. Jung, and each of your attorneys, officers, clerks, servants, employes, workmen and representatives, heirs or assigns, and all persons or parties claiming through or from or holding through or under you, under the pain and penalties which may fall upon you in case of disobedience, that you forthwith desist from placing or causing to be placed upon liquor the said designation as being distilled with "Carduus Benedictus Herb" or any imitation of complainant's trade-marks, names and labels, and from selling any liquor, other than complainant's liqueur, as and for "Benedictine" in

any form or by any name or designation in imitation thereof, or in any manner that may simulate the liqueur of complainant or resemble complainant's said name and trade-marks and labels; and that you remain so inhibited and enjoined until the further order of our said court in the premises.

Witness, the Honorable Rufus E. Foster, judge of the district court of the United States at New Orleans, in the said eastern district of Louisiana, this 3rd day of May, in the year of our Lord one thousand, nine hundred and sixteen.

(Signed) H. J. CARTER,
Clerk.

[Seal.]

Taken from same case as No. 935.

No. 936.

Decree Denying Injunction under Sherman Anti-Trust Act.

[Caption.]

This cause came on to be heard upon the bill of the United States, the demurrer and answer of the defendants, the affidavits filed by plaintiff and defendants, from all of which the court was of opinion that the plaintiff was not entitled to the injunction prayed for; that the merits of the petition were fully met and denied by the answer, and were not sustained by the proof the court being of the opinion that the association between defendants was not a contract or a combination in restraint of trade, or monopoly of trade and commerce, under the act of Congress of July 2, 1890.

It was therefore ordered, adjudged and decreed that the petition filed against the defendants be dismissed, and that petitioner pay the costs of this cause.

No. 937.

Order to Show Cause Why Injunction should not Issue, etc.

[Caption.]

Upon reading the bill of complaint herein and the affidavits of G. R. and S. P., and on motion of R. X., solicitor for the plaintiff, it is hereby ordered this — day of —, 1894, that the defendant show cause, if any he has, before the judge

of said court at —, in the city of —, district of —, on the — day of —, 1894, at ten o'clock a. m., or as soon as counsel can be heard, why the injunction should not issue pursuant to the prayer of said bill.

No. 938.

Order Allowing Injunction to Restrain Collection of Taxes.

[Caption.]

On motion of the plaintiff by its attorneys, after due notice given to the defendant, and good cause being shown therefor, it is ordered that on an undertaking being given in the sum of \$— with sureties to the approval of the clerk of this court, a preliminary writ of injunction issued herein, restraining and enjoining said defendant, R. S., as treasurer of the county of —, and state of —, and his successors in office, from collecting or attempting to collect from the plaintiff or from its individual shareholders named in said bill, by distraint or otherwise, any of the taxes named in the bill, as the same stand charged upon the duplicate of — county, except that said respondent is hereby given authority without prejudice to his rights in the premises, to receive from the plaintiff \$— on the taxes due December —, and \$— due June —, being the taxes by said plaintiff's bill, admitted to be justly due from it and its individual shareholders to said defendant, and that said writ remain in force until the further order of this court.

No. 939.

Order Granting an Injunction against Municipality Interfering with Telegraph Poles, etc.

[Caption.]

On reading the petition filed herein —, also the affidavits and exhibits filed herein by and on behalf of the parties

hereto respectively, to wit, the complainant and the defendants, also after arguments made and briefs filed on behalf of complainant and defendants by their respective counsel, and also upon due consideration, the court finds that the complainant has proposed and still proposes itself to establish and maintain in the city of —, a local district telegraph system, and to operate and maintain the same through its own servants and agents, and that said complainant has proposed and still proposes to do so through the use of its own wires and other mechanical apparatus necessary to be placed and used therefore upon its poles and within its conduits above and below the surface and within the boundaries of the streets, alleys, highways and other public grounds of the city of —, without interference with the ordinary travel thereon. It is therefore ordered that the defendants, and each of them, and the officers and agents of every character of the city of —, be, and they hereby are, enjoined until further order of court, from preventing or interfering with complainant, or any of its officers or agents, replacing, maintaining or using, any of the wires or other mechanical apparatus or instrumentalities which have heretofore been cut or otherwise severed or disconnected and removed by any of defendants, or from preventing or interfering with complainant or its officers or agents placing and maintaining or using the wires and other mechanical apparatus or instrumentalities upon complainant's poles and within its conduits within the boundaries of any of the streets, alleys, highways or public grounds of said city of —, so far as such wires, mechanical apparatus or instrumentalities are necessary for the full and complete operation of such district telegraph system within said city; and said defendants, and each of them, and the officers and agents of every character of said city of —, are further enjoined from cutting, breaking, destroying, mutilating, or otherwise interfering with, any such wires, mechanical apparatus or instrumentalities, or from severing or disconnecting any of them, whether the same be upon com-

plainant's poles, or within its conduits, or elsewhere, within said city, and are also further enjoined from obstructing or interfering with complainant itself, through its own officers and agents, in carrying on and conducting a district telegraph system within said city.

No. 940.

Order Granting Injunction Against Telephone Company.

The District Court of the United States for the — District of —.

A. B. Telephone Company } Equity.
 vs. }

The People's Telephone Company. } No. —.

Whereas, in the above entitled cause an application for issuance of preliminary writ of injunction was duly filed and set down for hearing before the Hon. C. D., judge of the District Court of the United States for the — Division of the — District of —, on the — day of —. Notice of such application to be given to the defendants People's Telephone Company, and J. C.; and the parties now appearing by their solicitors, being heard upon said application, and it appearing that cause exists for the granting of writ of injunction pending final hearing of this cause as prayed for.

It is therefore ordered that defendants, People's Telephone Company, and J. C., their agents, servants and attorneys, be and they are hereby, strictly restrained and enjoined from making any further connections by wires, switches, instruments or any other devices of any kind or character, directly or indirectly, or furnishing material for the same, or advising, showing or directing any other parties how to make the same with the property of the complainant, as complained of in the bill to which reference is made.

And they, and each of them, are hereby restrained, inhibited and enjoined from the further use of the connections

heretofore made that are now being operated and maintained by wires and material furnished by the defendant company, and J. C., and are inhibited and restrained from furnishing for use wires, instruments or other devices connected or to remain connected, as specifically prayed for in the bill of complaint, until further orders of the court in the premises.

No. 941.

Order Granting an Injunction against Chief Executive of a Labor Union (1).

[*Caption.*]

On application of the complainant, and the filing of the second amendment to the bill of complaint and accompanying affidavits, and its appearing to the court that serious, irreparable and immediate damage will ensue unless a temporary restraining order is allowed as prayed for in said amendment and the motion filed therewith. It is ordered that the defendant Peter M. Arthur do forthwith in the manner customary and usual according to the practice of the Brotherhood of Locomotive Engineers of giving information to its members, cause to be made known and published that the law, by-law, rule or regulation of said brotherhood, requiring its members to refuse to handle cars of the Toledo, Ann Arbor & North Michigan Railway Company is not in force or effect against said company, and that Jasper W. Watson made a defendant herein do forthwith cause to be made known and published to the locomotive engineers in the employment of the Lake Shore & Michigan Southern Railway Company, who are members of said brotherhood in the usual way in which according to the practice of said brotherhood, information is disseminated among the members of said organization that the law, rule, regulation or by-law of said brotherhood requiring its members to refuse to handle cars of the Toledo,

Ann Arbor & North Michigan Railway Company is not in force or effect against said company.

And also that Peter M. Arthur and said Jasper W. Watson do forthwith file with the clerk of this court for inspection by the court a copy of such by-law, rule or regulation so governing the actions of the members of the said brotherhood requiring its members to refuse so to handle the cars and freight of said The Toledo, Ann Arbor & North Michigan Railway Company.

Ordered, that a temporary restraining order be issued as prayed for in the said amendment to the bill, and the motion filed therewith leave to the defendants or any of them to move to dissolve the same, hearing to be had on one day's notice to the complainant's solicitor.

Comes complainant and moves for an injunction pending the hearing of the issues herein, and accordingly Monday, March 27th, at 10 o'clock a. m., is set for said hearing. Notice of same will be served on all defendants.

(1) This order was entered in Toledo, etc., R. R. Co. v. Pennsylvania Co., 54 Fed. 730.

No. 942.

Order Enjoining Striking Workmen from Interfering with Business.(1)

The District Court of the United States for the ——— District of ———, ——— Division.

The A. B. Company, a corporation, organized under the laws of the State of ———, Complainant,

vs.

C. D., E. F., G. H. [*naming all the defendants against whom injunction is granted*], Defendants.

Now, on this day comes the complainant, by its counsel, and having filed its bill of complaint, moved thereon, and upon the affidavits of R. T., W. B., and others, filed in this

cause, for an injunction against the defendants, restraining them, and each of them, as prayed for in said bill of complaint.

And thereupon the principal defendant, Shilling, came by his counsel, R. S., and asking a postponement of said motion, it is ordered that said application for postponement be, and the same is hereby sustained, and the further hearing of said motion stand over to the — day of —, A. D. —, but in the meantime, and until it is otherwise ordered and decreed, that the said defendants named in the bill, are and each of them is ordered, commanded and enjoined from in any manner impeding, hindering, obstructing, or interfering with any of the business of the complainant in the operation of any of its works in the city of —, or elsewhere, and from entering upon the grounds or premises of said company against its wish for the purpose of impeding in any manner its business or interfering therewith; and the said defendants are, and each of them is, also ordered, commanded and enjoined from compelling or inducing or attempting to compel or induce, by use of threats or intimidation of any sort, or fraud or deception or violence, any person to leave the employment of said company, or not to enter its employ if desirous of doing so, and from doing any act or thing whatsoever by any of the above named means or methods in furtherance of a purpose to impede the business of the said company, or to impede any of its officers or employees in the free and unhindered conduct and control of said company's business; and said defendants are, and each of them is, enjoined from in any manner whatsoever ordering, directing, aiding, counselling, assisting or abetting any person, company or organization to do, or cause to be done, any of the things aforesaid. And the said individual defendants above named are, and each of them is, ordered, commanded and enjoined to desist and abstain from congregating at or near the premises of said company with the purpose, and in such manner as to intimidate or to obstruct, surround or impede in a manner calculated to intimi-

date, or for that purpose, any of the employes of said company, or persons seeking employment from it in going to, remaining at or coming from the premises of said company, and said defendants are, and each of them is, enjoined from in any manner interfering with or molesting any person or persons, who may be employed by or be seeking employment of said company, in the operation of its said business, and the said individual defendants are, and each of them is hereby enjoined and forbidden, either singly or in combination with others, from picketing, guarding, obstructing, impeding or besetting the streets, alleys and approaches of the premises of the said company with the purpose and in such manner as to intimidate, threaten, impede, obstruct, surround or coerce any of the employes of said company, or persons seeking employment of said company, and all of said individual defendants are, and each of them is, enjoined from in any manner interfering with such persons in going to or from, or in remaining at, the works or place of business of said company, and from interfering with any such persons anywhere because of such persons being in the employment of complainant, or of their seeking to be employed by it, or because such persons failed or refused to join in this present strike, ordered May —.

And said defendants are, and each of them is, enjoined and restrained from going, either singly or collectively, to the homes, boarding-houses or places of habitation of employes of complainant, or any of them or of persons seeking its employment, with the purpose of intimidating or coercing any or all of them to leave the employment of the complainant, or from entering complainant's employment, and as well from intimidating or threatening in any manner the relatives, wives and families of said employes at their said homes or elsewhere.

And it is further ordered that this order shall be in force and binding upon each of the defendants, and all of them named in the bill, from and after service upon them of said order by delivering to them a copy, or by reading the same to

them, and shall be binding upon defendants whose names are alleged to be unknown, from and after publication thereof by posting or printing, and shall be binding upon all defendants, and all other persons whatsoever, from and after the time they severally have knowledge of the allowance of this order.

Hereof fail not under the penalty of the law thence ensuing.

Witness the Honorable Melville W. Fuller, chief justice of the United States, this — day of —, A. D. —, and in the — year of the Independence of the United States of America.

B. R.,

Clerk of the District Court of the United States
for the — District of —.

[Seal.]

(1) *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 695; *Elder v. Whitesides*, 72 Fed. 724; *Casey v. Cincinnati Typographical Union*, 45 Fed. 135, 12 L. R. A. 193; *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811; *Mackall v. Ratchford*, 82 Fed. 41.

No. 943.

Order of Injunction Extended.

[Caption.]

On motion of complainant and upon affidavits filed by it in this cause, the order of injunction heretofore, to wit, on August 29, 1900, made by Judge Thompson, is hereby extended until September 25, 1900, when the court, Judge Clark sitting, will hear the cause for further extension of such order of injunction and for additional relief as prayed in the bill and petition herein, and the injunction order this day so extended shall continue thereafter until further order is made herein by the court.

No. 944.**Decree Denying Motion to Vacate Preliminary Injunction.**

[Caption.]

And now, to wit, this 13th day of April, 1915, upon consideration of the motion made by the defendants on the 7th day of April, 1915, to vacate the preliminary injunction granted by this court on the 26th day of March, 1915, in so far as the same applies to the right of the defendants or their counsel to directly or indirectly disclose any and all processes, apparatuses, articles of manufacture or compositions of matter, or any new or useful improvements thereon in issue herein, claimed to be the property of the plaintiffs, to expert or fact witnesses produced at or during the taking of proofs of trial including the right to consult with expert or fact witnesses regarding the same, either during cross-examination or in preparation or presentation of the defendants' case, and after argument of counsel, the said motion is denied for the reasons set forth in opinion filed the 12th day of April, 1915, and it is ordered, directed and decreed that the preliminary injunction granted on the 26th day of March, 1915, shall stand; provided that defendants shall not be deprived of the right to examine expert and fact witnesses excepting as to said processes, apparatuses, articles of manufacture, or compositions of matter, or any new or useful improvements thereon in issue herein and claimed to be the property of the plaintiffs.

By the court:

DICKINSON, J.

No. 945.**Decree Enjoining the Carrying on of a Business in Violation of a Contract.**

[Caption.]

This cause came on to be heard upon the bill of complaint and the amended answer filed by the defendants thereto, and the evidence and arguments of counsel, upon consideration whereof the court finds for the complainant and against the

and direction, be and hereby are enjoined and restrained from operating and carrying on their said business in violation of the terms and conditions of the said contract dated February 7, 1910, up to and including the 6th day of February, 1915, at 12 o'clock midnight of said day, being the date of the expiration of said contract; and that the said defendants, and each of them, and the said Bessie M. Cropper, their agents, servants and attorneys, and all persons acting by or under their authority and direction, be and they are hereby perpetually enjoined and restrained from in any wise using, giving away or distributing in any business conducted by them, or either of them, the said book entitled "Collecting by Rating," and the book entitled "Red Guide and Credit Record," and from in any wise using, giving away and distributing the forms, notices and printed matter contained in said book, "Collecting by Rating"; and that said defendants, and each of them, and the said Bessie M. Cropper, their agents, and servants, and all persons acting by or under their authority, be and they are hereby perpetually enjoined and restrained from in any wise making use in their business of the term "Collecting by Rating."

It is further ordered, adjudged and decreed that the defendants pay the costs of this action to be taxed by the clerk.

To all of which foregoing findings, order and decree, the defendants and Bessie M. Cropper except, which exceptions are hereby allowed.

By the Court:

PAGE MORRIS,
Judge.

Taken from Cuepper v. Davis, 156 C. C. A. 90.

No. 946.

Order Allowing Injunction Against Use of Copyrighted Forms in Business.

[Caption.]

This cause coming on to be heard upon the application of the complainant for a provisional or temporary order of injunction herein and upon the bill of complaint filed herein

and positively verified, and the exhibits annexed thereto, and the affidavits of the complainant and S. W. Ivers in support thereof, and upon the affidavits filed by the defendants against the issuance of the preliminary writ of injunction prayed for, the complainant appearing by Brown, Baxter & Van Dusen, his attorneys, and the defendants appearing by Hugh A. Myers, their attorney, and upon hearing had and argument of counsel, the cause was submitted, whereupon the court, upon consideration, finds that a writ of injunction preliminary to the final hearing is proper and should be allowed as against the defendant Walter L. Cropper and that prima facie the complainant is entitled thereto as against the defendant Walter L. Cropper, enjoining the said defendant from the acts complained of and threatened to be committed.

Therefore, complainant's application for such preliminary and provisional order of injunction be and hereby is granted upon his giving bond to the defendant Walter L. Cropper, with good and sufficient surety or sureties to be approved by the clerk of the court in the penal sum of one thousand dollars, securing the said defendant against all loss or damage which may result from the issuance of such order, if it should be finally determined that the same was improperly issued, or that may be awarded to him by reason of the granting of said order.

Now, therefore, it is ordered, that you, the said Walter L. Cropper, one of the defendants herein, your agents, servants and attorneys and all persons acting by or under your authority or direction, be, and you hereby are, specially restrained and enjoined from making, issuing and using in any business conducted by you forms of "Certificate of Membership and Contract," "Rating Notice," "Listing Blank," "Rating Statement," and "Rating Report," similar in form and style, matter and plan to that now used by Will M. Davis doing business under the name and style of National Rating League and from soliciting members of the National Rating League, and from engaging as employee or otherwise, in any line of business using the same or similar plan and forms to those used by

said Will M. Davis, doing business under the name and style of National Rating League, and in competition therewith, until the further order of this court.

It is further ordered that a copy of this order, certified under the hand of the clerk and seal of this court, be served upon the said defendant to be restrained thereby.

A. B.,
Judge.

Taken from same case as No. 945.

No. 947.

Decree Enjoining Disclosures of Secret Processes in Issue, Even to Experts.

[*Caption.*]

The renewed application for a preliminary injunction under the leave granted having come on to be heard and argued by counsel, upon consideration thereof it is ordered, adjudged and decreed as follows:

That defendants, Walter E. Masland, Charles H. Masland, Maurice H. Masland, Charles W. Masland, Frank E. Masland, and J. Wesley Masland, their officers, clerks, attorneys, servants, agents, employees, workmen and confederates and each of them, be and hereby are enjoined and prohibited, until the further order of the court, from directly or indirectly disclosing any and all processes, apparatuses, articles of manufacture, or compositions of matter, or any new and useful improvements thereof, in issue herein claimed to be the property of the plaintiffs, including the disclosure to experts or to fact witnesses produced at or during the taking of the proofs of trial, but excepting therefrom defendants' solicitors or counsel and subject to leave granted defendants to move to vacate said injunction if occasion to consult expert witnesses or otherwise arises.

It is further ordered that sufficient time be given defendants in which to present reply proofs to the proofs submitted by plaintiffs.

It is further ordered that the protection to be thrown around the taking of proofs and who shall be permitted to attend

thereat may be agreed upon by counsel or determined by the court at the time such proofs are taken. Plaintiffs to file injunction bond in the sum of one thousand dollars (\$1,000.00).

By the Court:

DICKINSON, J.

Taken from *Du Pont Co. v. Masland*, 244 U. S. 100.

No. 948.

**Application for Injunction Against Enforcing a Judgment of
a State Court.(1)**

[Caption.]

Now comes the defendant, the Black Panther Oil and Gas Company, and complaining of one George M. Swift, states:

First. In the order made on April 17, 1914, by this court in this action appointing a receiver, the said receiver was directed to enter into a contract with this defendant for the development of the lands described therein, to-wit: the north-west quarter (NW $\frac{1}{4}$) of section nine (9), township eighteen (18) north, range seven (7) east in Creek county, Oklahoma, the said receiver was directed to release to this defendant what is known as the working interest in the oil and gas produced therefrom free from any claim of any party to this action, and in the contract thereafter entered into between the receiver and this defendant, the said receiver covenanted and agreed that he would release to this defendant free from any claim of any party to this action all the oil and gas produced from said premises, over and above the royalty of one-fourth interest directed to be paid to the receiver. This defendant has faithfully complied with all the obligations it assumed, with the receiver in the making of said contract.

Second. After the appointment of the receiver herein, and on the 23rd day of November, 1913, Saber Jackson, by order of this court, was made a party defendant herein and in his answer on said date filed, he expressly ratified all the orders, judgments, and proceedings that have heretofore been made in this cause. The said answer of the said Saber Jackson was filed herein prior to the time the said George M. Swift claims

to have acquired any interest in or to any oil or gas produced from said premises, or in any lease upon said premises or any other lease of whatsoever character in or to said premises.

Third. Thereafter, on the 27th day of February, 1915, the said George M. Swift filed his petition in the district court within and for Creek county, Oklahoma, against this defendant wherein he claimed that on the 13th day of November, 1913, the said Saber Jackson had executed an oil lease upon the lands in controversy to one J. Coody Johnson reserving to the said Saber Jackson a royalty of all the oil produced upon the said premises by the said J. Coody Johnson or his assigns. It is further alleged in said petition that through several assignments said lease had become the property of this defendant. In said petition it was shown that the purpose of said suit was to procure judgment for one-eighth of all the oil theretofore produced or that might be thereafter produced upon said premises. A copy of said petition is hereto attached as a part hereof and marked Exhibit "A" of this application.

Fourth. In said cause this defendant filed its answer in which it advised said court that this court had already taken possession of said property through its receiver; that the said Saber Jackson had become a party to this action expressly ratifying the action of this court in appointing a receiver, and suggesting to said court that it ought not to entertain jurisdiction of said cause. A true and complete copy of this defendant's answer, with amendment thereto, is attached hereto as a part hereof and marked Exhibit "B." This defendant further states that, notwithstanding its said plea, said court entertained jurisdiction of said cause and thereafter and on the 30th day of October, 1915, rendered judgment wherein it decreed that the said George M. Swift was entitled to a one-eighth of all the oil which this defendant had produced from said land under and by virtue of its contract with said receiver. A copy of said judgment and decree is attached hereto as a part hereof and marked Exhibit "C." Thereafter, on the 5th day of February, 1916, the said court rendered its further judgment and decree wherein it held that the said

George M. Swift was entitled to one-eighth of all the oil theretofore produced or which should thereafter be produced by the defendant from the said premises under its said contract with the receiver herein. A copy of said final decree is hereto attached as a part hereof and marked Exhibit "D." Motion for a new trial in said cause was duly filed and by the court overruled on March 4, 1916, and this defendant was by order of said court, required to give bond in the sum of two hundred fifty thousand (\$250,000.00) dollars to supersede said judgment. A copy of the order of said court is attached hereto as a part hereof and marked Exhibit "E" of this application.

Fifth. This defendant states that it owns no property of any character whatsoever, except the interest it has in the lease made herein with the receiver of this court; that it tried but was unable to give said supersedeas bond, and unless this court shall protect the defendant, the said George M. Swift will, through the process of the said state court not only harass and annoy the defendant, so as to make it impossible for it to comply with its contract with the receiver, but will, in effect, nullify the order of this court appointing said receiver wherein it released to this defendant the working interest in said premises free from the claims of all parties to this suit and will nullify and make impossible the carrying out and performance of the covenants of the receiver wherein the said receiver agreed to release to this defendant the working interest of said oil and gas free from the claims of all parties of this action. This defendant further states that the said state court will, through its process, assist the said George M. Swift in thus nullifying the aforesaid order and decree of this court and the aforesaid contract of the receiver herein.

Sixth. This defendant further avers that on the 28th day of March, 1916, the said George M. Swift procured writs of garnishment to issue out of said state court, wherein it summoned the Security State Bank of Wewoka, Oklahoma; the Security National Bank of Oklahoma City, Oklahoma, and Howard Weber, of Bartlesville, Oklahoma, as garnishees, and by reason of said garnishment writs, the said George M.

Swift has induced the said banks and the said Howard Weber to withhold from this defendant any and all monies owing it, an any and all oil produced from said premises which this defendant is entitled to receive, under the aforesaid order of this court, a copy of which said garnishment summons is hereto attached, made a part hereof, and marked Exhibit "F."

Seventh. This defendant states that on the 29th day of March, 1916, the said George M. Swift procured from the judge of the said state court, to-wit: the Honorable Earnest E. Hughes, a writ of injunction, which by its terms prevents this defendant paying out any monies that may come into its hands or under its control, and from checking out any funds that may be placed in any bank to its credit or for its benefit, and from paying out any money that it may hereafter receive from any oil produced upon the aforesaid premises, a true and complete copy of which said restraining or injunctional order is hereto attached, marked Exhibit "G" and made a part hereof.

Eighth. Now this defendant states that said writs of garnishment and said restraining order were all procured in contempt of the order of this court: that they were purposely procured for the purpose of infringing upon the jurisdiction of this court and for the further purpose of nullifying the aforesaid order of this court and the aforesaid contract of this defendant with the said receiver, and for the purpose of making it impossible for this defendant to carry out its contract with the said receiver, and that, unless this court shall restrain the said Swift from further attempting to execute said judgment the proceedings of the said Swift in the said state district court will make it impossible for this defendant to carry out its contract with the said receiver and will nullify and destroy the aforesaid order of this court and the aforesaid guaranty of the receiver.

Ninth. This defendant further represents and shows to this honorable court that it has been informed and verily believes and therefore alleges that the said George M. Swift, as plain-

tiff and judgment creditor in said state district court action, has caused an execution to be issued by the clerk of said court and levied by the sheriff of said Creek county, Oklahoma, upon the property of this defendant located in said county, consisting entirely of its interest in and to said above described tract of land, acquired under the said lease contract with the receiver of this court, and all the equipment and improvements placed in and upon said land, in performance of its obligation under and by virtue of the terms of said lease; also that the said sheriff of Creek county has advertised all of said property for sale on the 3rd day of May, 1916, at the courthouse in the city of Sapulpa, said county and state, and will on said date, unless restrained and prevented by the order of this court, sell said property to the highest bidder, thereby making it utterly impossible for this defendant further to comply with and carry out the provisions of said contract with the receiver of this court.

Defendant further alleges that the amount of damages which will accrue to it by the various proceedings to enforce said judgment, restored to by the said George M. Swift, in said state district court, is incapable of exact or approximate estimation and that this defendant has no other adequate remedy than the injunction process of this court; also that the said Swift is insolvent.

Wherefore, this defendant prays that the aforesaid George M. Swift, his agents, attorneys, and other employes, be immediately restrained from further enforcing or attempting to enforce said judgment, either directly or indirectly, against the said three-fourths working interest of this defendant in and to the oil and gas produced on and from said above described premises, until a hearing of this application can be had and that upon such hearing a further order be passed enjoining the said George M. Swift, his agents, attorneys, servants, and employes, from further enforcing or attempting to enforce said judgment during the continuance of said receivership, and until the final determination of this action. This defendant further prays for such other and general relief as

will fully protect it in the enjoyment of the guarantees contained in its said contract with the receiver of this court.

(Signed) STUART & CRUCE,
KEATON, WELLS & JOHNSTON,
Attorneys for the defendant,
Black Panther Oil & Gas
Company.

(1) This case is reported in 244 Fed. 20, 156 C. C. A. 448, and the opinion contains a comprehensive summary of the cases dealing with this question. The chief question at issue in such cases is, which court lawfully obtained jurisdiction first?

If the federal court, as here, then it may enjoin further proceeding in the state court, or a judgment of the state court.

Judicial Code, Sec. 265, prohibits injunction issuing out of a federal court to stay proceedings in a state court except in bankruptcy proceedings where authorized by law.

Under this section a federal court is not precluded from granting an injunction restraining the enforcement of the judgment of a state court where necessary to preserve the rights of parties in a suit properly before it. *Southern Ry. Co. v. Simon*, 153 Fed. 234.

No. 949.

Decree Enjoining State Court Judgment.

[Caption.]

On this 22d day of April, 1916, came on for further hearing the application for an injunction filed herein by defendant Black Panther Oil and Gas Company seeking to restrain George M. Swift, his agents, attorneys and employees, and the applicant, Black Panther Oil and Gas Company and the respondent, said George M. Swift, being present by counsel, the court, after hearing the testimony, and duly considering the same, finds that the law and the facts are in favor of the petitioner and the injunction prayed for herein should be granted.

It is therefore ordered, adjudged and decreed by the court that the respondent, George M. Swift, his attorneys, employees, servants and agents be enjoined from further attempting, either by execution or by writs of garnishment or other

process to enforce a certain judgment heretofore recovered in the district court of Creek county, Oklahoma, wherein the said George M. Swift is plaintiff and the said Black Panther Oil and Gas Company is defendant, insofar as said writs of garnishment or executions seek to subject to the payment of said judgment in the said Creek county district court the three-fourths working interest, or the proceeds of the same, heretofore derived or that hereafter may be derived, by the said Black Panther Oil and Gas Company in the operation for oil and gas on the Northwest Quarter (NW $\frac{1}{4}$) of section nine (9), township eighteen (18) north, range seven (7) east, in Creek county, Oklahoma; and said George M. Swift, his agents, servants and employees are further enjoined from attempting to enforce, or from maintaining, writs of garnishment heretofore sued out in said cause pending in said district court of Creek county, Oklahoma, against the Security State Bank of Wewoka, Oklahoma; the Security National Bank of Oklahoma City, Oklahoma, and Howard Weber, of Bartlesville, Oklahoma; and the said George M. Swift, his agents, servants and employees are further enjoined from further maintaining any writ of injunction heretofore issued in said cause pending in said district court of Creek county, Oklahoma, which attempts to restrain the said Black Panther Oil and Gas Company from checking out, or using any funds placed to its credit in any bank or banks in the State of Oklahoma; and the said George M. Swift, his agents, employees and servants are further restrained and enjoined from, in any manner, seeking to subject said three-fourths working interest in the oil and gas produced from said premises, or the proceeds or moneys arising from the sale of said oil and gas, either by execution, attachment, garnishment, injunction or other process, to the payment of said judgment procured in the said District Court of Creek county, Oklahoma, and said George M. Swift is commanded to dismiss said writs of garnishment and said restraining order, and to recall any execution issued out of the said District Court of Creek county, Oklahoma.

This decree and injunction to be and remain in full force and effect until the final discharge of the receivership herein.

And thereupon, in open court, the respondent, George M. Swift, by his attorneys, orally moved the court to require the Black Panther Oil & Gas Company to execute a bond conditioned to pay all damages by reason of the injunction herein as a condition to granting this injunction, which motion and request is overruled and refused.

It is further ordered, that the said Black Panther Oil & Gas Company recover of and from the said defendant, George M. Swift, all its costs in this behalf expended, and the respondent, George M. Swift, excepts to the order and decree herein.

RALPH E. CAMPBELL,
Judge.

Taken from U. S. v. Wildcat, 244 U. S. 111.

No. 950.

Order Enjoining Prosecution of a Pending Suit at Law in the Same Federal Court and forbidding the Bringing of Suits in a State Court, and to Strike Out.(1)

[Caption.]

This cause came on to be heard at the November term of this court and was argued by counsel and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the defendant herein, The Shubert Theatrical Company of New Jersey, be and it is hereby enjoined from taking any further steps in a certain action at law pending in this court in which the said Shubert Theatrical Company of New Jersey is plaintiff and the plaintiff herein, The Sherman National Bank, is defendant, until further order of this court; and it is further

Ordered, adjudged and decreed that the said defendant herein, The Shubert Theatrical Company of New Jersey, is enjoined from commencing any other action against the plaintiff herein, The Sherman National Bank, in any court upon the cause of action stated in the said action hereinbefore mentioned. And it is further

Ordered, adjudged and decreed, that the answer herein of The Shubert Theatrical Company of New Jersey be amended as follows: First, that the defence therein denominated "First Defence" be and the same hereby is stricken out and the defendant directed to file a further and better statement of the nature of the defence therein contained and further and better particulars of the matters therein stated, within twenty days after the service upon them of a copy of this order. And it is further

Ordered, adjudged and decreed that the defences therein denominated "Second Defence" and "Third Defence" be and the same hereby are stricken out without leave to re-plead.

LEARNED HAND,

D. J.

(1) Judicial Code, Sec. 265 does not prevent a federal court from protecting its own jurisdiction, and it may therefore enjoin prosecution in a state court which would render its own decree nugatory. *Julian v. Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629; *St. Louis, etc., Ry. Co. v. Bellamy*, 211 Fed. 172; *Jackson v. Parkersburg, etc., Ry. Co.*, 233 Fed. 784.

No. 951.

Order for Preliminary Injunction in a Patent Suit.(1)

[Caption.]

This cause having come on to be heard on motion of plaintiff for a preliminary injunction, and on reading and filing notices of motion for an injunction herein and proof of service thereof, and the affidavits on behalf of the plaintiff annexed thereto, and on reading and filing affidavits on behalf of the defendant, and counsel for defendant as well as for the plaintiff have been heard, and the same having been duly considered by the court, and it appearing that letters patent of the United States No. —, were issued in due form of law on the — day of —, for an improvement in hobby-horses, to A. B., and that the said defendant, C. D., has infringed on the rights secured by the aforesaid letters patent by making and selling to others hobby-horses embody-

ing the invention set forth in said patent contrary to form of the statute in such case made and provided;

Now, therefore, it is hereby ordered, adjudged, and decreed that a preliminary injunction be issued pursuant to the prayer herein, strictly commanding and enjoining the defendant, C. D., his clerks, agents, servants, workmen, and attorneys, under the pains and penalties which may fall upon them, and each of them, in case of disobedience, that they forthwith, and until the further order, judgment, and decree of this court, desist from making, using, and selling any hobby-horses as described and claimed in the said letters patent.

(1) As to injunction generally. See Foster's Fed. Prac., 5th ed., Secs. 262 to 300; Beach's Modern Eq. Prac., Secs. 753 et seq. When preliminary injunctions are grantable in patent cases. See Robinson on patents, Secs. 1169 et seq., and cases cited in notes.

No. 952.

Preliminary Injunction to Restrain the Infringement of a Patent.

[Caption.]

The President of the United States to C. D., and his clerks, agents, attorneys, servants, and workmen, Greeting:

Whereas, it has been represented to us in the circuit court of the United States for the ——— district of ———, that letters patent No. ——— were issued in due form of law on the ——— day of ———, for an improvement in hobby-horses to A. B., and that you, the said C. D., have infringed the rights secured by the aforesaid letters patent by making and selling to others hobby-horses embodying the invention set forth and claimed in the said letters patent, contrary to the form of the statute in such cases made and provided;

Now, therefore, you, the said C. D., your clerks, agents, attorneys, servants, and workmen are strictly commanded and enjoined under the pains and penalties which may fall upon you and each of you, in case of disobedience, that you forthwith, and until the further order, judgment, and decree of this court, desist from making and selling any hobby-horses

embodying the invention of said letters patent, substantially as described and claimed in the said letters patent.

[*Add. teste.*]

No. 953.

Order Refusing Injunction in a Patent Suit upon Defendant Giving Bond.

[*Caption.*]

And now, this — day of —, 1893, the above cause having come on to be heard on the — day of —, on motion of plaintiff for a preliminary injunction in accordance with the prayer of the bill in the above entitled cause, and upon affidavits and exhibits filed by the plaintiff and the defendant, and having been argued by counsel for the respective parties, and the court having fully considered the same, the motion is overruled at the cost of the plaintiff, but it is ordered that the defendant give bond in the sum of — dollars to the plaintiff for the payment of any profits or damages that may be decreed against it in this cause for the infringement of the patent sued on (between the date of this order and the final decree): and it is further ordered that if the defendant fails to execute and file with the clerk of this court such bond within twenty days from the date of this entry, plaintiff may renew said motion.

It is further ordered that the defendant keep an account of all sales of chimneys manufactured and sold, or sold by him like the exhibits marked —, to be produced when called for by the court.

No. 954.

Bond in Lieu of Preliminary Injunction in a Patent Suit.

[*Caption.*]

The United States of America,
for the — District of —, ss.

Know all men by these presents, that C. D., as principal, and E. F., as surety, are held and firmly bound unto A. B.

in the sum of —— dollars, to the payment of which they bind themselves and each of them, their heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this —— day of ——, 1894.

The condition of the above bond is such that whereas in accordance with an order of the district court of the United States within and for the —— district of ——, in the case wherein A. B. is plaintiff and C. D. is defendant, the said C. D. executed a bond in the sum of —— dollars, to pay the plaintiff A. B. such sum as may, upon final hearing, be decreed in his favor by reason of infringement of the patent sued on committed between the date of the order of said court and the final decree herein, in the said cause.

Now, if the said C. D. shall abide the decisions of the said court, and pays all moneys and costs which shall be attached against him in this cause, then these presents shall be void; otherwise to remain in full force.

C. D. [*Seal.*]

E. F. [*Seal.*]

[Add acknowledgment and justification of sureties.]

No. 955.

Writ of Injunction (General Form).(1)

The United States of America,
—— District of ——, ss.

The President of the United States of America to C. D.,
Greeting:

Whereas, A. B., citizen of the state of ——, has filed on the chancery side of the district court of the United States for the —— district of ——, a bill against C. D., and has obtained an allowance for an injunction, as prayed for in said bill. Now, therefore, we having regard to the matters in said bill contained, do hereby command and strictly enjoin you, the said C. D., [*set forth from doing what he is restrained, also the names of all persons so restrained*], which

commands and injunctions you are respectively required to observe and obey, until our said district court shall make further order in the premises.

Hereof fail not, under penalty of the law thence ensuing.
[*Add teste.*]

(1) Any injunction to be effective should be served personally upon the persons to be enjoined, but this is not necessary when the party to be enjoined has actual notice that the injunction has been granted. *Ex parte Lennon*, 166 U. S. 548; *Ulman v. Ritter*, 72 Fed. 1000; affirmed, 78 Fed. 222, 24 C. C. A. 71; *In re Cary*, 10 Fed. 622; *Toledo, etc., R. Co. v. Penn. Co.*, 54 Fed. 746, 19 L. R. A. 395; *Stateler v. Calif. Natl. Bank*, 77 Fed. 43; *U. S. v. Sweeney*, 95 Fed. 434.

No. 956.

Marshal's Return of Writ of Injunction.

Received this writ at —, on the — day of —, and on the same day I served the within named The C. D. Manufacturing Company by leaving a true copy of this writ, with all the endorsements thereon, at the usual place of residence of P. J., president of said company, placing same in the hands of an adult member of his family; and on the same day I served said company by leaving a true copy of this writ with all the endorsements thereon at the usual place of residence of T. O., secretary and treasurer of said company, placing same in the hands of his son K. W.

And on the same day I served the said The C. D. Manufacturing Company by handing a true copy of this writ with all the endorsements thereon to H. G., superintendent of said company personally.

S. R.,
U. S. Marshal.
By L. J., Deputy.

No. 957.**Injunction to Restrain Certification of Values to Comptroller
for Taxation.**

The President of the United States of America to the Marshal of the — District of —, Greeting:

Whereas, a decree was rendered by the District Court of the United States for the — District of — and thereafter, to wit, on —, entered in the clerk's office of said court, wherein it is decreed that E. F., governor, G. H., treasurer, and J. K., secretary of state, *ex-officio* Board of Equalization, shall not deliver or certify to the comptroller of the state of — the valuation fixed by them upon the property of the complainant, the A. B. Company, in a suit in equity pending in said court against them, in —, for taxation, for the years — and —, as shown and set forth in said bill and from certifying and delivering said assessment or any record thereof to the said comptroller, etc.

Therefore you will make known unto the said E. F., G. H. and J. K., governor, treasurer and secretary of state, respectively, Board of Equalization, and enjoin them, their agents, servants, clerks, and attorneys from certifying or delivering said valuation, or said assessment, or any record thereof, to said comptroller of the treasury of the state of —.

This you will in no wise omit and due return make hereof of how you have executed this writ to the April term of our said court, the — of —.

Witness, the Hon. Melville W. Fuller, chief justice of the United States, this the — day of —, and of American Independence the one hundred and — year.

B. R.,

Clerk of the District Court of the United States
for the — District of —.

No. 958.**Injunction Restraining a Telephone Company Connecting its Instruments with Those of a Rival Company.**

**The President of the United States to The People's Telephone Company and J. C.; and to their counselors, attorneys, solicitors and agents, and each and every of them —
Greeting:**

Whereas, The A. B. Telephone Company has lately filed an original bill of complaint in said District Court of the United States at —, against you, the said People's Telephone Company and J. C., to be relieved touching the matters set forth in said bill, in which it is charged that your actings and doings in the premises are contrary to equity and good conscience; and whereas, the Honorable C. D., judge of the District Court of the United States, in said District, has ordered that an injunction issue, as prayed by complainant.

Therefore, in consideration of said fiat, and of the particular matters in said bill set forth, you, the said People's Telephone Company and J. C., and the persons before named, and each and every of you, are hereby strictly commanded and enjoined, under the penalty of a contempt of court, that you do absolutely desist and refrain from making any further connections by wires, switches, instruments or any other devices of any kind or character, directly or indirectly, or furnishing material for the same, or advising, showing or directing any other parties how to make the same with the property of the complainant, as complained of in the bill to which reference is made.

And you, and each of you, are hereby restrained, inhibited and enjoined from the further use of the connections heretofore made that are now being operated and maintained by wires and material furnished by the defendant company, and J. C., and are inhibited and restrained from furnishing for use wires, instruments or other devices connected or to remain connected, as specifically prayed for in the bill of the com-

plainant, until the further order of the said court in the premises.

Witness the Honorable Melville W. Fuller, chief justice of the Supreme Court of the United States, at —, in said District, this — day of —.

[Seal.]

B. R.,

Clerk of the District Court of the United States
for the — District of —.

No. 959:

Writ of Injunction Against Chief Executive of Labor Union.

The President of the United States of America, to Peter M. Arthur — Greeting:

Whereas, the Toledo, Ann Arbor & North Michigan Railway Company, citizen of the state of Michigan, has filed on the chancery side of the Circuit Court of the United States, within and for the Northern District of Ohio, a bill against the Pennsylvania Company, the Wheeling & Lake Erie Railway Company, the Lake Shore & Michigan Southern Railway Company, the Michigan Central Railroad Company, the Cincinnati, Hamilton & Dayton Railroad Company, the Columbus, Hocking Valley & Toledo Railway Company, the Toledo & Ohio Central Railway Company, the Cincinnati, Jackson & Mackinaw Railway Company, Peter M. Arthur and others, and has obtained an allowance of an injunction, as prayed for in said bill, from Honorable William H. Taft, judge of said court.

Now, therefore, we having regard to the matters in said bill contained, do hereby command and strictly enjoin and restrain you, the said Peter M. Arthur from issuing, promulgating, or continuing in force any rule or order of any kind under the rules and regulations of the association known as the Brotherhood of Locomotive Engineers or otherwise, which shall require or command any employes of any of the defendant railway companies herein to refuse to receive, handle or deliver any cars of freight in course of transportation

from one state to another, from and to the Toledo, Ann Arbor & North Michigan Railway Company, or from refusing to receive or handle cars of such freight which have been hauled from the railroad of said Toledo, Ann Arbor & North Michigan Railway Company, and also from in any way, directly or indirectly, endeavoring to persuade or induce any employees of the railway companies whose lines connect with the railroad of said Toledo, Ann Arbor & North Michigan Railway Company not to extend to said company the same facilities for interchange of interstate traffic as are extended by said companies or other railway companies.

Which commands and injunctions you are respectfully required to observe and obey, until our said District Court shall make further order in the premises.

Hereof fail not, under penalty of the law thence ensuing.

Witness, the Honorable Melville W. Fuller, chief justice of the United States, this 5th day of April, A. D., 1893, and in the 117th year of the Independence of the United States of America.

Irvin Belford, Clerk.

[Seal.]

By Ford Belford, Deputy Clerk.

Said writ was returned to the clerk's office of said court and filed on April 10, 1893, having the following endorsement thereon, to wit:

Northern District of Ohio, ss.

On the 7th day of April, A. D. 1893, at Cleveland, Ohio, I made due service of this writ upon the within named Peter M. Arthur by delivering to him a true and certified copy thereof.

W. C. HASKELL,

U. S. Marshal.

Service, \$2.00

Copy50

Expenses25

By B. F. SEYMOUR, Deputy.

\$2.75

(1) This writ of injunction was issued and served on Peter M. Arthur, chief of Brotherhood of Locomotive Engineers, in the case of Toledo, etc., R. R. Co. v. Pennsylvania Co., 54 Fed. 730.

No. 960.**Injunction Bond.**

The United States of America,

— District of —, ss.

Know all men by these presents, that C. D., E. F., and G. H. are held and firmly bound unto A. B. in the sum of — dollars, to the payment of which they bind themselves, each for himself and his heirs, executors and administrators firmly by these presents.

Sealed with their seals and dated this — day of —, 1894.

The condition of the above obligation is such, that whereas, A. B., citizen of the state of —, having filed on the chancery side of the district court of the United States for the — district of — a bill against the said C. D., and having obtained an allowance of an injunction, as prayed for in said bill, from said court. Now, if the said C. D. shall abide the decision of said court, and pay all moneys and costs which shall be adjudged against him in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

C. D. [*Seal.*]

E. F. [*Seal.*]

G. H. [*Seal.*]

[*Add acknowledgment and justification of sureties.*]

No. 961.**Motion to Modify Injunction.(1)**

[*Caption.*]

Now comes the defendant by its counsel and moves the court to modify the injunction heretofore granted in this cause in the following respects, to wit: [*Here state the modification desired.*]

R. Y.

(1) This motion should regularly be presented to the judge who granted the injunction. See *Klein v. Fleetford*, 35 Fed. 98; *Westerly Water Works v. Westerly*, 77 Fed. 783.

No. 962.**Motion to Dissolve Injunction.(1)****[Caption]**

Defendant, C. D., now moves this honorable court to dissolve the temporary injunction or restraining order granted in this case on the ground that this defendant has filed herein a good and sufficient answer under oath.

X. & X.,

Attorneys for Defendants.

We have notice of the above motion.

Y. & Y.,

Attorneys for Plaintiff.

(1) A motion to dissolve an injunction is regularly presented to the judge, who granted the injunction. *Klein v. Fleetford*, 35 Fed. 98; *Westerly Water Works v. Westerly*, 77 Fed. 783.

The motion should be supported by affidavits.

No. 963.**Motion to Dissolve Preliminary Injunction.(1)****[Caption]**

And now comes the defendant, by its counsel, and moves the court to dissolve the injunction heretofore issued in this cause, on the ground that the patent sued on is invalid and void in view of the exhibits filed herein on behalf of defendant, or to modify the injunction so as not to prohibit the manufacturing and selling of hobby-horses by C. D. under and in accordance with letters patent No. —, granted to A. B., —, 1893, for the reason that said hobby-horses do not infringe said patent sued on.

R. Y.,

Solicitor for Defendant.

(1) See Robinson on Patents, Sec. 1213.

No. 964.**Order Overruling Motion to Dissolve.**

[Caption.]

This case coming on to be heard this — day of —, on motion of the defendant to dissolve the preliminary injunction, and counsel having been heard for the defendant as well as for the plaintiff, and due consideration having been had thereof, it is ordered that the said motion be and the same is hereby overruled at the defendant's cost.

No. 965.**An Order Granting Motion to Dissolve Injunction and Substituting Bond for Injunction.**

[Caption.]

This cause came on to be heard on the — day of —, on the motion of defendant filed —, 1894, to dissolve the preliminary injunction heretofore granted in this cause, and counsel having been heard, and the same having been duly considered by the court, it is ordered, adjudged, and decreed that the said injunction be set aside, provided the said defendant within five days give a good and sufficient bond in the sum of — dollars, to pay all damages and profits with reference to any account which may be found or assessed against the said defendant by reason of the manufacture and sale of hobby-horses, and all manufactures and sales in infringement of plaintiff's letters patent sued on in his said bill, and the bond shall relate back to the — day of —, when the order for injunction was first made.

No. 966.**Order Dissolving Injunction.**

[Caption.]

This cause coming on to be heard upon the motion of the defendant to dissolve the injunction heretofore granted in this

cause, and upon affidavits in support of and against the said motion, and counsel having been heard, and the same having been considered by the court, it is hereby ordered, adjudged and decreed that the same be and it is hereby set aside and vacated.

No. 967.

Final Decree Making a Temporary or Preliminary Injunction Perpetual. (1)

This cause came on for final hearing on the bill of complaint, and the amendment thereto herein filed upon the — day of —, the answer of the defendant, C. D., and the replication thereto; and thereupon it was by and between counsel for complainant and said C. D., with the consent of the court, agreed that said cause should be submitted upon the same evidence on this final hearing as was had and produced before the court at the hearing upon the motion for a preliminary injunction hereinbefore allowed. And thereupon said evidence being submitted, the cause was argued by counsel.

Upon consideration whereof the court being fully advised in the premises, do find that the equity in the case is with the complainant as against the said C. D., and that the said E. & F. Railway Company is entitled to the relief for which it prays as against him.

It is therefore accordingly ordered, adjudged and decreed by the court that the injunction heretofore granted in the case as against the said C. D. be made perpetual, and that said C. D. pay all the costs herein made.

(1) Taken from the record in *Arthur v. Toledo, etc., R. Co.*, 11 C. C. A. 583.

No. 968.**Motion for Restraining Order and Application for Hearing on
Injunction under Judicial Code, Section 266.**

[Caption.]

Now comes complainant and files this, its motion for the issuance of a restraining order for the reasons and on the grounds set forth in its Bill of Complaint to prevent irreparable damage to complainant; and complainant further makes this its application to this Court for a hearing on this cause for an interlocutory injunction in accordance with Section 266 of the Judicial Code of the United States, as amended by the Act of Congress approved March 14th, 1913.

A. B. and C. D.,
Attorneys for Complainant.

No. 969.**Restraining Order and Order to Appear for Hearing Before
Three Judges for Preliminary Injunction under Judicial
Code, Section 266.**

[Caption.]

Whereas, in the above named cause it has been made to appear upon the bill of complaint filed herein that a writ of injunction preliminary to the final hearing is proper, and that prima facie the complainant is entitled thereto, enjoining the defendants from the acts complained of and about to be committed.

Now, on motion of the said complainant, it is ordered that the defendants appear before the Judge of this District Court of the United States for the Southern District of Mississippi, and a judge of the Circuit Court of the United States, and another district judge of the United States Court, sitting to hear this matter on the 27th day of October, 1914, at 10:00 a. m., at the court room of the United States Circuit Court of Appeals at New Orleans, Louisiana, and then and there show

the cause, if any they have, why the preliminary injunction therein prayed for should not issue. And it appearing to the undersigned district judge that there is danger of irreparable injury being caused to the complainant before the hearing of said application for this preliminary writ of injunction can be had, unless defendants are, pending such hearing, restrained as hereinafter set forth;

Therefore, complainant's application for such restraining order is granted upon its giving bond with good and sufficient surety, to be approved by the clerk of this court in the penal sum of \$10,000.00, securing the said defendants against all loss or damage which may result from the issue of said order, if it should be finally determined that the same was improperly issued, or that it may award to them by reason of the granting of said order.

Now, therefore, it is ordered that the Mississippi Railroad Commission, F. M. Sheppard, president and member of the said commission, George R. Edwards and W. B. Wilson, members of said commission, and Ross A. Collins, Attorney General of Mississippi, be and they are hereby specially restrained and enjoined until further order of this court, from enforcing or taking any steps to enforce compliance by complainant with any of those six orders issued by the said commission on October 7, 1914, directing complainant to operate certain passenger trains numbered 7, 8, 9, 10, 11 and 12; further restraining and enjoining all of said defendants and their attorneys and agents and all other parties from taking any steps to collect from complainant any of the penalties provided in any of said orders.

It is further ordered that a copy of this order, certified under the hand of the clerk and seal of the court, be served on each of the defendants to be restrained hereby, and that copies of this order duly certified under the hand of the clerk and the state of Mississippi, and that the hearing of this cause on an application for an interlocutory injunction be had and proceeded with in accordance with Section 266 of the Judicial

Code of the United States as amended by the Act of Congress approved March 14, 1913.

Dated at Aberdeen, Miss., eastern division of the northern district of Mississippi, this the 8th day of October, 1914.

H. C. NILES,

Judge of the United States District Court
for the Southern District of Mississippi.

Taken from *Miss. Ry. Com. v. Ry.*, 244 U. S. 388.

No. 970.

**Marshal's Return on Restraining Order under Judicial Code,
Section 266.**

Received in office at Jackson, Miss., this October 9, 1914,
Executed by handing a true copy of this writ to James Galceran, secretary of the Mississippi Railroad Commission; Ross A. Collins, attorney general; Earl Brewer, governor, at Jackson, Miss., this 9th day of October, 1914.

JOHN G. CASHMAN, U. S. M.,

By C. B. FREENY, D. M.

Executed by handing a true copy of this writ to F. M. Shepard at Beaumont, Miss., this October 12, 1914.

JOHN G. CASHMAN, U. S. M.,

By J. D. MONEY, D. M.

No. 971.

**Order by Circuit Judge where District Judge not Available.
Setting Down Application for Hearing on Temporary Injunction, Calling Two Judges to Aid, Naming a Place for the Hearing before the Three Judges, and Granting Temporary Restraining Order.**

[Caption.]

The application for a temporary injunction and temporary restraining order, to remain in force until the hearing of the said application for a temporary injunction can be heard and determined, was presented to me this 2nd day of September, 1916, and it was shown that the Honorable T. S. Maxey,

United States District Judge for the Western District of Texas, is absent from said district, and for that reason is unable to hear and act upon said application; and having read and considered the bill presented, it is ordered that the same be filed and that the application for a hearing for a temporary injunction is granted and such hearing is set down for September 28, 1916, at my chambers in the city of Atlanta, Georgia, at ten o'clock a. m. That immediate notice of said hearing, not less than five days, shall be given to the governor and the attorney general of Texas and the defendants. And I hereby call to my assistance at said hearing of said application the Honorable Richard W. Walker, Circuit Judge of this circuit, and the Honorable William T. Newman, District Judge of the northern district of Georgia.

It being further shown, and it is my opinion, that irreparable loss and damage will result to complainants unless a temporary restraining order is granted, it is ordered that such temporary restraining order be granted, and the clerk of the district court for the Western District of Texas is ordered and directed to issue a temporary restraining order as prayed for restraining the Railroad Commission of Texas, the attorney general and others with notice, from filing and prosecuting suits against the plaintiffs or either of them for failure or refusal to put into effect circular number 5060 of the Railroad Commission of Texas, dated August 28, 1916, until such time as the application for temporary injunction can be heard and determined, and the said temporary restraining order issued by said clerk shall restrain and prevent the Railroad Commission of Texas, the attorney general of Texas and the other defendants hereto, and others with notice, from filing and prosecuting suits against the plaintiffs or either of them for damages or penalties, for charging by them, on and after Nov. 1, 1916, the rates prescribed and authorized by the Interstate Commerce Commission in its order of July 7, 1916, on shipments moved between points in the state of Texas, and such temporary restraining order as prayed for to re-

main in force until the hearing and determination of the application for an interlocutory or temporary injunction upon notice as aforesaid.

This September 2nd, 1916, at Atlanta, Georgia.

DON A. PARDEE,
Circuit Judge.

No. 972.

**Motion to Show Cause Why Temporary Injunction Should not
Issue under Judicial Code Section 266, and for Restraining
Order.**

[*Caption.*]

Come now the above named plaintiffs and allege and show the court as follows:

That there has been instituted in the above entitled court an action by bill of complaint against W. V. Tanner, as attorney general of the State of Washington, and George H. Crandall, as prosecuting attorney of Spokane county, Washington, the object and purpose of said action being to secure from this honorable court an order that the said defendants above mentioned, and all other persons, be restrained and enjoined provisionally, preliminarily and perpetually by the order and injunction of this court from bringing directly or indirectly any proceedings at law or in equity for the enforcement of that certain law known and referred to as Initiative Measure No. 8, entitled as follows:

"An act to prohibit the collection of remuneration or fees from workers for the securing of employment or furnishing information leading thereto, and providing a penalty for violation thereof," said act having been adopted at the last general election held in the state of Washington on the 3rd day of November, 1914, and which law will become effective on the 3rd day of December, 1914, and from causing the plaintiffs, or any of their officers, agents, employees or servants, from being arrested for violation of the terms and provisions of said act, and from taking any other action or in any man-

ner interfering with the plaintiffs, or either of them or their business, by reason of said act, and praying that an order to show cause herein issue upon application of the plaintiffs herein directed to the above named defendants, and each of them, requiring them and each of them to show cause why a temporary injunction should not issue as prayed for herein and for other equitable relief.

Plaintiffs further allege and show to this honorable court that the act hereinbefore referred to is contrary to the terms, provisions and protection of the Constitution of the United States and amendments thereof and is therefore void, all of which is more fully alleged, set out and explained in the bill of complaint filed herein, and that said act is also contrary to the terms, provisions and protection of the constitution of the state of Washington, and is therefore void, all of which is more fully alleged, set out and explained in the bill of complaint filed herein.

That said act becomes effective and a law of the state of Washington on December 3, 1914, and the defendants and each of them now threaten to and will, unless enjoined and restrained by this honorable court, prosecute the complainants, their officers, agents, employees and servants for violation of its provisions, all of which is more fully set out in the bill of complaint herein filed, to which reference is hereby made and by which reference said bill of complaint is made a part of this application. That by reason thereof and for the further reason that before notice of the time and place for the hearing of said temporary or interlocutory injunction can be heard by this honorable court and be determined by three judges in the manner provided by law, the defendants will cause irreparable damage and loss to the plaintiffs as they now threaten to do, and plaintiffs move the court for an order directed to the defendants and each of them, citing and requiring them to appear before this honorable court and such other judges as this court shall designate, at a time and place to be fixed by this court according to law, then and there

to show cause, if any they have, why a temporary or interlocutory injunction should not issue against them and each of them in the manner hereinbefore stated. And for the reasons hereinbefore set forth the plaintiffs further move the court for a temporary restraining order remainable in force until the hearing and determination of the application for an interlocutory injunction restraining the defendants and each of them in the manner that an interlocutory injunction is sought.

This application is based upon the bill of complaint on file herein and upon the affidavits attached hereto and filed herewith.

(Signed) A. B. and C. D.,
Attorneys for Plaintiffs.

Taken from *Puget Sound, etc., Co. v. Pub. Service Com. of Washington*, 244 U. S. 574.

No. 973.

**Notice of Hearing on Motion for Temporary Injunction under
Judicial Code Section 266.**

[Caption]

To Honorable Ernest Lister, Governor of the State of Washington; Honorable W. V. Tanner, Attorney General of the State of Washington; Honorable Charles A. Reynolds, Frank R. Spinning, and Arthur A. Lewis, Constituting the Public Service Commission of the State of Washington:

You, and each of you, are hereby notified that the Puget Sound Traction, Light & Power Company, the above named plaintiff, has filed its verified bill of complaint, supported by affidavits, in the District Court of the United States for the Western District of Washington, Northern Division, against Charles A. Reynolds, Frank R. Spinning and Arthur A. Lewis, constituting the Public Service Commission of the state of Washington, and W. V. Tanner, as attorney general of the state of Washington, praying that the order of the Public Service commission of the state of Washington, made on the 24th day of March, 1915, in reference to the Ballard Beach line, Alki Point line and the Fauntleroy Park line of

the above named plaintiff be adjudged null and void, and the enforcement of such order by the Public Service Commission and the attorney general be perpetually enjoined.

In such suit the plaintiff has moved for the temporary injunction to be in effect during the pendency of the suit enjoining the Public Service Commission and the attorney general from proceeding to enforce such order and from proceeding against the plaintiff for non-compliance therewith. The motion for such temporary injunction will be heard in the United States District Court at the court house thereof, in the city of Seattle, King county, state of Washington, on the 17th day of April, 1915, at 10.00 o'clock a. m.

You are further notified that a temporary restraining order has been granted in the above entitled suit restraining the Public Service Commission and the attorney general of the state from proceeding to enforce such order, and from proceeding against the plaintiff for non-compliance therewith until the hearing of the motion of the plaintiff for a temporary injunction.

JAMES B. HOWE,
HUGH A. TAIT,
Solicitors for Plaintiff.

No. 974.

Order to Show Cause Why a Temporary Injunction Should not Issue.

[Caption.]

This cause came on duly and regularly for hearing before the court on application of the above named plaintiffs for an interlocutory injunction, enjoining the defendants and each of them, and all other persons from bringing, either directly, or indirectly, any proceeding at law or in equity for the enforcement of that certain law known and referred to as Initiative Measure No. 8, entitled as follows:

"An act to prohibit the collection of remuneration or fees from workers for the securing of employment or furnishing

information leading thereto, and providing a penalty for violation thereof."

Said act having been adopted at the last election held in the state of Washington on the 3d day of November, 1914; and from causing the plaintiffs, their officers, agents, servants or employes to be arrested, and from taking any other action, or in any other manner interfering with the plaintiffs or either of them or their business by reason of said law; and that an order to show cause issue herein upon the application of plaintiffs, directed to the above named defendants, requiring them to show cause why a temporary injunction should not issue as prayed for herein, and the court being fully advised in the premises,

It is hereby ordered that the defendants, and each of them, be and appear before the above entitled court sitting in the western district of Washington, northern division, at Seattle, Washington, where said cause has been transferred for hearing on the 30th day of November, 1914, at the hour of two o'clock in the afternoon of said day, then and there to show cause, if any they have, why they and each of them should not be enjoined and restrained in the manner hereinbefore stated.

It is further ordered by the court that a copy of this order be served upon said defendants and each of them forthwith.

Done in open court this 25th day of November, 1914.

(Signed) JEREMIAH NETERER,
Judge.

No. 975.

**Order Allowing Temporary Injunction with Exceptions
Thereeto, under Judicial Code, Section 266.**

[Caption.]

The application of the plaintiff for a temporary injunction in the above entitled suit having been duly brought on for hearing on the 17th day of April, 1915, before Honorable

William B. Gilbert, circuit judge, and Honorable Frank H. Rudkin and Honorable Jeremiah Neterer, district judges, pursuant to notice duly given, and the judges having concurred in an opinion, duly filed, holding that so much of the order of the Public Service Commission of the state of Washington, as required the through routing of cars upon the Ballard Beach, Alki Point and Fauntleroy Park lines should not be enjoined, and the judges having also in such opinion concurred in holding that so much of the order of the Public Service Commission of the state of Washington as required the plaintiff to furnish a seat to every passenger desiring to travel upon the Fauntleroy Park line and the Alki Point line is unreasonable and void, and to that extent the enforcement of such order should be enjoined, it is

Ordered and adjudged that a temporary injunction be and the same is hereby to such extent granted, and the clerk of this court is hereby ordered to issue the same, restraining the defendants, Charles A. Reynolds, Frank R. Spinning and Arthur A. Lewis, constituting the Public Service Commission of the state of Washington, and W. V. Tanner, as attorney general of the state of Washington, from enforcing and from attempting to enforce so much of the order of the Public Service Commission of the state of Washington made on the 24th day of March, 1915, as requires Puget Sound Traction, Light & Power Company to furnish to all persons desiring to travel upon its street railway lines known as Alki Point line and Fauntleroy Park line with seats, and from taking any action against the plaintiff for non-compliance with that portion of such order; and such temporary injunction shall remain in force until the final hearing and determination of the above entitled suit.

It is further ordered that in all other respects the application of the plaintiff for a temporary injunction be and the same is hereby denied.

(Date.)

M. O.,
Judge.

The plaintiff excepts to so much of the above order as denies the injunction and the defendants except to so much of the above order as grants an injunction.

O. K. as to form.

W. V. TANNER,
Attorney General.

Taken from same case as No. 972.

No. 976.

Order by Three Judges Enjoining State Officials under Judicial Code, Section 266.(1)

[Caption.]

In the above entitled cause application having been heretofore made and presented to the Honorable H. C. Niles, United States District Judge, for the issuance of a preliminary injunction as prayed for in the bill in said cause, and the said Honorable H. C. Niles having heretofore called to his assistance Honorable Don A. Pardee and Richard Walker, United States Circuit Judges, to hear and to determine the said application, and the said application having been set down for hearing at New Orleans on the 27th day of October, 1914, and due notice thereof having been given to the parties in said cause, the said application came on for hearing and determination at the time and place stated in such notice, and, after considering the pleadings in the case and the evidence offered on said hearing by the parties to the cause,

It is ordered, adjudged and decreed that a preliminary injunction issue as prayed for in said bill.

DON A. PARDEE,
Circuit Judge.

R. W. WALKER,
U. S. Circuit Judge.

H. C. NILES,
U. S. District Judge.

Taken from *M. & O. Ry. v. Miss. Ry. Com.*, 244 U. S. 388.

(1) A. Federal Statute Regulating Injunction. Section 266 of the Federal Judicial Code requires that no interlocutory injunction shall be granted to restrain the enforcement of a state statute by restraining the action of a state officer in the execution thereof or of an order

made by a board or commission, except upon a hearing by three judges.

Above proceedings illustrate the manner in which the judges are chosen by the district judge and the choice of the place of hearing, in a case where it is sought to enjoin a state railway commission and the state attorney-general.

The province of the three judges is solely to determine whether the injunction should be granted, not to pass on the merits of the litigation. *Brown Drug Co. v. U. S.*, 235 Fed. 503.

The statute prescribes all convenient haste for the decision upon the injunction, and safeguards the rights of the defendant by requiring notice for at least five days.

Note that application for injunction must be based on the alleged unconstitutionality of the statute in question, and this means, of course, conflict with the United States constitution.

This section receives careful consideration in *Ex parte Metropolitan Water Company*, 220 U. S. 539 at p. 544, Chief Justice White speaking for the court.

B. Function of the Three Judges. *Brown Drug Co. v. U. S.* 235 Fed. 603, was a suit against the United States, the Interstate Commerce Commission, the American Express Company, and others, seeking to enjoin the putting into effect of certain express rates in South Dakota.

The proceeding here was carried on under a federal statute of Oct. 22, 1913, 38 Stat. L. 208, requiring a court of three judges, when an injunction to restrain the enforcement of an order of the Interstate Commerce Commission should be asked, the language being the same as that in Judicial Code, Sec. 266.

In this case the court says at page 605: "A motion is made by the express companies to dismiss the case. This motion in my judgment could not be heard before the three judges now sitting. The three judges are convened to hear the application for a temporary writ of injunction, not to determine whether the case should be dismissed upon its merits. If the motion had been filed before the application had been made there would be no pretense that these three judges should sit to hear that question." (N. D. of Iowa.)

In *Raich v. Truax*, 219 Fed. 273 (D. Arizona), application was made for temporary injunction under Judicial Code, Sec. 266 and the court composed of three judges granted the application, but at the same time acted upon the motion to dismiss, denying it, and on appeal the U. S. supreme court in 239 U. S. 33 at p. 37 says: "The application for an interlocutory injunction and the motion to dismiss were then heard before three judges as required by Sec. 266 of the Judicial Code."

But in *Crane v. Johnson*, 233 Fed. 334, Ross, judge, says, where motion for preliminary injunction under Sec. 266 is under consideration by the three judges: "We do not understand that, upon such an application as the present, the court, composed, under statutory requirement, of the judge of the district court, of another district judge and a circuit judge, is called upon, if, indeed, authorized, to decide

the merits of the suits." (Apparently to decide a motion to dismiss, as in *Raich v. Truax*, above, is to decide upon the merits of the suit.)

Eastern Texas Ry. Co. v. Railroad Commission of Texas, 242 Fed. 300, on motion for preliminary injunction under Sec. 266, before three judges, at page 305 the court says: "Certainly at this time we are not called upon to decide upon the merits of the case. On the hearing before this special tribunal, it seems that we are not called upon to try or decide any of the questions presented upon the pleadings further than to determine if the bill itself as amended presents a case for equitable relief. On this issue enough has been stated to show that the complainants are entitled to such relief, and we find on the facts proved that the protection of the complainants requires the issuance of a temporary injunction."

In *Kansas City, etc., Ry. Co. v. Barker*, 242 Fed. 310, a similar case, the court says at page 315: "We recognize that this is not a hearing on the merits. The pleadings have not been made up, nor has testimony been taken. However, the situation presented, in our opinion, calls for the issuance of a temporary injunction."

In *Hebe Co. v. Calvert*, 246 Fed. 711, a similar case, injunctive relief having been asked for, the court of three judges heard the case on its merits, the court saying at page 714: "Injunctive relief is sought against the enforcement by the state officers of the pertinent sections of the state statute, on the ground of their unconstitutionality. The presence of three judges is therefore necessary to a hearing of the case. (Citing Sec. 266.) The issues having been made up, the case was heard on its merits. It is now for decision with reference to the Ohio statutes."

The court dismissed the bill.

In *L. & N. Ry. v. Garrett*, 231 U. S. 298, the court says at page 303: "Because of the federal questions raised by the bill the circuit court had jurisdiction and was authorized to determine all the questions in the case, local as well as federal. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges, and authorizes an appeal to this court. This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its unconstitutionality. The reference, undoubtedly, is to an asserted conflict with the federal constitution, and the question of unconstitutionality, in this sense, must be a substantial one. But, where such a question is presented, the application is within the provision, and this being so, it can not be supposed that it was the intention of congress to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising under this state constitution and statutes were therefore before the circuit court and the appeal brings them here."

In this case the motion for preliminary injunction was heard in the court below on bill and affidavits and was denied. This rule positing jurisdiction in the supreme court to go into the whole case on appeal asserts the jurisdiction of the lower court over the entire case and was recognized and acted upon in *Van Dyke v. Geary*, 244 U. S. 39.

In both of these cases the supreme court merely affirmed the order of the lower court on the application for injunction.

It appears from the foregoing that the tendency among the district courts of three judges constituted under Section 266 is to go into the merits and in a proper case to dismiss the bill, and the judges do not therefore confine their action merely to awarding or denying the injunction asked; and this attitude finds support in the controlling principles laid down by the supreme court.

No. 977.

Order Denying Temporary Injunction Prayed under Judicial Code, Section 266.

[Caption.]

This cause coming on to be heard on the application of the plaintiff herein for a temporary injunction, as prayed for in the bill of complaint, pending final hearing, and having been heard before the Hon. D. D. Shelby, circuit judge, the Hons. H. C. Niles and W. I. Grubb, district judges, sitting as the said district court, and in pursuance of Section 266 of the judicial code, and having been submitted upon the original bill and answer thereto and the affidavits filed in the cause by the respective parties, and upon oral arguments and briefs, and the court being of the opinion that the plaintiff is not entitled to the relief applied for by him,

It is ordered, adjudged and decreed that the application of the plaintiff on injunction pendente lite be and it is hereby denied and that the plaintiff be and he is hereby taxed with the cost of the application.

It is further ordered that this decree shall become effective upon the filing of the same in court.

Given this 10th day of November, 1913.

D. D. SHELBY,

Circuit Judge United States.

H. C. NILES, District Judge.

W. I. GRUBB, District Judge.

No. 978.**Order Denying Application for Injunction under Judicial Code, Section 266, and Instructing to Proceed in Equity as Usual (Another Form).**

[Caption.]

This cause comes on to be heard at New Orleans, in Louisiana, on the 24th day of November, 1915, before the undersigned, a court convened by virtue of the Act of Congress approved March 3d, 1914, relating to the hearing, trial and determination of questions involving the validity of state legislation, alleged to be in violation of the Constitution of the United States; and the plaintiffs in said cause having therein prayed for a preliminary injunction to temporarily restrain the officials of the state of Florida therein named, from the enforcement of the Naval Stores Inspection Statutes of the state of Florida, enacted by the legislature of said state and approved by the governor thereof, on the 5th day of June, 1915, and the application having been duly assigned for hearing, and the solicitors for the parties having been duly heard and the Court having taken time for advisement, it is now, after due consideration,

Ordered, adjudged and decreed that the said application for preliminary injunction be and the same is hereby denied.

Ordered further that said cause proceed as usual in equity.

A. B.,

Circuit Judge.

C. D. and E. F.,

District Judges.

No. 979.**Order Denying Injunction Pendente Lite and Granting Motion to Dismiss Bill of Complaint, under Judicial Code, Section 266.**

[Caption.]

This cause coming on regularly to be heard before the Hon. W. B. Gilbert, United States circuit judge, Hon. Ed-

ward E. Cushman and Hon. Jeremiah Neterer, United States district judges, at the city of Seattle, Washington, upon the application of the complainants for a temporary injunction herein, and upon the motion of the defendants to dismiss said bill of complaint; the complainants being represented by their solicitors, Messrs. Cannon & Ferris, and the defendants being represented by their solicitors, W. V. Tanner, attorney general, and George H. Crandall, prosecuting attorney, and the court having heard the arguments of counsel and being fully advised in the premises, and opinion and dissenting opinion herein having been filed,

Now, therefore, in accordance with said opinion, and on motion of the solicitors for the defendants, it is ordered that the application for a temporary injunction be, and the same hereby is, denied.

It is further ordered that said motions of defendants herein for dismissing said bill of complaint be, and the same hereby are, granted, and that the bill of complaint be, and the same hereby is, dismissed, to which complainants and each of them except, and their exceptions are hereby duly allowed.

Done in open court this 14th day of September, 1915.

(Signed) JEREMIAH NETERER,
Judge.

(1) Here the court of three judges passed upon the motion to dismiss also, and it is noted that the order is signed only by the district judge before whom the case was filed.

In this case the court followed its ruling in *Wiseman v. Tanner*, 221 Fed. 694, raising the same question before the same judges.

In *Adams v. Tanner*, 244 U. S. 590, the court reverses the lower court but no question is anywhere raised about the jurisdiction of the three judges to decide the motion to dismiss.

No. 980.

Preliminary Injunction Suspending Enforcement of an Order of the Interstate Commerce Commission(1) Prescribing a Bill of Lading.

At a stated term of the United States District Court for the Southern District of New York, held in the United States

court house and post office building, borough of Manhattan, on the 2d day of August, 1919.

Present: Hon. Henry G. Ward, Circuit Judge; Hon. Learned Hand, District Judge; Hon. Julius M. Mayer, District Judge. In equity, E—16—149.

Alaska Steamship Company, Central of Georgia Railway Company, Clyde Steamship Company, Delaware, Lackawanna & Western Railroad Company, Delaware and Hudson Company, James H. Hustis as temporary receiver of Boston and Maine Railroad Company, Illinois Central Railroad Company, Lehigh Valley Railroad Company, Mallory Steamship Company, Merchants & Miners Transportation Company, The New York Central Railroad Company, New York, New Haven & Hartford Railroad Company, Norfolk & Western Railroad Company, Ocean Steamship Company of Savannah, Old Dominion Steamship Company, Pennsylvania Railroad Company, Rutland Railroad Company, Southern Pacific Company, Southern Steamship Company, Union Pacific Railroad Company, Yazoo and Mississippi Valley Railroad Company and others,

Petitioners,

Against

United States of America,

Respondent,

and

Interstate Commerce Commission,

Intervening Respondent.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

I. That the motion of the United States of America, respondent, to dismiss the petition be and the same is hereby denied.

II. That the motion of the Interstate Commerce Commission, intervening respondent, to dismiss the petition be and the same is hereby denied.

III. That the application of the petitioners for a preliminary injunction be and the same is hereby granted, as prayed for in the petition, and that a preliminary injunction be and the same is hereby issued out of this court, restraining and suspending enforcement of the order of the Interstate Commerce Commission, No. 4844, "In the Matter of Bills of Lading," dated April 14, 1919, and entered at a general session of the Interstate Commerce Commission held at its office in Washington, D. C., April 14, 1919, prescribing two certain forms of bills of lading to be used by the director general of railroads and certain carriers, subject to the act to regulate commerce, until the final determination of this cause, and that the respondents and each of them, their officers, members, attorneys, agents and employes, and any and all persons whomsoever, be and they are hereby enjoined and restrained from enforcing or in any manner attempting to enforce or carry out said order, or the terms thereof, until further order of this court.

H. G. WARD, U. S. C. J.

JULIUS M. MAYER, U. S. D. J.

A True Copy:

ALEX. GILCHRIST, JR., Clerk.

[Seal.]

Taken from *Alaska Steamship Co., et al. v. U. S. and J. C. Com.*, S. D. N. Y.

(1) See Judicial Code, Sec. 207, conferring jurisdiction upon the commerce court over cases brought to enjoin, etc., an order of the Interstate Commerce Commission. Upon the abolition of the commerce court this jurisdiction was placed in the district court, 38 Stat. L. 219, and an application for interlocutory injunction must be presented to a district or circuit judge, and heard and determined by three judges, similar to cases arising under Judicial Code, Sec. 266.

Notice must be served upon the Interstate Commerce Commission and the attorney-general of the United States. 38 Stat. L. 220. See also Judicial Code, Secs. 208, 209, 210, and 212, the latter permitting the Interstate Commerce Commission to appear as of right by its own attorneys in such proceedings.

In this connection consult also general provisions of the Clayton Act, October 15, 1914, 38 Stat. L. 737, 738, Secs. 17, 18, 19 and 20.

No. 981.**Bill Requesting Injunction Against United Mine Workers of America to Prevent a Strike.**

[Caption.]

The United States of America, by its attorney for the district of Indiana, acting under the direction of the attorney general, brings this bill of complaint against the following defendants, both as individuals and in their representative capacities as officers of the International Union United Mine Workers of America, as indicated in the following list, which also shows the citizenship and residence of the defendants: *[Here follow names and residences.]*

This bill of complaint is brought to restrain the said defendants, and other persons whose names are unknown to plaintiff, from further engaging in and carrying out a conspiracy, combination, agreement and arrangement (a) to restrict the supply and distribution throughout the United States of a necessary within the meaning of the act of Congress of August 10, 1917, entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel"—namely, bituminous coal—and (b) to restrict the distribution of such coal in the interstate commerce throughout the United States, and (c) to restrict the operation by the United States of the railroads of the country by means of the consumption of such coal.

Bituminous coal is the most important fuel consumed in the United States. It is used throughout the United States in the generation of steam and electricity for motive power; in the operation of railroads, steamboats, lighting and power plants, street-car lines, factories and industrial plants of all kinds, and in the generation of heat in hotels, office buildings, apartment houses and private dwellings for the purpose of protection against cold. It is mined and produced from the ground to the extent of approximately 500,000,000 net tons annually, in the aggregate, in the states of Alabama, Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky,

Maryland, Michigan, Missouri, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wyoming; in varying amounts, however, the largest production being in the states of Pennsylvania, Illinois and West Virginia. It is mined from the ground by human labor in the aforesaid states, particularly in the three last-mentioned states, and is shipped and distributed from the mines, in the interstate commerce, into all the states of the United States for the above-described uses in the generation of heat and power, including the operation of the railroads of the country.

Approximately 615,000 miners and mine workers are engaged in the United States in the production of bituminous coal, of whom upwards of 400,000 are members of local trade unions and of district unions of the International Union United Mine Workers of America, an organization of all the members of the aforesaid unions and of certain local and district unions of bituminous coal miners and mine workers in Canada.

The said act of Congress of August 10, 1917, as originally enacted on that date and as amended by the act of Congress of October 22, 1919, entitled "An act to amend an act entitled 'An act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel,' approved August 10, 1917, and to regulate rents in the District of Columbia," provides as follows:

"That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the army and navy, to assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, fuel, including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds and fuel, hereafter in this act called necessities.

* * *

And as follows:

"Sec. 4. That it is hereby made unlawful for any person to conspire, combine, agree or arrange with any other person (a) to limit the facilities for transporting, producing, harvesting, manufacturing; (b) to restrict the supply of any necessities; (c) to restrict distribution of any necessities," etc.

And as follows:

"Sec. 24. That the provision of this act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President."

For the purpose of carrying out other provisions of the said act of Congress of August 10, 1917, there was subsequently established by the President of the United States and recognized by presidential proclamation an administrative body known as the United States Fuel Administration, at Washington in the District of Columbia, which body pursuant to the authority of such proclamation exercised a large measure of control and supervision over the production and distribution of bituminous coal throughout the United States.

With the official approval and sanction of the United States Fuel Administration there was entered into at Washington, in the District of Columbia, on October 6, 1917, a supplemental agreement (the so-called Washington wage agreement) between the operators and the union miners and mine workers of the so-called central competitive fields, composed of western Pennsylvania, Ohio, Indiana and Illinois, for the increase in the production of bituminous coal and an increase in wages to the miners and mine workers over the then existing scale of compensation. The said agreement provided for an advance of 10 cents per ton to miners, and for advances ranging from 75 cents to \$1.40 per day to laborers, and for an advance of 15 per cent. for yardage and dead work, resulting in an increase to miners of 50 per cent.

of the best-paid laborers of 78 per cent. over the wages of April 1, 1914. The said agreement also provided for the establishment of automatic penalties to be imposed upon miners for working less than eight hours per day as stipulated in the then existing wage agreements, in order to avoid a shortage of coal—it being considered that no such shortage would develop if the miners then at work would work for eight hours per day during five days of the week. This agreement also contained the following provision:

"Subject to the next biennial convention of the United Mine Workers of America, the mine workers' representatives agree that the present contract be extended during the continuance of war, and not to exceed two years from April 1, 1918."

Subsequently, from January 15, 1918, to January 26, 1918, there was held at Indianapolis, Indiana, the twenty-sixth consecutive and third biennial convention of the International Union United Mine Workers of America, which convention, on January 19, 1918, duly ratified and approved the said Washington wage agreement of October 6, 1917.

From September 9, 1919, until September 23, 1919, there was held at Cleveland, Ohio, the twenty-seventh successive constitutional and fourth biennial convention of the International Union United Mine Workers of America, consisting in a meeting of delegates selected to represent the various local and district unions, together with and under the auspices of the officers of the International Union United Mine Workers of America, comprising the above specified defendants. The principal subject considered and dealt with by the said convention was the formulation of new and further wage demands which the miners were to place before the operators of the central competitive field at a joint conference with such operators at Buffalo on September 25, 1919.

At the said convention the vice-president and acting president of the International Union United Mine Workers of America, in the absence of the president, read a report in

which he recommended that this convention take action declaring the Washington wage agreement officially terminated at a date not later than November 1st; that the automatic penalty clause of the Washington wage agreement be eliminated in the next contract, and that if a basic agreement for the central competitive field should not be negotiated by November 1st there should be a complete cessation of mining operations by all the members of the United Mine Workers of America.

Subsequently, under date of September 22, 1919, the defendants constituting the so-called scale committee submitted a report to the said convention recommending, amongst other things, that the convention demand a 60 per cent. increase applicable to all classifications of day labor and to all tonnage, yardage and dead-work rates throughout the central competitive field, and that all new wage agreements replacing existing agreements should be based on a six-hour work day, from bank to bank, five days per week; the abolition of all automatic penalty clauses; that all contracts in the bituminous field should be declared to expire on November 1, 1919; that no agreement for the central competitive field should be concluded until the convention should have been reconvened at Indianapolis, Indiana, on a date to be designated by the resident international officers and until it should have ratified such contract; and that—

“In the event a satisfactory wage agreement is not secured for the central competitive field before November 1, 1919, to replace the one now in effect, that the international officials be authorized to and are hereby instructed to call a general strike of all bituminous miners and mine workers throughout the United States, the same to become effective November 1, 1919.”

The acting president thereupon explained to the convention that if the general strike should be called for November 1, 1919, the convention would not be reconvened, and that the international officials were clothed with full authority to

handle the strike, whereupon the report of the scale committee was adopted by the convention and the convention was declared closed.

Subsequently, at Buffalo, on September 25th, certain of the delegates to the above-mentioned convention who had been designated and the members of the said scale committee participated in a joint wage conference with the operators of the bituminous mines of the central field. After prolonged negotiations a motion was made in behalf of the miners and mine workers that their demands be adopted as a whole, including the 60 per cent. wage increase, and a motion was made in behalf of the operators to continue the existing agreement in effect until March 31, 1920. Both motions were defeated. Thereupon a sub-committee of representatives of both the miners and mine workers and of the operators was appointed to conduct negotiations and adjourned to meet in Philadelphia on Thursday, October 9, 1919. The representatives of the miners and mine workers were then and there unsuccessful in having their demands granted, and the sub-committee adjourned without having reached an agreement.

Subsequently, at Indianapolis, Indiana, within this district, the defendants, being officers of the International Union United Mine Workers of America, and other persons whose names are unknown to plaintiff, in an effort to enforce and coerce the operators of bituminous mines in the central competitive district to grant the above enumerated demands of the officers and delegates of the said union, including the demand for a 60 per cent. increase in wages for the miners and mine workers in the central competitive field who are members of the said union, in violation of the aforesaid act of Congress of August 10, 1917, and against the public policy of the United States of America, unlawfully and knowingly conspired, combined, agreed and arranged together to restrict the supply and distribution and to limit the facilities for transporting and supplying bituminous coal from all the mines where such coal is produced, as herein-

above described, to and throughout all the states of the United States for the various uses hereinabove described, by means of declaring, enforcing and maintaining the said general strike or cessation of labor on the part of all bituminous miners and mine workers who are members of the International Union United Mine Workers of America.

Pursuant to their said conspiracy, combination, agreement and arrangement, the defendants, at the city of Indianapolis, within this district; on October 15 or 16, 1919, under the authority conferred upon them as officers of the said International Union United Mine Workers of America, issued so-called strike orders, signed by defendants, John L. Lewis and Wm. Green, to the various local unions and members of local unions who are members of the said international union, to cease all work in the mining of bituminous coal at midnight on Friday, October 31st, and until further orders, and they have issued supplemental instructions and orders necessary to the fulfillment of such orders to cease work.

Further means of carrying out the said unlawful conspiracy, combination, agreement and arrangement agreed upon by the defendants as a part of such conspiracy, combination, agreement and arrangement will consist in the issuance of further and supplemental orders and instructions covering and arranging for all necessary details of a successful enforcement of the strike; and in the continuous and repeated issuance and promulgation by the defendants of messages of encouragement and exhortation to continue to abstain from work and not to return to the mines; and in the issuance and distribution to the striking miners and mine workers of so-called strike benefits or sums of money previously accumulated and subsequently acquired for the purpose of assisting the striking miners and mine workers to subsist without their wages temporarily and long enough to produce a shortage of bituminous coal so acute as to cause widespread national distress and thereby to enforce compliance with the defendants' aforesaid demands.

At Washington, in the District of Columbia, on or about October 15, 1919, and thereafter, there was held at the instance of the Secretary of Labor of the United States a conference between the defendants and the operators of the bituminous mines in the central competitive field, in the course of which the President of the United States proposed to the conference that the defendants' above-stated demands should be submitted to negotiation and arbitration. The operators consented to such proposal of the President of the United States, but the defendants present at such conference refused to submit their demands to arbitration and declared that unless they were granted on or before October 31, 1919, the strike would take effect.

The aforesaid strike and cessation of work ordered by the defendants to begin at midnight on Friday, October 31st, will, as the defendants publicly and authoritatively declare as officials of the said International Union United Mine Workers of America, be successful in reducing the production of bituminous coal in this country by at least 80 per cent., and will result in a widespread shutting down of factories and industrial operations, and consequently in enforcing idleness and cessation of wages to vast numbers of workers throughout the country; in the curtailment of production of many necessary articles and commodities and of gas and electricity, and in widespread suffering from cold in large sections of the United States, so as to constitute a national disaster in those respects.

Moreover, pursuant to the act of Congress of August 29, 1916, entitled "An act making appropriations for the support of the army for the fiscal year ending June 30, 1917, and for other purposes," providing as follows:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon for the transfer or trans-

The terms "Eastern," "Allegheny," etc., in the foregoing table comprise the following states:

Eastern: Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Northern Pennsylvania, Ohio, Indiana.

Allegheny: Part of Pennsylvania, Maryland, Penna. and B. & O. Railroads as far west as Chicago.

Northwestern: Wisconsin, Northern Illinois, Northern Iowa, Northern Nebraska, Minnesota, South Dakota, North Dakota, Montana, Northwestern corner of Idaho, Washington, Oregon.

Central-Western: Illinois, Southern Iowa, Northern Missouri, Southern Nebraska, Kansas, Northwestern Oklahoma, New Mexico, Colorado, Arizona, Utah, Wyoming, Idaho, Nevada, California.

Southwestern: Remainder of Missouri, Arkansas, Louisiana, Remainder of Oklahoma, Texas.

Southern: Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi.

Pocohontas: Virginia, West Virginia, Northeastern Kentucky.

If the aforesaid strike ordered by the defendants to begin on midnight of October 31, 1919, becomes and remains effective, as defendants declare that it will, it will be impossible for the operators of the bituminous mines to fulfill their aforesaid contracts for supplying coal to the Director General of Railroads for the operation of the railroads of the United States, and it will thereupon become impossible for the government of the United States through the railroads of the country and the operation to operate the passenger trains and the transportation of persons and property by railroads throughout the country will have to be discontinued and abandoned. The operating revenues of the railroads for the present year will thus be enormously reduced below the average annual revenues earned during the three years ended June 30, 1917, and the deficit thus incurred will have to be made up and supplied by the government of the United States under its aforesaid guarantees to the owners of the principal railroads of the country of annual revenues equivalent to the average operating annual revenues for the three years ended June 30, 1917, out of the public treasury and out of other revenues derived by the government from tax-

ation. In addition to this, a suspension of the operation of the railroads will make it impossible for the government to continue the transportation of the mail, the army of the United States, the food supplies of the people, the raw materials essential to the industries of the country, and the output of its factories, and will paralyze both intra and interstate commerce.

The aforesaid defendants, or many of them, and persons whose names are unknown to the plaintiff who are associated with the defendants in their said unlawful conspiracy, combination, agreement and arrangement on October 29, 1919, assembled at the principal offices of the International Union United Mine Workers of America at Indianapolis, in this district, and considered a final message and appeal to them made by the President of the United States on October 25, 1919, to refrain from enforcing the aforesaid strike order to begin at midnight on October 31, 1919. Said defendants have publicly declared, however, that the said strike will not be cancelled and that the defendants will take further proceedings to render it effective. They have already determined, voted and resolved amongst themselves that the said strike shall become effective, and that the preparations therefor by the defendants shall continue, and they are about to send out messages announcing and declaring to the members of the International Union United Mine Workers of America and to the local and district unions thereof that the said strike shall be enforced and become effective, as previously announced, at midnight of October 31, 1919. The various members of the said union and the local and district unions thereof are now awaiting the issuance of such messages by the defendants in order to determine whether or not the members of the said union shall cease work at midnight on October 31st. The issuance of such messages will render the strike effective at the time mentioned and will render it much more difficult to terminate the strike by the return of the miners to work after having ceased work than it would to prevent the effective operation of the strike if the messages

were not issued, in which event large numbers of members of the said union would in all probability not cease work. The aforesaid messages will be issued forthwith by the defendants unless they are immediately restrained by the restraining order of this court. Unless so restrained the defendants will issue further orders essential to rendering effective and maintaining the said strike and cessation from work without which orders such strike would not continue effective and the men would return to work. The defendants will also unless restrained proceed to distribute strike benefits as aforesaid to the various miners and mine workers on strike so as to compensate them for their loss of wages while on strike. Thus the defendants will render effective and maintain the said strike, and they will thus stop the production and distribution of bituminous coal throughout the country so as to paralyze the industries of the country and to throw large numbers of workmen into enforced idleness and to cause widespread suffering from cold and to disrupt the operation of the railroads of the country by the plaintiff, the United States of America, and to require the plaintiff to meet the resultant deficiencies in railroad operating revenues by disbursements out of the public treasury as aforesaid. The plaintiff is without adequate remedy in the premises to prevent the bringing about of such a catastrophe by the unlawful acts and doings of the defendants and the other persons associated with them in such acts whose names are unknown to the plaintiff, except in a court of equity and by the immediate restraining orders and subsequent injunctions and decrees of the court.

Wherefore plaintiff prays:

1. That writs of subpoena issue, directed to each and every of the defendants, commanding them to appear herein and answer, but not under oath (answer under oath being hereby expressly waived), the allegations contained in this complaint, and to abide by and perform such orders and decrees as the court may make in the premises.

2. That the court issue forthwith its restraining order directed to each of the said defendants, both as individuals and in their said representative capacities, and to all other combining, conspiring, agreeing and arranging with them, and to all other persons whomsoever, commanding and enjoining them not to issue any messages that the aforesaid strike is to be enforced as previously announced and to desist and refrain from doing any further act whatsoever to bring about or continue in effect the above-described strike and cessation from work on the part of the miners and mine workers in the bituminous mines; from issuing any further strike orders to local unions and members of local unions or to district unions for the purpose of keeping such strike in effect or for the purpose of supporting such strike by bringing about or maintaining any other strikes; from issuing any instructions, written or oral, covering or arranging for the details of enforcing such strike ordered to begin at midnight on October 31, 1919; from issuing any messages of encouragement or exhortation to striking miners or mine workers or unions thereof to abstain from work and not to return to the mines in pursuance of such strike; and from issuing and distributing or taking any steps to procure the issuance or distribution to miners and mine workers striking and abstaining from work in pursuance of such strike of so-called strike benefits or sums of money previously accumulated or subsequently acquired to assist such striking miners and mine workers to subsist while striking or to aid them in any way by reason of or with reference to such strike and abstaining from work, and from conspiring, combining, agreeing or arranging with each other or any other person to limit the facilities for the production of coal, or to restrict the supply or distribution of coal or from aiding or abetting the doing of any such act or thing.

3. That the court, after notice to and hearing of the defendants, issue its temporary injunction *pendente lite* enjoin-

ing the defendants and all other persons unlawfully conspiring, combining, agreeing and arranging with them as hereinbefore alleged, during the continuance of this suit, in all respects as enumerated in the next preceding paragraph hereof; and further, from permitting said strike order to remain in effect, and commanding them to desist from aiding said strike by permitting said strike order to remain in effect and commanding them to issue a withdrawal and cancellation of said strike order.

4. That the court upon final hearing of this suit issue its permanent injunction against the defendants and all persons with them, as hereinbefore alleged, in all respects as specified in paragraphs 2 and 3 of this prayer.

That plaintiff have such other, further and general relief as the nature of the case may require and the court may deem proper in the premises.

C. B. AMES,

Assistant to the Attorney General.

HENRY S. MITCHELL,

Special Assistant to the Attorney General.

L. ERT. SLACK,

United States Attorney.

State of Indiana,

County of —.

L. Ert Slack, being first duly sworn, on oath states that he has read the foregoing bill and knows the contents thereof, and that he verily believes the things therein contained are true.

L. ERT. SLACK.

Subscribed and sworn to before me this 31st day of October, 1919.

NOBLE C. BUTLER,

Clerk United States District Court for the District of Indiana.

[Seal.]

Taken from U. S. v. Hays, et al., Indiana District.

No. 982.**Temporary Restraining Order.**

In the District Court of the United States,
District of Indiana.

| | |
|--|--------------|
| United States of America, Plaintiff, | } In Equity. |
| <i>vs.</i> | |
| Frank J. Hayes <i>et al.</i> , Defendants. | } No. —. |

And now, on this 31st day of October, 1919, at 10:40 a. m., this cause coming on to be heard on the motion of the plaintiff for a temporary restraining order, as prayed in said bill, and plaintiff having exhibited its sworn bill to the Honorable Albert B. Anderson, judge of the United States district court for the district of Indiana, and the court now being fully advised in the premises and having heard read said bill,

It is ordered that a temporary restraining order issue out of and under the seal of this court commanding the said defendants, Frank J. Hayes, John L. Lewis, William Green, Thomas Davis, William Donaldson, John O'Leary, A. R. Watkins, N. J. Ferry, Lawrence Bramlet, John J. Mates, Sam Caddy, W. D. VanHorn, John Zimmerman, Samuel Ballantyne, G. L. Peck, Luke Brennan, B. A. Scott, Frank Walters, William Dalrymple, Hugh McLeon, George Baker, William Muir, Andrew Steele, Silby Barrett, Adam Wilkinson, Lawrence Dwyer, John T. Dempsey, John Brophy, Philip Murray, John Moore, Thomas Kennedy, John Roman, Christ J. Golden, Robert H. Harlin, Edward Stewart, Frank Farrington, J. C. Lewis, Alex Howat, George O. Johnson, Francis Drum, C. F. Keeney, S. A. Kellar, J. R. Kennamer, John Wilkinson, Martin Cahill, W. D. Duncan, William Stevenson, D. A. Frampton, Henry Drennan, J. R. Gilmore, John Mack, Richard Gilbert, William Hargest, G. W. Savage, John Yourishin, Ira Stoner, James J. McAndrews, Ernest Newsham, William Mitch, Walter Nesbit, John Gay, Thomas Harvey, H. C. Stewart, William Trickett, Fred

Mooney, E. L. Reed, J. L. Clemo, E. F. Ross, James Morgan, H. H. Vincent, John Murray, George Hepple, J. B. McLachlan, Robert Condon, John Gatherum, John Mossop, Albert Neutzling, T. G. Morgan, Percy Tetlow, William Young, Thomas Paskell, Thomas Holliday, Ellis Searles and Robert Livett, both individually and in their representative capacities as officers of the International Union United Mine Workers of America, or as members of said organization or any of its district or local union or any committee thereof, and all persons combining, conspiring, agreeing or arranging with them, and all other persons whomsoever, not to issue any messages that the strike of the miners and mine workers in the bituminous coal fields of the United States, heretofore ordered by the said defendants, or some of them, to take effect at midnight on October 31, 1919, is to be enforced as previously announced or otherwise and to desist and refrain from doing any further act whatsoever to bring about or continue in effect the above-described strike and cessation from work on the part of the miners and mine workers in the bituminous mines; from issuing any further strike orders to local unions and members of local unions or to district unions for the purpose of keeping such strike in effect or for the purpose of supporting such strike by bringing about or maintaining any other strikes; from issuing any instructions, written or oral, covering or arranging for the details of enforcing such strike order to begin at midnight on October 31, 1919; from issuing any messages of encouragement or exhortation to striking miners or mine workers or unions thereof to abstain from work and not to return to the mines in pursuance of such strike; and from issuing and distributing or taking any steps to procure the issuance or distribution, to miners and mine workers striking and abstaining from work in pursuance of such strike, of so-called strike benefits or sums of money previously accumulated or subsequently acquired to assist such striking miners and mine workers to subsist while striking, or to aid them in any way by reason of or with

reference to such strike and abstaining from work, and from conspiring, combining, agreeing or arranging with each other or any other person to limit the facilities for the production of coal, or to restrict the supply or distribution of coal, or from aiding or abetting the doing of any such act or thing.

It is further ordered that the aforesaid temporary restraining order shall be in force and binding upon such of said defendants as are named herein from and after the service upon them severally of this writ by delivering to them severally a copy of this writ, or by reading the same to them, and the service upon them respectively of the writ of subpoena herein.

It is further ordered that this cause be set down for hearing, upon the application for temporary injunction, on the 8th day of November, 1919, at 10 o'clock a. m., in the United States district court room, in the city of Indianapolis, Indiana; and the said defendants and each of them are hereby notified of said hearing and this temporary restraining order shall remain in full force and effect until said hearing and the further order of this court.

Taken from *U. S. v. Hays, et al.*, Indiana District.

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